

RETHINKING
CORRUPTION

RETHINKING CORRUPTION

ABDUL GOFUR

University College London

PhD Thesis

I confirm that the work presented in this thesis is my own. Where information has been derived from other sources, I confirm that this has been indicated in the thesis.

Abdul Gofur

5 November 2012

ABSTRACT

It is generally agreed by policymakers and scholars alike that corruption is a form of misconduct which merits criminalisation. But definitions of corruption vary widely and there is no consensus on what constitutes corruption.

Theorising about corruption is therefore a valuable exercise because it promotes greater understanding of this important concept. For example, it enables us to clarify the issues for debates about criminalisation, it assists with fair labelling of wrongdoing, and it helps in establishing coherent penalty regimes through accurate identification of the harms involved in corruption.

But in order to theorise about corruption, we must have a complete picture of the harm which results from such conduct, and this in turn requires us to identify the interests being set back and their relationship to the wrongdoing involved. The scholarship on corruption is defective in this respect because it fails to provide a complete account of the harm which results from corruption.

The dominant bodies of non-legal literature tend to argue that corruption results in remote harms to public interests. They assume but fail to provide a detailed account of the primary and indirect harms suffered by those innocent actors who are not engaged in corruption. By contrast, the legal literature has tended to focus almost exclusively on the wrongdoing in corruption. But this approach is incomplete because it not only fails to acknowledge that corruption harms innocent actors by setting back their interests, it also fails to emphasise the connection between such harming and the wrongdoing which also results from corruption.

This thesis addresses these omissions by articulating a coherent theory of the harm in corruption. Using a three-part analytical framework, it analyses a number of core cases of corruption, and uncovers the harm and wrongdoing caused by such conduct (particularly to those innocent actors who are not engaged in corruption).

ACKNOWLEDGEMENTS

A thesis is a time-consuming and laborious endeavour. When I embarked upon this project in 2006, I did not appreciate the full extent of these demands. As a single man, I welcomed the intellectual challenge.

Much has changed since those early days. I am now happily married, and the proud father of a little boy. I am conscious of the sacrifices that they have both made in order to allow me to see this thesis through to completion. I thank my long-suffering wife and my little boy for their love, support, and encouragement. I could not have written this thesis without them.

Lastly, I also owe a large debt to my supervisors, Professor Ian Dennis and Professor Riz Mokal, who have patiently nurtured and guided me over the years. All errors are mine alone.

For Marjana and Noah
No man ever had a better wife and son

CONTENTS

<i>Abstract</i>	iv
<i>Acknowledgements</i>	v
<i>Abbreviations</i>	xii
I. INTRODUCTION	1
1. The purpose of a coherent theory of harm	8
2. The scope of our project	13
3. Road map	14
The main arguments	14
The remaining chapters	16
Chapter II	16
Chapter III	18
Chapter IV	19
Chapter V	20
II. LITERATURE REVIEW	21
1. Political harm	22
The revisionists	24
The post-revisionists	27
Kleptocracies	31
Bilateral monopolies	36
Competitive corruption	39
2. Economic harm	41
The revisionists	45
The post-revisionists	47
3. Moral wrongdoing	54
Green's everyday norms	55
Passive bribery: the receipt of an inducement	55
Active bribery: the offer of an inducement	57
Other theorists	57
4. Conclusion	61

III. ANALYTICAL FRAMEWORK	64
1. Part One: The 2010 Act	68
Section 1 - Offences of bribing another person	68
Section 2 - Offences relating to being bribed	69
Section 3 - Function or activity to which bribe relates	70
Section 4 - Improper performance to which bribe relates	71
Section 5 - Expectation test	71
Section 6 - Bribery of foreign public officials	72
Section 7 - Failure of commercial organisations to prevent bribery	74
Some observations	75
A working summary	80
Section 1: Offences of bribing another person	80
Section 2: Offences relating to being bribed	81
Section 6: Bribery of foreign public officials	81
Section 7: Failure of commercial organisations to prevent bribery	82
Sections 3 to 5: The interpretation provisions	82
2. Part Two: The law in the USA	83
18 USC § 201: Bribery	84
15 USC § 78dd: the Foreign Corrupt Practices Act 1977	85
15 USC § 1: the Sherman Act 1890	88
15 USC § 78j: the Securities Exchange Act 1934	88
California Penal Code § 641.3	90
3. Part Three: Harm and wrongdoing	91
Interests	93
Private interests	93
Public interests	94
Exceptions	95
Wrongs	95
Exceptions	99
Setbacks	99
Exceptions	99
Mediating maxims	100
Wigmorean analysis	100
Wigmorean chart of the harm principle	102
Primary, indirect, and remote harms	103

Primary and indirect harms	103
Remote harms	105
Analysis of rights	107
The form of rights: Hohfeld's analytical scheme	109
The function of rights: MacCormick's theory	113
4. Conclusion	117
IV. CASE STUDIES	118
1. Bribery	119
Bribery of a public official	119
Part 1: The 2010 Act	121
Part 2: The law in the USA	123
Part 3: Harm and wrongdoing	124
Bribery in the private sector	126
Part 1: The 2010 Act	127
Part 2: The law in the USA	129
Part 3: Harm and wrongdoing	130
2. Noble cause	132
Judith Ward	133
Part 1: The 2010 Act	134
Part 2: The law in the USA	137
Part 3: Harm and wrongdoing	139
The Birmingham six	140
Part 1: The 2010 Act	141
Part 2: The law in the USA	143
Part 3: Harm and wrongdoing	144
3. Nepotism	146
The University of Queensland scandal	147
Part 1: The 2010 Act	148
Part 2: The law in the USA	151
Part 3: Harm and wrongdoing	153
A hypothetical example	156
Part 1: The 2010 Act	157
Part 2: The law in the USA	158
Part 3: Harm and wrongdoing	159

4. Match-fixing	161
The Pakistan cricketers' spot-fixing scandal	162
Part 1: The 2010 Act	163
Part 2: The law in the USA	166
Part 3: Harm and wrongdoing	167
Robert Hoyzer	169
Part 1: The 2010 Act	170
Part 2: The law in the USA	171
Part 3: Harm and wrongdoing	172
5. Facilitation payments	174
The Helmerich & Payne case	176
Part 1: The 2010 Act	177
Part 2: The law in the USA	180
Part 3: Harm and wrongdoing	181
The Dow Chemical Company case	183
Part 1: The 2010 Act	184
Part 2: The law in the USA	186
Part 3: Harm and wrongdoing	187
6. Extortion	189
Santiago Valle	190
Part 1: The 2010 Act	191
Part 2: The law in the USA	192
Part 3: Harm and wrongdoing	193
The Sochi 2014 scandal	194
Part 1: The 2010 Act	195
Part 2: The law in the USA	196
Part 3: Harm and wrongdoing	197
7. Bid rigging	199
The New York Presbyterian Hospital case	201
Part 1: The 2010 Act	201
Part 2: The law in the USA	203
Part 3: Harm and wrongdoing	203
The Virginia real estate scam	205
Part 1: The 2010 Act	206
Part 2: The law in the USA	209

Part 3: Harm and wrongdoing	209
8. Insider dealing	212
The Blue Index case	213
Part 1: The 2010 Act	214
Part 2: The law in the USA	217
Part 3: Harm and wrongdoing	218
The Uberois	220
Part 1: The 2010 Act	221
Part 2: The law in the USA	223
Part 3: Harm and wrongdoing	224
9. Vote buying	226
The Breathitt County vote buying scandal	227
Part 1: The 2010 Act	228
Part 2: The law in the USA	231
Part 3: Harm and wrongdoing	231
The Newton County vote buying case	233
Part 1: The 2010 Act	234
Part 2: The law in the USA	237
Part 3: Harm and wrongdoing	238
10. The harm in corruption	239
V. CONCLUSION	244
<i>Bibliography</i>	249

ABBREVIATIONS

the 1889 Act	The Public Bodies Corrupt Practices Act 1889 (repealed)
the 1906 Act	The Prevention of Corruption Act 1906 (repealed)
the 2010 Act	The Bribery Act 2010
the FCPA	15 USC § 78dd: The Foreign and Corrupt Practices Act 1977 (USA)
the old law	The law prior to the coming into force of the Bribery Act 2010 on 1 July 2011

I

INTRODUCTION

This thesis seeks to articulate a coherent theory of the harm in corruption. The word “harm” consists of two distinct but overlapping elements.¹ The first element refers to a simple sense of the word harm and describes a setback to a person’s interests. The second element refers to the wrong caused to a person by the indefensible violation of their rights. The articulation of a coherent theory is not straightforward and there is considerable uncertainty as to what the harm and wrongdoing in corruption is.

As to harm, the general scholarship suggests that corruption is harmful because it results in remote harms. That is to say, it has long-term adverse effects on the proper functioning of government and the efficient operation of the economy. However, it is submitted that this view of harming underestimates the significance of the primary and indirect harms inflicted upon those innocent actors who are not engaged in corruption. This thesis does not seek to argue that primary, indirect, and remote harms are definitional features of corruption. Rather, it is submitted that these are descriptive features which are typically found in core cases of corruption.

In terms of wrongdoing, there is very little in the way of scholarship on what makes corruption wrongful. But the literature that exists is defective in two important respects. First, by focusing almost exclusively on the nature of the wrongdoing in corruption, the literature fails to acknowledge that corruption is harmful insofar as it results in setbacks to the interests of innocent actors who are not engaged in corruption. Second, as a result of this focus, the literature fails to properly emphasise the connection between such harming and the wrongdoing inflicted upon these innocent actors by the corrupt acts of others.

However, notwithstanding these deficiencies, there is some acknowledgement amongst policymakers that corruption can result in a range of different harms and wrongs. For example, in the foreword to the guidance on the Bribery Act 2010 (the 2010 Act), it states that:

¹ Joel Feinberg, *Harm to Others* (The Moral Limits of the Criminal Law, Oxford University Press, 1984) 36.

Bribery blights lives. Its immediate victims include firms that lose out unfairly. The wider victims are government and society, undermined by a weakened rule of law and damaged social and economic development.²

We can see from this statement that there is a recognition that corruption has adverse consequences for both individuals and society. But despite this acknowledgement, there are no studies which provide a complete account of the harm and wrongdoing which results from corruption.

When this thesis was first conceived in 2006, the criminal law of corruption consisted of an untidy collection of common law and statutory offences which were both overlapping and inconsistent.³ The common law dealt exclusively with bribery whereas the statutory offences were concerned with offences of corruption. This division was the result of piecemeal development rather than design (hence the overlap and inconsistency).

It is important to note the distinction in the preceding paragraph between bribery and corruption as the two are not synonyms. It is clear from both ordinary usage and juristic consensus that bribery is essentially a large subset of corruption which consists of core cases of corrupt conduct (though not all forms of corrupt conduct).⁴ By contrast, corruption is much wider. It extends to all forms of abuse of position for personal gain and includes conduct such as money laundering and accounting offences which are not types of bribery.⁵ Despite this distinction, the two terms are often used interchangeably. This thesis will seek to introduce some precision to such talk by using the noun “corruption” to refer to corruption in the wider sense so as to include bribery. The terms “bribery” and “core cases of corruption” are interchangeable and will be used to refer to core cases of corrupt conduct which fall under the umbrella of bribery. By contrast, the adjective “corruptly” will be used to refer to behaviour which, depending on the context, may refer to either bribery or corruption.

² Ministry of Justice, *The Bribery Act 2010: Guidance* (March 2011) 2.

³ David Lanham, ‘Bribery and Corruption’ in Peter Smith (ed), *Criminal Law: Essays in Honour of JC Smith* (Butterworths, 1987); Ian Dennis, ‘The Bribery Act 2010’ [2010] (6) *Criminal Law Review* 439.

⁴ Arnold J. Heidenheimer and Michael Johnston (eds), *Political Corruption: Concepts and Contexts* (3rd edn, Transaction Publishers, 2002) 11.

⁵ Home Office, *Bribery: Reform of the Prevention of Corruption Acts and SFO Powers in Cases of Bribery of Foreign Officials: A Consultation Paper* (December 2005) 10.

Returning to the position in 2006, it was difficult to locate a satisfactory definition of bribery at common law because the offence had evolved piecemeal over the centuries.⁶ Even when one could be found, there was disagreement as to whether bribery at common law was a general offence (applying to a range of different offices and functions) or whether it was comprised of a number of distinct offences (distinguished by office and function).⁷ Despite this confusion, most commentators regard *Russell on Crime* as providing the clearest definition of bribery:⁸

Bribery is the receiving or offering [of] any undue reward by or to any person whatsoever, in a public office, in order to influence his behaviour in office, and incline him to act contrary to the known rules of honesty and integrity.⁹

We can see from this definition that two harms are mentioned. The harm resulting from the conduct of the bribe payer is the improper influencing of a public official. By contrast, the harm arising from the conduct of the recipient of the bribe (the public official) is the failure to act with honesty and integrity. Although a definition need not account for all the harms and wrongs which may result from a given activity, it is instructive to note why this definition of bribery is incomplete. First, the most fundamental omission is the failure to recognise that there are other innocent actors who may be harmed and wronged by acts of bribery. That is, innocent third parties whose interests are set back by the corrupt acts of the bribe payer and the recipient of the bribe. Second, it is completely silent as to acts of bribery which are committed exclusively within the private sector. It is trite that those in the private sector may also engage in acts of bribery. Third, it is arguable that a public official who receives an undue reward may nonetheless act with honesty and integrity thereby falling outside the scope of the offence. For example, by remaining behind after working hours to process an application in accordance with proper procedures.

⁶ David Lanham, 'Bribery and Corruption' in Peter Smith (ed), *Criminal Law: Essays in Honour of JC Smith* (Butterworths, 1987) 92-93.

⁷ For example, bribery of a privy counsellor (*R v Vaughan* (1769) 4 Burr 2494) and bribery of a coroner (*R v Harrison* (1800) 1 East PC 382).

⁸ Law Commission, *Legislating the Criminal Code: Corruption* (1998, Law Com Report No 248) 11; Law Commission, *Reforming Bribery* (2008, Law Com Report No 313) 5.

⁹ J. W. Cecil Turner, *Russell on Crime* (12th edn, Stevens & Sons, 1964) 381.

Unlike the piecemeal development of the common law offence of bribery, the main statutory offences relating to corruption were hastily drafted responses to contemporary scandals. For example, the Public Bodies Corrupt Practices Act 1889 (the 1889 Act) was introduced in the wake of revelations of corrupt practices made before a Royal Commission appointed to enquire into the affairs of the Metropolitan Board of Works.¹⁰ Similarly, the Prevention of Corruption Act 1916 was passed in the wake of scandals concerning the clothing department of the War Office which involved the taking of bribes by viewers and inspectors of merchandise.¹¹

This haste may account for the failure of the main statutes dealing with corruption to furnish any kind of meaningful definition of corruption (let alone offer any suggestion as to what the harm and wrongdoing in corruption is). Both the 1889 Act and the Prevention of Corruption Act 1906 (the 1906 Act) rely upon the word “corruptly” to describe the mens rea in corruption. In the leading case of *Cooper v Slade*,¹² the House of Lords held that this meant “purposefully doing an act which the law forbids as tending to corrupt”¹³ (see chapter III for an alternative view). However, as Smith points out, this circular and unhelpful definition leaves the word “corruptly” devoid of any functional significance.¹⁴ In short, this definition tells us nothing about what corruption is or how it harms and wrongs those innocent actors whose rights and interests are set back by the corrupt acts of others.

That being said, the 1906 Act (but not the 1889 Act) does make an attempt to proscribe the perceived wrongdoing in corruption. The offences of corruption proscribed by the 1906 Act are underpinned by the agency model. In its simplest form, the agency model requires three parties: the bribe payer, the agent of the principal (and recipient of the bribe), and the principal of the agent. When the agent accepts a bribe from the bribe payer, he betrays his duty of loyalty to his principal.¹⁵ According to this model, corruption is objectionable because

¹⁰ Phil Fennell and Philip A. Thomas, ‘Corruption in England and Wales: An Historical Analysis’ (1983) 11 *International Journal of the Sociology of Law* 167, 172.

¹¹ *ibid* 174.

¹² (1858) 6 HL Cas 746; 10 ER 1488.

¹³ (1858) 6 HL Cas 746 at 773; 10 ER 1488 at 1499.

¹⁴ A. T. H. Smith, *Property Offences: The Protection of Property Through the Criminal Law* (Sweet & Maxwell, 1994) 792-793.

¹⁵ Law Commission, *Legislating the Criminal Code: Corruption* (1997, Law Com Paper No 145) 4.

it causes an agent to betray his duty of loyalty to his principal. In other words, corruption is wrong because it results in the betrayal of trust. However, this narrow conception of wrong, which was no doubt based on pragmatic reasons, is defective in two important respects.

First, the agency model regards the principal as the sole victim of a corrupt transaction. This means that the principal is the only person who is capable of being wronged by the agent's corrupt conduct. But as we shall see, this view is incomplete because it fails to recognise that there are other innocent actors whose rights and interests may be harmed and wronged by the corrupt behaviour of others. Second, the agency model is unduly narrow because it insists upon the presence of a principal-agent relationship in every corrupt transaction (there can be no corruption in the absence of such a relationship). However, there is no credible account as to why corruption may only be located in such relationships.

These problems had been well documented since the mid-1970s by successive governments that had promised (but failed) to reform this out-dated area of the criminal law. By 2006, the question of reform had already been considered by a number of prestigious bodies.¹⁶ The government of the time sought to reform the law of corruption with the publication of a draft Corruption Bill.¹⁷ Somewhat surprisingly, the draft Corruption Bill relied upon the agency model to capture the harm in corruption. It was not well received and was heavily criticised for its reliance upon the agency model during pre-legislative scrutiny by the Joint Committee on the Draft Corruption Bill.¹⁸ Although the Home Office sought to defend the draft Corruption Bill,¹⁹ it was clear that an impasse had been reached. In March 2007, the

¹⁶ The reform of the criminal law of corruption had been considered by: (1) the Prime Minister's Committee on Local Government Rules of Conduct (Redcliffe-Maud Committee), *Conduct in Local Government* (1974, Cmnd 5636); (2) the Royal Commission on Standards of Conduct in Public Life (Salmon Commission), *Report of the Salmon Commission* (1976, Cmnd 6524); (3) the Committee on Standards in Public Life (Nolan Committee), *Standards in Public Life: First Report of the Committee on Standards in Public Life* (1995, Cm 2850-I); (4) the Law Commission, *Legislating the Criminal Code: Corruption* (1998, Law Com Report No 248), and; (5) the Joint Committee on the Draft Corruption Bill, *Draft Corruption Bill: Report and Evidence* (2002-03, HL Paper 157, HC Paper 705).

¹⁷ Home Office, *Corruption: Draft Legislation* (2003, Cm 5777).

¹⁸ Joint Committee on the Draft Corruption Bill, *Draft Corruption Bill: Report and Evidence* (2002-03, HL Paper 157, HC Paper 705).

¹⁹ Home Office, *Draft Corruption Bill: The Government Reply to the Report from the Joint Committee on the Draft Corruption Bill* (2003, Cm 6086).

government finally conceded defeat and stated that due to significant and influential opposition, the draft Corruption Bill was unsuitable for presentation to Parliament.²⁰

It was in the midst of this uncertainty that this thesis was conceived. The aim of the project then was to articulate a general theory of corruption supported by a coherent account of harm and wrongdoing. The need to construct a general theory (i.e. a model of what constitutes corrupt conduct) arose for two reasons. First, because there is no agreement on the types of conduct which constitute corruption. Second, because of the general dissatisfaction with the agency model. It was clear that if we had relied upon the agency model as a tool for identifying core cases of corruption that our project would have been too narrow and open to criticism. Although there were other models of corruption in circulation, these were also contentious. The first draft of this thesis sought to resolve this difficulty by constructing a new model which viewed corruption as a bilateral exchange. This bilateral exchange model was used to identify core cases of corruption for analysis. But our reliance upon the bilateral exchange model led to an unexpected difficulty. Although the bilateral exchange model was not intended to be determinative of what constitutes corrupt conduct, our reliance upon it meant that it had this stipulative effect.

With the coming into force of the 2010 Act on 1 July 2011,²¹ the landscape is now radically different to that which existed in 2006. The 2010 Act has swept away the common law offence of bribery and the statutory offences of corruption (including the agency model contained in the 1906 Act). In short, it has replaced the law prior to the coming into force of the 2010 Act on 1 July 2011 (the old law) with four new streamlined offences of bribery based on a new model of corruption: the improper conduct model. As we shall see, the 2010 Act has been well-received.

As a result of this seismic development, it is necessary to change direction. Accordingly, this thesis no longer seeks to defend the bilateral exchange model.²² Instead, our thesis will actively

²⁰ HC Deb, 5 March 2007, vol 457, cols 116WS-117WS.

²¹ The 2010 Act received Royal Assent on 8 April 2010 and came into force on 1 July 2011.

²² The first draft of this thesis gave rise to two published articles. In light of our change of direction, the views expressed in those articles are not relied upon; Abdul Gofur, 'A Panoptic Study of Corruption' (2006) 1 (1) *Opticon* 1826 28; Abdul Gofur, 'White Collar, Paper Tiger: Corruption in the UK' (2007) 13 (4) *Tilburg Foreign Law Review* 317.

embrace the improper conduct offences contained in the 2010 Act. As a result of our change of direction, there is no need to construct a new model of corruption. Instead, we shall rely upon the improper conduct model to help identify core cases of corruption.

Our focus on core cases of corruption follows an approach advocated by Hart. According to this view, sometimes the difference between the paradigm and the borderline is only a matter of degree. But other times, the division between the two lies in the fact that the core elements of the paradigm may be absent in the borderline. Such difficulties are instructive because they force us to make explicit our conception of the paradigm case. This in turn allows us to distinguish the borderline.²³

In short, by relying upon core cases of corruption, we can ensure that our account of the harm and wrongdoing in corruption is accurate and not distorted by focusing on borderline cases of corrupt conduct. It is important to stress that this thesis does not argue that the 2010 Act is determinative of the outer limits of what constitutes corrupt conduct. Rather, this thesis proceeds on the basis that the 2010 Act captures core cases of corruption.

This new approach has two advantages. First, it avoids any objection about our model of corruption being stipulative. This will allow us to focus on articulating a complete account of the harm and wrongdoing which stems from core cases of corruption rather than engaging in a discussion about the bounds of corruption. Second, relying upon the improper conduct model gives our project a practical dimension which was lacking from the first draft of this thesis as the 2010 Act is the current law in England and Wales.

However, our reliance upon the improper conduct model in the 2010 Act prompts a further question. The sceptical reader might ask why, given that bribery and corruption are not exact synonyms, we are relying upon a statute which is entitled the “Bribery Act 2010” to articulate the harm and wrongdoing in corruption? There are a number of reasons for this. First, as we have already mentioned, bribery is essentially a large subset of corruption. In other words, it encompasses core cases of corrupt conduct. Second, the ambit of the 2010 Act, notwithstanding its title, extends beyond cases of bribery to other forms of corrupt conduct. There is ample support for this proposition. The 2010 Act repealed the old law (which was

²³ H. L. A. Hart, *The Concept of Law* (2nd edn, Oxford University Press, 1997) 4-5.

concerned with both bribery and corruption) and replaced it with four new streamlined offences of bribery (two general offences and two discrete offences). Scholars in this area are agreed that the two general offences capture everything that the old law proscribed and do not criminalise any new forms of conduct.²⁴ In other words, the 2010 Act captures not just instances of bribery but corruption as well. In addition, the 2010 Act fully complies fully with the United Kingdom's (UK) international obligations under a number of anti-corruption (as opposed to anti-bribery) instruments.²⁵ This lends further support to the proposition that the 2010 Act criminalises both bribery and corruption. Interestingly, a close reading of the 2010 Act shows that, aside from the use of the words "bribery" and "bribe" in the section headings of sections 1 to 4, neither word actually appears in the body of sections 1 to 4 (which contain the two general offences and the interpretation provisions).

1. THE PURPOSE OF A COHERENT THEORY OF HARM

Despite the voluminous literature on corruption, there are no systematic studies of the harm and wrongdoing which result from acts of corruption.²⁶ The general scholarship is disparate and there are no studies which bring together the elements of harm and wrongdoing so as to create a coherent whole.

Most of the literature on corruption underemphasises the primary and indirect harms which results from such conduct, and instead focuses on the remote harms. That is, the long-term

²⁴ G. R. Sullivan, 'The Bribery Act 2010: Part 1: An Overview' [2011] (2) Criminal Law Review 87, 94.

²⁵ For example: (1) the Council of Europe's Criminal Law Convention on Corruption (signed by the UK on 27 January 1999, ratified on 9 December 2003, entered into force on 1 April 2004, ETS 173); (2) the United Nations' Convention Against Corruption (signed by the UK on 9 December 2003, ratified on 9 February 2006, entered into force on 11 March 2006, Cm 6854).

²⁶ The Law Commission has conducted the most comprehensive analyses of bribery and corruption but these do not provide systematic accounts of harm and wrongdoing; Law Commission, *Legislating the Criminal Code: Corruption* (1997, Law Com Paper No 145); Law Commission, *Legislating the Criminal Code: Corruption* (1998, Law Com Report No 248); Law Commission, *Reforming Bribery: A Consultation Paper* (2007, Law Com Paper No 185); Law Commission, *Reforming Bribery* (2008, Law Com Report No 313).

adverse consequences for society²⁷ (although there are a small number of scholars who argue the contrary and suggest that corruption may actually be beneficial). It is these remote harms which many policymakers rely upon to justify the criminalisation of corruption.

There is a small but emerging body of literature which deals with the wrongdoing in corruption. The most prominent view in this context suggests that the offer of a bribe is wrong because it induces the recipient into committing an unlawful act. By contrast, the receipt of a bribe is said to be wrong because it causes the recipient to breach his duty of loyalty to his principal (or to a principle).

Whilst neither the remote harms nor the wrongs caused by corruption are disputed, this thesis argues that the existing scholarship has underemphasised the primary and indirect harms caused by corruption. It is submitted that the existing literature fails to properly account for the primary and indirect harm to those innocent actors whose rights and interests are set back by the corrupt acts of others. The harm and wrongdoing suffered by these innocent actors can only be explained by undertaking a systematic study of the harm and wrongdoing in corruption. This is the principal reason for undertaking our project.

We can demonstrate the primary and indirect harms to these innocent actors by reference to the case of Munir Patel (discussed in detail in chapter IV). Patel pleaded guilty to, inter alia, one count of accepting a financial advantage contrary to section 2 of the 2010 Act. In short, he accepted a bribe of £500 in return for not entering the details of a court summons into the court's computer database. In passing sentence, HHJ McCreath made the following remarks:²⁸

Your position as a court clerk had at its heart a duty to uphold and protect the integrity of the criminal justice process. What you did was to undermine it in a fundamental way.

²⁷ Nick Kochan and Robin Goodyear, *Corruption: The New Corporate Challenge* (Palgrave Macmillan, 2011) 19-25.

²⁸ Judiciary of England and Wales, 'R v Munir Patel (Southwark Crown Court): Sentencing Remarks of HHJ Alistair McCreath' (Press Release, 18 November 2011) <<http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/munir-patel-sentencing-remarks.pdf>> accessed 19 November 2011.

By doing what you did, you created a danger not only to the integrity of the process but also to public confidence in it. The harm you did was not just to the process. It extended more widely because by your actions a number of people who should have been subject to monitoring and control by way of the imposition of penalty points avoided that. The penalty point system has two aspects. The obvious one is that it puts bad drivers off the road for a period of time. The other one is that it is a wake-up call to many. We all know of motorists whose driving habits are transformed when points are added to their licences through fear of the consequences of further offending.

And it should not be forgotten that the imposition of penalty points is a relevant matter for insurance companies. Bad drivers pose a higher risk than good ones. One of the effects of your offending was that insurers were carrying risks at an inappropriate cost, insuring bad drivers as if they were good ones.

We can see from HHJ McCreath's sentencing remarks that Patel's corruption not only set back the public interest (a remote harm) in a fair and impartial criminal justice system, it also resulted in primary harm to the financial interests of those innocent insurance companies who insured bad drivers at an inappropriate cost.

However, a coherent theory of the harm and wrongdoing in corruption may also provide a number of subsidiary benefits. For example, articulating the harm and wrongdoing in corruption may assist with providing a robust account of what makes corruption objectionable. Although our project is not concerned with the justification for criminalising corruption, a coherent account of harm and wrongdoing is generally regarded as a good starting point for any such discussion.²⁹

Second, a coherent account may help with correct labelling because it allows us to explain why seemingly different types of conduct such as bribery, nepotism, and match-fixing all fall to be treated as types of corruption.³⁰ For example, most observers would agree that a public official who accepts a bribe in order to process an application quickly is acting corruptly. But matters are less clear when the public official remains after working hours to process the application.

²⁹ Andrew Ashworth, *Principles of Criminal Law* (5th edn, Oxford University Press, 2006) 22.

³⁰ Charlie Monteith, 'The Bribery Act 2010: Part 3: Enforcement' [2011] (2) *Criminal Law Review* 111, 111.

In this example, it is not immediately obvious whether the public official has engaged in an act of bribery or some other type of criminality such as misconduct in a public office.

The scope for disagreement is brought into sharp focus in more extreme cases. For example, let us suppose that a Nazi officer accepts a bribe to let a prisoner escape from a concentration camp. In this example, there is considerable uncertainty (both conceptually and morally) as to whether the Nazi officer has acted corruptly by accepting the bribe and letting the prisoner escape.³¹

Such difficulties have led some exasperated theorists to conclude that corruption is like an elephant. It is difficult to describe but is generally not difficult to recognise. It is said that in most cases, observers will have an intuitive sense of whether a particular activity constitutes an act of corruption.³² However, this claim is highly doubtful given that the word “corruption” is used by some scholars to describe an array of different, arguably non-corrupt conduct, such as desertion, treason, smuggling, larceny and stealing, forgery and embezzlement, deceit, and fraud.³³ One reason for this confusion may be the fact that despite the near-universal condemnation of corruption, what is considered as falling within the scope of corruption may vary according to political, economic, and cultural conditions and tradition.³⁴

Third, a coherent account of harm and wrongdoing may be helpful in determining the appropriate sanctions for acts of corruption through the development of sentencing guidelines (there being no such guidelines at present). The sentencing guidelines for other types of white collar offences such as fraud are based on the financial gain or loss which results

³¹ This example is borrowed from Stuart P. Green, *Lying, Cheating, and Stealing: A Moral Theory of White-Collar Crime* (Oxford University Press, 2006) 205-207.

³² Vito Tanzi, ‘Corruption Around the World: Causes, Consequences, Scope, and Cures’ in George T Abed and Sanjeev Gupta (eds), *Governance, Corruption, and Economic Performance* (International Monetary Fund, 2002) 24-25.

³³ Gerald E. Caiden, ‘Toward a General Theory of Official Corruption’ (1988) 10 (1) *Asian Journal of Public Administration* 3, 5; Jeremy Pope, *TI Source Book 2000* (2nd edn, Transparency International, 2000) xviii.

³⁴ William Twining, ‘Have Concepts, Will Travel: Analytical Jurisprudence in a Global Context’ (2005) 1 (1) *International Journal of Law in Context* 5, 9.

from such offending.³⁵ However, the problem with corruption is that it encompasses many different types of misconduct which cannot easily be translated into simple statements about financial gain or loss.

We can better demonstrate this point by recalling the case of Munir Patel who was sentenced to three years' imprisonment (with full credit for an early guilty plea) for accepting a bribe of £500.³⁶ If we were to apply the most relevant sentencing guidelines for fraud (revenue fraud) to the facts of Patel's case, we would end up with a surprising result. According to the revenue fraud guidelines, based on a gain of £500, the starting point for sentence is a fine, and the range is a fine to a low level community order. In order to pass a custodial sentence of three years' imprisonment under the revenue fraud guidelines, the court would have to be satisfied that Patel had received a bribe of £300,000.³⁷ Similarly, the sentencing guidelines for theft³⁸ (theft in breach of trust), also produce unexpected results. Based on a gain of £500, the starting point for sentence is a medium level community order, and the range is a fine to 26 weeks' imprisonment. Even a case involving breach of a high degree of trust (such as Patel's case) only has, as a starting point, a sentence of 18 weeks' imprisonment, and a range of a high level community order to 12 months' imprisonment.

Thus, we can see that the sentencing guidelines for fraud and theft, which are based on financial gain and loss, are not immediately applicable when it comes to sentencing cases of corruption. It may be that by focusing on harm and wrongdoing instead, sentencing

³⁵ Sentencing Guidelines Council, 'Sentencing for Fraud - Statutory Offences: Definitive Guideline' (October 2009) <http://sentencingcouncil.judiciary.gov.uk/docs/web_sentencing_for_fraud_statutory_offences.pdf> accessed 13 October 2012.

³⁶ The sentence of three years' imprisonment for bribery was left undisturbed following an appeal against sentence; *R v Munir Patel* [2012] EWCA Crim 1243.

³⁷ Sentencing Guidelines Council, 'Sentencing for Fraud - Statutory Offences: Definitive Guideline' (October 2009) <http://sentencingcouncil.judiciary.gov.uk/docs/web_sentencing_for_fraud_statutory_offences.pdf> accessed 13 October 2012.

³⁸ Sentencing Guidelines Council, 'Theft and Burglary in a Building other than a Dwelling: Definitive Guideline' (December 2008) <http://sentencingcouncil.judiciary.gov.uk/docs/web_Theft_and_Burglary_of_a_building_other_than_a_dwelling.pdf> 13 October 2012.

guidelines could be devised based on categories of offending (much like the sentencing guidelines for robbery³⁹ and theft).⁴⁰

Lastly, a coherent account of harm and wrongdoing may be useful insofar it provides a normative account of corruption. Although such an account may not map neatly on to the contours of the positive law of a given foreign jurisdiction, this does not detract from its philosophical value.

For the sake of clarity, it is worth emphasising that this thesis does not seek to develop a full account of the subsidiary benefits mentioned above. The central aim of this thesis is to articulate a coherent theory of the harm and wrongdoing in corruption.

2. THE SCOPE OF OUR PROJECT

It is important at this stage to delineate the scope of our thesis. First, this thesis is not intended to be doctrinal or comparative. There is no dispute that corruption is a transnational phenomenon. Neither is it contentious to suggest that the ambit of corruption may vary from country to country.⁴¹ One only has to turn to the wide array of international anti-corruption instruments in circulation if further proof is required (the UK is a signatory to a large number of these). That being said, it would require a feat of Herculean proportions to undertake a detailed comparative study of every international anti-corruption instrument and the positive law of every major jurisdiction which proscribes corruption.

³⁹ Sentencing Guidelines Council, 'Robbery: Definitive Guideline' (July 2006) <http://sentencingcouncil.judiciary.gov.uk/docs/web_robbery-guidelines.pdf> 13 October 2012.

⁴⁰ Sentencing Guidelines Council, 'Theft and Burglary in a Building other than a Dwelling: Definitive Guideline' (December 2008) <http://sentencingcouncil.judiciary.gov.uk/docs/web_Theft_and_Burglary_of_a_building_other_than_a_dwelling.pdf> 13 October 2012.

⁴¹ Section 5(2) of the 2010 Act recognises this and makes an exception where it can be shown that conduct, which would otherwise be regarded as corrupt under the 2010 Act's extra-territorial provisions, is permitted by the written law of a given foreign jurisdiction.

However, although a detailed comparative analysis is beyond the scope of this thesis, there is value to be gained from looking at the positive law of a major foreign jurisdiction in order to assess the normative dimension of our project. After all, if we were to find on analysis that there are significant differences between what is considered corrupt in England and Wales and what is considered corrupt in a foreign jurisdiction, it might cause us to reassess our account of the harm and wrongdoing in corruption. For this reason, we shall consider some carefully selected anti-corruption statutes from the United States of America (USA).

Second, this is not a thesis about the criminalisation of corruption. Although a coherent account of harm and wrongdoing may provide good justificatory reasons in support of criminalisation, it is not the only liberty-limiting principle available to the legislature. A project about criminalisation would, at the very least, need to consider other liberty-limiting principles, the costs of criminalisation, as well as possible non-criminal sanctions; all of which is beyond the scope of this thesis.

3. ROAD MAP

Now that we have introduced our project, let us set out a road map of the main arguments which will follow in this thesis together with a description of the contents of the remaining chapters.

THE MAIN ARGUMENTS

It is generally agreed by policymakers and scholars alike that corruption is a form of misconduct which merits criminalisation. However, notwithstanding this agreement, definitions of corruption vary widely and there is no consensus as to the types of conduct which constitute corruption (as opposed to some other form of misconduct such as misconduct in a public office, theft, and fraud, etc.).

Theorising about corruption is therefore a valuable exercise because it promotes greater understanding of this internationally important concept. For example, it enables us to clarify the issues for debates about criminalisation, it assists with fair labelling of wrongdoing, and it helps in establishing coherent penalty regimes through accurate identification of the harms involved in corruption.

But before we can begin theorising about corruption, we must have an accurate and complete picture of the harm which results from corruption, and this in turn requires us to identify the interests being set back and their relationship to the wrongdoing resulting from such conduct. The scholarship in this area is defective because it fails to provide a complete account of all the harm which result from corruption.

The dominant bodies of non-legal literature emphasise the remote harms which result from corruption. However, in so doing, they underestimate the harms inflicted upon those innocent actors whose rights and interests are set back by the corrupt acts of others. In other words, the literature assumes but omits to provide a detailed account of the primary and indirect harms caused to the interests of these innocent actors. By contrast, the legal literature has tended to focus almost exclusively on the wrongdoing in corruption. But this approach is incomplete because it not only fails to acknowledge that corruption harms the interests of innocent actors by setting back their interests, it also fails to make any connection between such harming and the wrongdoing which also results from corruption.

This thesis seeks to address these omissions by articulating a coherent theory of the harm in corruption. Our use of the word “coherent” is intended to imply that the existing literature on corruption is incomplete for the reasons stated above. However, in order to articulate a coherent theory, it is necessary to set out a robust framework for study.

To this end, this thesis relies upon a three-part analytical framework which allows us to: (1) identify core cases of corruption (as opposed to corruption in the wider sense), (2) assess whether core cases of corruption travel well by comparing and contrasting such conduct with the law in the USA, and (3) critically analyse core cases of corruption in order to uncover the harm and wrongdoing caused by such conduct (particularly to those innocent actors who are not engaged in corruption).

By approaching the matter in a systematic way, this thesis plugs the lacuna in the literature and furnishes a complete account of the harm and wrongdoing in corruption. As we shall see, those who engage in core cases of corruption inflict a number of different harms on innocent actors who are not engaged in corruption. These harms (or setbacks to interests) can be divided into primary harms and indirect harms, and are distinct from the remote harms caused to public interests. The three harms (primary, indirect, and remote) are descriptive features which are typically found in core cases of corruption. In addition, it will be seen that

core cases of corruption also wrong innocent actors who are not engaged in corruption. Contrary to the existing legal literature on wrongdoing, it will be shown that there is a nexus between the primary harms suffered by these innocent actors and the wrongdoing resulting from corruption.

Our thesis also confirms that core cases of corruption travel well in the sense that what is considered corrupt in England and Wales is largely regarded in the same way in the USA. This underlines the transnational nature of corruption and supports the normative aspects of this thesis.

THE REMAINING CHAPTERS

The remaining chapters of this thesis can be summarised thus:

Chapter II

We begin with a review of the literature on the harm and wrongdoing in corruption. It is submitted that the literature can broadly be divided into three distinct strands (although there is some overlap). The first two strands (political harm and economic harm) are concerned exclusively with the harm in corruption whereas the third strand (moral wrongdoing) is concerned solely with the wrongdoing in corruption.

The first strand consists of contributions from political scientists. There is a dispute between political scientists as to whether corruption is harmful. The minority (the revisionists) argue that corruption is not harmful. On the contrary, they maintain that corruption is a necessary and inevitable part of the modernisation process of a country. According to the minority, corruption may make certain positive contributions to the political development of a country. This view fell out of vogue towards the end of the 1960s as a result of sustained attacks from the majority (the post-revisionists) who argue that corruption adversely affects the proper functioning of government and the rule of law.

Whilst these claims about the remote harm consequences of corruption are not disputed, this thesis argues that the account advanced by the post-revisionists suffers from two weaknesses. First, it underemphasises the primary and indirect harms suffered by those innocent actors whose rights and interests are set back by the corrupt acts of others. It is submitted that

primary and indirect harms typically arise in core cases of corruption. This thesis maintains that the primary, indirect, and remote harms which arise from corruption are descriptive (rather than definitional) features of corruption. It is not our thesis that primary harms are by definition the most serious harms which flow from acts of corruption. In fact, the most serious harms could, depending on the circumstances, be any of the three harms which we have identified: primary, indirect, and remote. The phrase primary harm is intended to refer to the most direct harm which flows from corruption (this matter is discussed in further detail in chapter III). Second, the post-revisionists' account fails to emphasise that nexus between such harming and the wrongdoing (the third strand) caused by corruption.

The second strand of literature is concerned with economic harm. Like their political scientist counterparts, there is a disagreement between economic theorists as to the harmfulness of corruption. For the minority (the revisionists), corruption results in an efficient use of resources and is therefore productive. This argument is rejected as false by the majority (the post-revisionists) who argue that corruption is inefficient (in the sense of being unproductive) and has serious deleterious effects for society. This account, based on the remote harms caused by corruption, has come to be regarded as the superior account of economic harm.

However, this macroeconomic view of corruption also underestimates the primary and indirect harms which typically arise in core cases of corruption; and which set back the rights and interests of those innocent actors who choose not to engage in corruption. Like the political scientists, the economic theorists also fail to account for the connection between such harming and the wrongdoing (the third strand) caused by corruption.

The third strand, which consists of a small but emerging body of literature, is concerned with the moral wrongdoing in corruption. Whilst the theorists in this area are agreed that corruption is wrongful, there is no agreement between them as to what makes corruption wrongful. The most prominent theorist in this area looks at the wrongdoing in bribery from the perspective of both the briber payer and the recipient of the bribe. According to this view, the offer of a bribe is wrong because it causes another to commit an unlawful act. By contrast, the receipt of a bribe is wrong because it causes the recipient to act in breach of a duty of loyalty owed to a principal (or to a principle).

This thesis argues that this view is defective in two respects. First, it is unduly narrow insofar as it fails to account for the fact that corruption also wrongs other innocent actors who are not

owed a duty (either as a principal or as a matter of principle). Second, it fails to make any connection between such wrongdoing and the primary harm caused to these innocent actors by the corruption of others.

We conclude chapter II by arguing that there is a major gap in the literature. The omission, which we have identified above, consists of a failure by theorists to provide a detailed and complete account of the harm and wrongdoing suffered by those innocent actors whose rights and interests are wrongfully set back by the acts of those who engage in corruption.

Chapter III

Having identified that there is a gap in the literature which prompts theoretical consideration, chapter III sets out a three-part analytical framework for exploring that gap. It is important to note that this chapter is largely descriptive. Although there is some analysis, chapter III is not intended to be critical of the materials contained within it.

The need for a framework is fairly obvious. We cannot begin to articulate a coherent account of the harm and wrongdoing in core cases of corruption (and in particular the harms and wrongs suffered by the innocent victims of corruption) until we have a mechanism for identifying core cases of corrupt conduct and a barometer for gauging harm (including primary harms, indirect harms, and remote harms) and wrongdoing.

We begin by setting out a mechanism for identifying core cases of corrupt conduct. As previously mentioned, we shall do this by adopting the improper conduct model in the 2010 Act. Thus, for the purposes of this thesis, a given type of conduct will be regarded as a core case of corruption if it falls within the ambit of the improper conduct offences contained in the 2010 Act. By adopting this approach, we can focus our attention on the harm and wrongdoing caused by core cases of corruption rather than trying to delineate the outer limits of corruption. Of course, it does not follow from this approach that conduct which is not caught by the 2010 Act is not a type of corruption. It may well be that such conduct is caught by the wider definition of corruption. Our reliance upon the 2010 Act is grounded in the fact that it is positive law which commands wide support.

The second part of our framework consists of a summary of some carefully selected anti-corruption statutes from the USA. By applying these US anti-corruption statutes to the core

cases of corruption identified by the first part of our analytical framework, we will be able to ascertain whether there are any major differences in terms of coverage between the law in England and Wales and the law in the USA. Assuming that there are no major differences in coverage, we will feel more secure in pressing the normative value of our theory of the harm and wrongdoing in corruption.

In the third and final part of our framework, we will explain what we mean by the terms “harm” and “wrongdoing”. To this end, we shall furnish a streamlined and modified version of Feinberg’s seminal work on the harm principle. According to Feinberg, a person is harmed in the appropriate sense when his interests are set back (i.e. simple harm) and his rights are indefensibly violated (i.e. he is wronged).⁴² In this part, we shall discuss the meaning of these key concepts and explain in detail how the harm principle operates.

However, as we shall see, although Feinberg’s version of the harm principle is both detailed and compelling, it suffers from two weaknesses. First, his account of harming does not tell us how to distinguish between the different types of harms which may arise from a given activity. Second, his account of wrongdoing tells us that one person wrongs another when his indefensible conduct violates the other’s rights (legal or moral). However, Feinberg does not provide us with a detailed account of what rights are and what they do for those who hold them.

Both of these weaknesses are remedied by way of supplementation. The first issue is addressed by furnishing an account of primary harms, indirect harms, and remote harms. The second issue is addressed through the provision of an account of both the form (i.e. a description of the internal structure of rights) and the function (i.e. what rights do for those who hold them) of rights.

Chapter IV

Chapter IV lies at the heart of our project. In this chapter, we shall take the three-part analytical framework set out in chapter III and apply it to a range of different case studies. The aim of this exercise is twofold. First, we shall remedy the gap in the literature by identifying, in

⁴² Joel Feinberg, *Harm to Others* (The Moral Limits of the Criminal Law, Oxford University Press, 1984) 36.

each of our case studies, the primary, indirect, and remote harms, and the wrongdoing caused to those innocent actors whose rights and interests are wrongfully set back by the corrupt acts of others. This thesis argues that primary, indirect, and remote harms are descriptive (rather than definitional) features of core cases of corruption. The case studies selected for analysis are those forms of conduct which are commonly regarded as being core cases of corruption (e.g. bribery, nepotism, and match-fixing). So far as possible, we shall rely upon actual (as opposed to hypothetical) examples within each case study. Second, we shall conclude the chapter by bringing our findings together. This will allow us to answer our research question by advancing a coherent theory of the harm and wrongdoing in core cases of corruption.

Chapter V

We conclude our thesis in chapter V by reviewing the aims of our project, the methodology adopted, setting out our findings, and discussing our account of the harm and wrongdoing in core cases of corruption.

II

LITERATURE REVIEW

The principal aim of this chapter is to develop a context for our project. We shall do this by reviewing the literature on the harm and wrongdoing in corruption, identifying any gaps which exist, and explaining the contribution that our project will make to the field.

There is a formidable body of literature on the harm and wrongdoing in corruption. Broadly speaking, the literature can be divided into three distinct strands (although there is some cross-fertilisation). The first two strands (political harm and economic harm) are solely concerned with the harm caused by acts of corruption. The third strand (moral wrongdoing) is concerned with the question of what makes corruption wrong. It is quite easy to divide the literature in this way since there are no studies which weave all three strands together into a coherent whole; something which this thesis will attempt to do.

The first strand consists of contributions from political scientists. The dominant view amongst the political scientists is that corruption results in remote harms which can undermine the proper functioning of government and set back the rule of law. The existence of corruption is said to indicate a state of decay in the proper functioning of government. When this occurs, the state loses its capacity for rational behaviour and thereby its ability to serve the interests of the public.⁴³ However, this account underemphasises the harm suffered by those innocent actors whose interests are set back by the corrupt acts of others.

The second strand is concerned with the economic harm which results from corruption. The prevailing view amongst economic theorists is that corruption is inefficient because it is conduct which is unproductive. The majority of economic theorists argue that corruption results in remote harms which can stifle competition, distort the allocation of resources, and retard economic development. But this account also underestimates the harm suffered by those innocent actors whose interests are adversely affected by the corruption of others.

⁴³ Crawford Young, 'Zaire: Is There A State?' (1984) 18 (1) *Canadian Journal of African Studies* 80, 80.

The third and final strand consists of a small body of emerging literature from legal philosophers who are interested in trying to explain the wrongdoing in corruption. The theorists in this area, though few in number, are agreed that corruption is wrong. The distance between them is a difference of opinion as to what makes corruption wrongful. The leading theorist in this area, Green, argues that the offer of a bribe is wrong because it induces the recipient into committing an unlawful act. By contrast, the receipt of a bribe is wrong because it causes the recipient to act in breach of a duty of loyalty owed to a principal (or principle). However, this account suffers from two major shortcomings. First, it fails to provide an account of the setbacks to the interests of innocent actors (other than principals) who are not engaged in corruption. Second, it fails to make any connection between such harming and the wrongdoing inflicted upon these innocent actors by the corrupt acts of others. As we shall see in this thesis, harm and wrongdoing are interconnected concepts.

In this thesis, the phrase “innocent actor” is used to refer to any person (natural or artificial) who is not engaged in corruption but whose interests are set back by the corrupt acts of another. These innocent actors are distinct from the general public in that their interests are directly affected by corruption. By contrast, the general public are harmed by corruption in a remote sense. Of course, there may be occasions when there is an overlap. For example, if a cabinet minister were to accept a bribe, his conduct would cause direct harm to the interests of his political party and remote harm to the general public (because the general public have an interest in a properly functioning government).

Let us consider these three strands of literature in turn.

1. POLITICAL HARM

Before the 1990s, there was a perception amongst some western policymakers that corruption was mainly limited to developing countries.⁴⁴ It was regarded by some as a problem which was prevalent in South American, African, and Asian cultures.⁴⁵ It is not entirely clear why

⁴⁴ Alan Doig and Robin Theobald (eds), *Corruption and Democratisation* (Frank Cass, 2003) 135-136.

⁴⁵ David Nelken and Michael Levi, ‘The Corruption of Politics and the Politics of Corruption: An Overview’ (1996) 23 (1) *Journal of Law and Society* 1, 1.

corruption should have been viewed in this way. After all, corruption has been a feature in developed countries for many decades. Indeed, the fact that most, if not all, countries (both developing and developed) have some sort of anti-corruption legislation is strong evidence in support of this.⁴⁶ Today, it is generally accepted that corruption can thrive and propagate itself in all types of governments.⁴⁷

But this was not always the case. For example, Bentham initially disagreed with this claim. He argued that corruption is not an aberration in the proper functioning of government. Rather, it is an essential feature of it. His ideas were based on a theory of human motivation which states that people generally act in ways which promote, as far as possible, their own self-interest. Whilst this applies to every member of a community, those in power are best placed to promote their self-interest in that they not only possess the necessary desire but also the means. According to Bentham, this meant that a public official's self-interest is diametrically opposed to the interests of the community. It is in this way that corruption offends the central tenet of utilitarianism insofar as it promotes the happiness of the few to the detriment of the many.⁴⁸

Bentham argued that corruption can only occur in those countries where the government is comprised of trustees (i.e. directly elected officials) of the people such as representative democracies⁴⁹ and mixed monarchies. In these forms of government, when a public official accepts a bribe, they set aside the public trust for private advantage and, in so doing, harm the public interest. By contrast, there can be no corruption in a pure or absolute monarchy because the people have no trustees. That is, because public officials owe a duty of loyalty to the monarch and not to the people. However, Bentham did not maintain this position for long. He subsequently recognised that public officials in a pure monarchy are trustees of the

⁴⁶ In England, the earliest reference to corruption is in section 29 of Magna Carta which remains in force today.

⁴⁷ Jeremy Pope, *TI Source Book 2000* (2nd edn, Transparency International, 2000) 1; Richard Alexander, 'Corruption as a Financial Crime' (2009) 30 (4) *Company Lawyer* 98, 98.

⁴⁸ Jeremy Bentham, *First Principles Preparatory to Constitutional Code* (Philip Schofield (ed), *The Collected Works of Jeremy Bentham*, Clarendon Press, 1989) 232-237.

⁴⁹ Democratisation is seen by some as a cure to corruption; Alan Doig and Robin Theobald (eds), *Corruption and Democratisation* (Frank Cass, 2003) 13; Alan Doig and Heather Marquette, 'Corruption and Democratisation: The Litmus Test of International Donor Agency Intentions?' (2005) 37 (2-3) *Futures* 199, 202.

monarch and are therefore capable of breaching their duty of loyalty to the monarch by engaging in corruption.⁵⁰

Bentham was right to concede this point. One need only refer to the daily media for reports of corruption from around the world in order to realise that corruption is not exclusive to any particular type of government. It is equally clear from such reports that corruption can take a variety of different forms ranging from petty bureaucratic episodes to large-scale political scandals.

But the issue which has given political scientists the most cause for debate over the years concerns the harm in corruption. Surprisingly, the debate is not about the types of harm that result from corruption. Rather, the dispute is more rudimentary in nature. The literature is divided between those who deny that corruption is harmful (the revisionists) and those who argue that corruption is harmful (the post-revisionists).

The revisionists argue that corruption is a positive phenomenon. They view corruption as a normal part of the development process of a country. By contrast, the post-revisionists argue that corruption is both harmful and self-perpetuating. Let us consider the arguments of both schools in turn.

THE REVISIONISTS

Prior to the 1960s, there was very little in the way of serious scholarship on the harm in corruption (Bentham is a notable exception). The Victorians were largely concerned with the problem of corrupt treating and the undue influencing of voters, and how best to combat the problem.⁵¹ Others simply regarded corruption as a moral failing and a religious sin.⁵² It was in the early 1960s that the first serious scholarship on corruption started to emerge. At the time, corruption was seen by political scientists as a type of social decay in developing countries.

⁵⁰ Philip Schofield, 'Jeremy Bentham on Political Corruption: A Critique of the First Report of the Nolan Committee' (1996) 49 *Current Legal Problems* 395, 400.

⁵¹ G. F. S. Elliot, *Thoughts on the Subject of Bribery and Corruption at Elections* (James Ridgway, 1853).

⁵² Julius Muller, *The Christian Doctrine of Sin*, Vol II (William Pulsford (tr), T&T Clark, 1853).

The revisionists proposed a radical thesis which moved away from this view. Led by Leff, they argued that corruption is an inherent aspect of the normal growth-decay cycle of a country.⁵³ In other words, it is a necessary and inevitable part of the process of modernisation.⁵⁴ The revisionists make two main claims. First, they claim that corruption may make certain positive contributions to the political development of developing countries.⁵⁵ For the revisionists, corruption is a type of functional dysfunction.⁵⁶ The second claim is that corruption is doomed to self-destruct as a country makes the transition from developing to developed status.⁵⁷

As to the first claim, it is said that corruption assists with the integration of those groups in society who would otherwise not be able to participate in the political process. In other words, corruption not only allows the rich access to top-level decision making, it also allows ordinary citizens access to lower levels of government bureaucracy.⁵⁸ In this way, corruption can play a useful and positive role in the development process because it lessens the chances of citizens challenging fledgling bureaucratic institutions; thus allowing them to survive and gain acceptance. When this occurs, the political structures of a developing country are better able to cope with change and preserve their legitimacy because the general populace share a sense of community.⁵⁹ This shared sense of community arises because corruption ensures that no group in society is alienated from the political system. Such integration can contribute to the

⁵³ Nathaniel H. Leff, 'Economic Development Through Bureaucratic Corruption' (1964) 8 (8) *American Behavioral Scientist* 8.

⁵⁴ Samuel P. Huntington, 'Modernization and Corruption' in Arnold J Heidenheimer and Michael Johnston (eds), *Political Corruption: Concepts and Contexts* (3rd edn, Transaction Publishers, 2002).

⁵⁵ Jose Velso Abueva, 'The Contribution of Nepotism, Spoils and Graft to Political Development' (1966) 3 (1) *East-West Center Review* 45.

⁵⁶ Gerald E. Caiden and Naomi J. Caiden, 'Administrative Corruption' (1977) 37 (3) *Public Administration Review* 301, 305; Simcha B. Werner, 'The Development of Political Corruption: A Case Study of Israel' (1981) 31 (4) *Political Studies* 620, 620.

⁵⁷ Simcha B. Werner, 'New Directions in the Study of Administrative Corruption' (1983) 43 (2) *Public Administration Review* 146, 146.

⁵⁸ James C. Scott, 'The Analysis of Corruption in Developing Nations' (1969) 11 (3) *Comparative Studies in Society and History* 315.

⁵⁹ Joseph S. Nye, 'Corruption and Political Development: A Cost-Benefit Analysis' (1967) 61 (2) *American Political Science Review* 417, 420-421.

building of new and stronger institutions in developing countries. This is said to be a better alternative to violence in times of change.

Bayley develops this theory by arguing that corruption may also serve to increase the quality of public servants. He suggests that where government wages are low, talented officials may nonetheless opt for government employment if they know that they will be able to supplement their income through corruption (e.g. by soliciting bribes).⁶⁰

Some revisionists, who have turned to economic theory for support, argue that corruption may introduce efficiency into the political system. There are at least three ways in which corruption may have this effect. First, by allowing governments in developing countries to raise capital in circumstances where private equity is scarce and the government lacks the capacity to openly tax a surplus from the general populace. Second, by allowing members of a community to bypass red tape and other cumbersome checks which actually impede economic development.⁶¹ Third, by encouraging entrepreneurship which in turn stimulates economic growth. That is, by providing a route of entry for all members of society (regardless of class or ethnicity) to access the political decisions needed to set up in business.⁶²

As to the second claim, it is said that over time, as a country becomes more developed, the opportunities for corruption will be reduced as government institutions become stronger.⁶³ However, it is here that the revisionists encounter difficulties. Put simply, they are unable to offer a credible explanation as to why corruption persists in the developed world.⁶⁴ After all, by their own account, there ought to be little or no corruption in developed countries. Yet we know that corruption continues to exist in the developed world.

⁶⁰ David H. Bayley, 'The Effects of Corruption in a Developing Nation' (1966) 19 (4) *Western Political Quarterly* 719, 728.

⁶¹ Colin Leys, 'What is the Problem about Corruption?' (1965) 3 (2) *The Journal of Modern African Studies* 215; Pranab Bardhan, 'Corruption and Development: A Review of Issues' (1997) 35 (3) *Journal of Economic Literature* 1320, 1322-1324.

⁶² Gunnar Myrdal, *Asian Drama: An Inquiry into the Poverty of Nation*, Vol II (Pantheon, 1968).

⁶³ Samuel P. Huntington, *Political Order in Changing Societies* (Yale University Press, 1968) 69.

⁶⁴ Gabriel Ben-Dor, 'Corruption, Institutionalization, and Political Development: The Revisionist Theses Revisited' (1974) 7 (1) *Comparative Political Studies* 63; Simcha B. Werner, 'The Development of Political Corruption in Israel' in Arnold J. Heidenheimer and Michael Johnston (eds), *Political Corruption: Concepts and Contexts* (3rd edn, Transaction Publishers, 2002) 200.

THE POST-REVISIONISTS

By the end of the 1960s, revisionism had come under attack. The post-revisionist movement grew out of a dissatisfaction with the theoretical claims made by the revisionists. The post-revisionists make a two-pronged attack. First, they argue that corruption is dysfunctional in all countries (both developing and developed). However, the remote harms caused by corruption are most apparent in developing countries. As to these, the post-revisionists argue that corruption can strengthen the dominance of the ruling elite, weaken the economy, and foster national disintegration. Second, they reject as false the revisionists' claim that corruption is a self-extinguishing phenomenon. Instead, they maintain that corruption is self-perpetuating.⁶⁵

The first argument made by the post-revisionists is that corruption is dysfunctional and that it has no developmental benefits.⁶⁶ They argue that corruption causes a number of different remote harms to the proper functioning of government. Let us consider some of these remote harms.

First, corruption is said to be wasteful because it allows capital to be siphoned off from state resources (usually into foreign bank accounts). Such capital outflow constitutes a net loss and inhibits growth.⁶⁷ In addition, it distorts investment because it allows for the channelling of funds into sectors such as construction which tend to be good vehicles for concealing corrupt payments. For example, in 2005, a British bridge building company was investigated for

⁶⁵ Padideh Ala'i, 'The Legacy of Geographical Morality and Colonialism: A Historical Assessment of the Current Crusade Against Corruption' (2000) 33 (4) *Vanderbilt Journal of Transnational Law* 877.

⁶⁶ M. Shahid Alam, 'Anatomy of Corruption: An Approach to the Political Economy of Underdevelopment' (1989) 48 (4) *American Journal of Economics and Sociology* 441; Arthur A. Goldsmith, 'Slapping the Grasping Hand: Correlates of Political Corruption in Emerging Markets' (1999) 58 (4) *American Journal of Economics and Sociology* 865, 870-871.

⁶⁷ M. Shahid Alam, 'Anatomy of Corruption: An Approach to the Political Economy of Underdevelopment' (1989) 48 (4) *American Journal of Economics and Sociology* 441, 451-452.

allegedly paying large bribes to secure lucrative bridge building projects in the Philippines.⁶⁸ Corruption also wastes the skills of the top level political elite, and may discourage foreign aid because donors may be offended by the prevalence of corruption.⁶⁹

Second, corruption represents a rise in the price of administration which the public is forced to endure. In short, the public are made to pay a second time for goods and services which they have already paid for through taxation.⁷⁰

Third, contrary to the claims made by the revisionists, corruption creates instability by destroying the legitimacy of political structures in the minds of those who have the power to do something about it (such as the military or the general populace). This can lead to social revolutions and military coups.⁷¹ The post-revisionists argue that such behaviour is unproductive and creates social disintegration rather than integration as the revisionists claim.

A good example of the social disintegration caused by corruption is the recent revolution in Tunisia. In December 2010, a young fruit and vegetable seller in Tunisia was asked for bribes by three inspectors from the council. When he refused to pay, they seized his goods and beat him. The young fruit seller went to the governor's office to ask for the return of his goods but the governor refused to see him. In an act of desperation, he poured petrol over his body and set himself alight (he died a few weeks later from his burns). His helplessness in the face of corruption, rising prices, and a lack of opportunities triggered a wave of sympathy which led

⁶⁸ David Leigh and Rob Evans, 'British Family Firm Accused of Getting Rich by Building Bridges to Nowhere' *The Guardian* (London, 20 December 2005) <<http://politics.guardian.co.uk/foi/story/0,9061,1671092,00.html>> accessed 12 January 2008; David Leigh and Rob Evans, 'SFO Studies Corruption Claims Against UK Bridge Builders' *The Guardian* (London, 21 December 2005) <<http://politics.guardian.co.uk/foi/story/0,9061,1671721,00.html>> accessed 12 January 2008.

⁶⁹ Joseph S. Nye, 'Corruption and Political Development: A Cost-Benefit Analysis' (1967) 61 (2) *American Political Science Review* 417, 421-422.

⁷⁰ William N. Brownsberger, 'Development and Governmental Corruption - Materialism and Political Fragmentation in Nigeria' (1983) 21 (2) *Journal of Modern African Studies* 215, 217.

⁷¹ Joseph S. Nye, 'Corruption and Political Development: A Cost-Benefit Analysis' (1967) 61 (2) *American Political Science Review* 417, 422.

to riots across Tunisia. As a direct result, the president, Ben Ali, a military autocrat who had been in power for 23 years, fled the country.⁷²

Fourth, corruption leads to a reduction in the administrative capacity of government. That is, it reduces the legitimacy of government in the eyes of modern-orientated civil servants (a scarce resource in developing countries). The loss of legitimacy is likely to alienate some civil servants and cause them to leave the country or reduce their efforts.⁷³

The second argument made by the post-revisionists is to deny the revisionists' claim that corruption withers away as a country makes the transition from developing to developed status. The post-revisionists argue that if this is correct, then it follows that there should be little or no corruption once developed status has been attained. It is here that the revisionists' theory collapses. Put simply, they are unable to explain why corruption persists in developed countries.⁷⁴

Having shown that corruption is not bound to self-destruct, some post-revisionists have developed accounts of the self-perpetuating nature of corruption. For example, Werner argues that if left unchecked, corruption can grow and spillover into other institutional structures.⁷⁵ There are three ways in which this can happen: leader-follower spillover, rationalised spillover, and institutional spillover.

Leader-follower spillover occurs when the ruler of a country plays a central role in shaping public opinion and societal behaviour. In such circumstances, if the ruler engages in corruption, his conduct will spillover and affect the trust, loyalty and personal integrity of his followers, and they in turn will also engage in corrupt conduct.⁷⁶

⁷² Frank Gardner, 'Tunisia one year on: Where the Arab Spring started' *BBC News* (London, 17 December 2011) <<http://www.bbc.co.uk/news/world-africa-16230190>> accessed 30 December 2011.

⁷³ Joseph S. Nye, 'Corruption and Political Development: A Cost-Benefit Analysis' (1967) 61 (2) *American Political Science Review* 417-423.

⁷⁴ Gabriel Ben-Dor, 'Corruption, Institutionalization, and Political Development: The Revisionist Theses Revisited' (1974) 7 (1) *Comparative Political Studies* 63.

⁷⁵ Simcha B. Werner, 'New Directions in the Study of Administrative Corruption' (1983) 43 (2) *Public Administration Review* 146.

⁷⁶ C. Simon Fan, 'Kleptocracy and corruption' (2006) 34 (1) *Journal of Comparative Economics* 57.

Rationalised spillover occurs through the rationalisation of petty or borderline corruption which does not clearly violate the law. When an activity is regarded as being innocuous, that act is removed from previous definitions of corruption. The acceptance of such conduct as legitimate tends to contribute to the legitimisation of other (more serious) types of misconduct.⁷⁷ Another unwanted side effect of such behaviour is that it erodes the boundaries of the law so that conscientious individuals are unable to regulate their conduct as the law itself is unclear.⁷⁸

The final way in which corruption can spread is through institutional spillover. In this scenario, corruption in one institution is mimicked by other institutions. For example, if manufacturer X consistently loses out on contracts to manufacturer Y, who secures contracts by offering bribes to influence government officials, then manufacturer X is likely to follow suit.⁷⁹

After deconstructing the revisionists' claims, the post-revisionists turned to economic theory in an effort to explain the remote harms caused by corruption. This natural progression recognises that the way a government conducts its affairs has a direct impact on the growth of the economy (and vice versa).⁸⁰ It is at this juncture that we see a degree of cross-fertilisation in the general scholarship on the harm in corruption (that is, between the ideas of the political scientists and the economic theorists). The post-revisionists tell us that corruption is best viewed as a transactional relationship between the state and the private sector. The key to understanding the remote harms which result from such corrupt relationships is to look at the relative bargaining power of the parties.⁸¹ According to Rose-Ackerman, the critical issue is whether the government or the private sector has the greater bargaining power when dealing

⁷⁷ J. P. Olivier de Sardan, 'A Moral Economy of Corruption in Africa?' (1999) 37 (1) *The Journal of Modern African Studies* 25.

⁷⁸ Simcha B. Werner, 'New Directions in the Study of Administrative Corruption' (1983) 43 (2) *Public Administration Review* 146, 150.

⁷⁹ *ibid* 150.

⁸⁰ Mushtaq H. Khan, 'The New Political Economy of Corruption' in Ben Fine, Costas Lapavistas and Jonathan Pincus (eds), *Development Policy in the Twenty-First Century: Beyond the Post-Washington Consensus* (Routledge, 2001), 112.

⁸¹ Susan Rose-Ackerman, *Corruption: A Study in Political Economy* (Academic Press, 1978); Susan Rose-Ackerman, *Corruption and Government: Causes, Consequences, and Reform* (Cambridge University Press, 1999) 113.

with the other. The term “bargaining power” is used here to describe the power of a seller of goods to set the price for those goods. In economics, the term bargaining power suggests some lack of equality between the buyers and sellers in a market.⁸²

According to the post-revisionists, depending on who has the bargaining power, corruption may manifest itself in one of four forms: kleptocracies, bilateral monopolies, mafia-dominated states, and competitive corruption.⁸³ However, as bilateral monopolies and mafia-dominated states are similar in character, we can conflate these so as to leave three polar forms: kleptocracies, bilateral monopolies, and competitive corruption. Let us consider these in turn.

Kleptocracies

A kleptocracy can be described as a government which is characterised by rampant greed. In this scenario, the bargaining power is concentrated at the top-level. It is usually wielded by a kleptocrat such as a dictator. However, it is not uncommon for a kleptocrat to enlist the assistance of a selected few who will share in the rewards. In a kleptocracy, those at the top-level exploit their positions by misusing the state machinery and misappropriating public resources for their own ends rather acting in the interests of the public.

Of course, some instances of misuse and misappropriation will be outright cases of theft, fraud, and embezzlement. However, of more interest to us are examples of corrupt conduct. Such behaviour usually involves the misappropriation of pre-existing output or even wealth (which is not current output).⁸⁴

⁸² John T. Dunlop and Benjamin Higgins, ‘Bargaining Power and Market Structures’ (1942) 50 (1) *Journal of Political Economy* 1, 1-3; Jon Elster, *The Cement of Society: A Study of Social Order* (Cambridge University Press, 1989) 80.

⁸³ Susan Rose-Ackerman, *Corruption and Government: Causes, Consequences, and Reform* (Cambridge University Press, 1999) 114.

⁸⁴ Edward Dommen, ‘Paradigms of Governance and Exclusion’ (1997) 35 (3) *Journal of Modern African Studies* 485, 491-492.

One of the most notorious examples of kleptocracy was that of Mobutu in Zaire.⁸⁵ According to a Transparency International press release,⁸⁶ Mobutu siphoned off \$5 billion (£3 billion) from Zaire's output. He is said to have employed various methods such as skimming the profits from one of Zaire's biggest cash cows, the state-run mining company, Gecamine. But this is not an isolated example. There are numerous others who have amassed astonishing personal fortunes by misusing the state apparatus. Mobutu was not even the worst offender. According to the same Transparency International press release, the most prolific offender was Indonesia's Suharto, who allegedly misappropriated between \$15 billion (£9 billion) and \$35 billion (£21 billion). Another example was Marcos of the Philippines who is said to have misappropriated between \$5 billion (£3 billion) and \$10 billion (£6 billion).

Of course, kleptocrats do not limit their misappropriation to national output. They also skim foreign aid and donations meant for development and the alleviation of suffering provoked by war or nature.⁸⁷ They use their position to siphon off a proportion of such aid for their own financial enrichment.

According to Rose-Ackerman, a kleptocrat wields his bargaining power and misappropriates resources by organising the state apparatus so as to maximise the possibilities for rent extraction. The rational kleptocrat does this by placing as much of the state apparatus as possible under his control. For example, a kleptocrat may use the regulatory system to create a bottleneck which individuals and companies will pay to avoid. However, to do this, he may need to buy the assistance of top-level officials (e.g. by conferring patronages or offering inducements). He may even offer them a share of the spoils. The rational kleptocrat will favour policies that transfer the most resources into his pocket whilst maintaining the

⁸⁵ Arthur A. Goldsmith, 'Slapping the Grasping Hand: Correlates of Political Corruption in Emerging Markets' (1999) 58 (4) *American Journal of Economics and Sociology* 865, 870.

⁸⁶ Transparency International, 'Plundering Politicians and Bribing Multinationals Undermine Economic Development, says TI' (Press Release, 25 March 2004) <http://www1.transparency.org/pressreleases_archive/2004/2004.03.25.gcr_relaunch.html> accessed 7 January 2007.

⁸⁷ Although not a kleptocracy, Bangladesh is a good example of a country where much foreign aid has been misappropriated through corruption; David J. Lewis, 'Corruption in Bangladesh: Discourse, Judgements and Moralities' (1996) University of Bath, Centre for Development Studies, Occasional Paper No. 05/96; Transparency International, 'Transparency International Country Study Report: Bangladesh' (2003) <<http://www.transparency.org/content/download/1628/8305/file/bangladesh.pdf>> accessed 20 December 2009.

productivity of the economy. By the same token, he will oppose policies which distribute benefits widely throughout society with little opportunity to extract payoffs at the centre.⁸⁸

A kleptocrat will be aware that corruption is likely to spillover into other parts of the state machinery. Corruption at the top-level encourages low-level public officials to act in the same way because they too will want to share in the rewards. In cases where low-level officials are not paid their salaries or are paid low salaries, they may be forced to turn to corruption in order to supplement their incomes. They may seek to benefit from corruption by introducing bureaucratic inefficiencies in the form of delays, red tape, and cross-agency interference. Whilst low-level corruption can be kept in check by honest governments, it can become endemic in a kleptocracy. This will be of particular concern to a kleptocrat because low-level corruption will reduce the rent that he can generate from corruption. If the kleptocrat can retain an honest civil service and share the gains with only a small group of associates, he will be better-off. But in reality, this will often be impossible.⁸⁹

Returning to Zaire, Mobutu could not have functioned without the co-operation of corrupt top-level officials, the judiciary, and military generals who together constituted an interdependent and secretive power elite.⁹⁰ Mobutu placed a third of the state budget under his control and siphoned off so much of the country's revenue that the Zairian economy collapsed. But in order to facilitate this, he had to share his corrupt gains with a select group. Mobutu and his cronies used grandiose infrastructure projects to disguise the payment of bribes and kickbacks.⁹¹ Such white elephants provide the ideal vehicle for hiding corrupt transactions.

Under Mobutu's regime, the lives of the Zairian people deteriorated day after day. Many low-level public officials did not receive their salaries for months or even years, and the army and the police, which were supposed to protect the public, harassed and terrorised them instead. To supplement their incomes, low-level public officials only performed public services on the

⁸⁸ Susan Rose-Ackerman, *Corruption and Government: Causes, Consequences, and Reform* (Cambridge University Press, 1999) 115.

⁸⁹ *ibid* 120-121.

⁹⁰ Robert Harris, *Political Corruption: In and Beyond the Nation State* (Routledge, 2003) 1.

⁹¹ Susan Rose-Ackerman, *Corruption and Government: Causes, Consequences, and Reform* (Cambridge University Press, 1999) 116.

payment of bribes.⁹² In post-revisionist terminology, this is an example of corruption spilling over from Mobutu's kleptocratic regime. Under Mobutu's leadership, Zaire served the interests of those who wielded bargaining power rather than the public. As a consequence, economic growth and development were stunted and the country lost the capability to improve the living conditions of the population as a whole.⁹³

There are some revisionist theorists who argue that a kleptocrat may be beneficial in the sense of being the lesser of two evils. Olson offers an alternative account of kleptocrats or "stationary bandits" as he calls them.⁹⁴ He argues that they monopolise and rationalise theft in the form of taxes. They seize a given domain, make themselves the ruler, and provide peace, order and other public goods for the inhabitants. This ensures that the bandit can continue to "tax" the public. Olson argues that if a bandit monopolises theft in his domain and steals only through regular taxation, his subjects will know what proportion of their output is left after they have paid their "taxes". This in turn creates stability. According to this theory, a bandit who has control over a country will provide public goods to that country because he has an encompassing interest in it.⁹⁵ He will ensure that rival bandits are deterred by maintaining a strong military. Olson argues that the bandit will choose the revenue-maximising tax rate so as to extract the maximum possible profit whilst leaving enough for the public.⁹⁶ In simple terms, once a bandit is in power, he will seek to create a "taxation" system which maintains an equilibrium so that the general populace are not pushed to breaking point and so continue to pay "tax" even though a proportion of their tax is being misappropriated. For the general populace such theft is to be preferred over the alternative (irregular looting by multiple bandits).

⁹² Mabiengwa Emmanuel Naniuzeyi, 'The State of the State in Congo-Zaire: A Survey of the Mobutu Regime' (1999) 29 (5) *Journal of Black Studies* 669, 669.

⁹³ Georges Nzongola-Ntalaja, *Class Struggles and National Liberation in Africa* (Omenanna, 1982) 44.

⁹⁴ Mancur Olson, 'Dictatorship, Democracy, and Development' (1993) 87 (3) *American Political Science Review* 567; Martin C. McGuire and Mancur Olson, 'The Economics of Autocracy and Majority Rule: The Invisible Hand and the Use of Force' (1996) 34 (1) *Journal of Economic Literature* 72.

⁹⁵ During Suharto's 32 year rule of Indonesia, poverty declined, rice yields doubled, per capita calorie intakes increased by 50 per cent, infant mortality rates halved, and the proportion of the population with no schooling fell from 50 per cent to around 15 per cent; H. Hill, 'The Indonesian Economy: The Strange and Sudden Death of a Tiger' in G. Forrester and R. May (eds), *The Fall of Soeharto* (Crawford House, 1998) 94.

⁹⁶ Mancur Olson, 'Dictatorship, Democracy, and Development' (1993) 87 (3) *American Political Science Review* 567, 567-570.

But the theory of the stationary bandit is flawed in a number of important respects. First, most kleptocrats are not as all powerful as Olson's stationary bandit. The tools at their disposal are imperfect and although they control the state, they seldom control the entire economy.⁹⁷ Second, Olson's theory assumes that the bandit, once in power, will be able to achieve peace and stability and thereby maximise revenue, albeit for his own benefit. Third, it assumes that bandits have an interest in maintaining the economic status quo through taxing at the revenue-maximising tax rate. Lastly, Olson assumes that the general populace will be content for the bandit to siphon off state resources. It is clear from examples around the world that kleptocracies are not synonymous with long-term stability. Rather, they tend to be the subject of frequent military coups and revolutions (which demonstrate instability).

According to Grossman, revolutions are manifestations of kleptocratic rivalry.⁹⁸ In this theory, the protagonists are the incumbent kleptocratic ruler and the leader of a revolution, who is an alternative kleptocrat. These protagonists are engaged in a struggle for the authority to exploit the productive members of society. The former acts in self-interest and the latter wishes to replace him for the same purpose. As Grossman explains, the incumbent kleptocrat will deploy military force in order to protect his income by deterring the revolutionary leader from organising a revolution or suppressing one if it occurs. The struggle between these two actors means that the incumbent ruler diverts a large proportion of state resources into deterring revolutions that do not occur.⁹⁹ But this is a necessary expense because in order to be a successful kleptocrat, one must be both a "fox in order to recognise traps, and a lion in order to frighten off wolves."¹⁰⁰

Grossman's theory finds support in the real world. History has shown us that the fall of many kleptocracies, such as Mobutu's Zaire, were driven by a public which had become disenchanted with the effects of kleptocracy. The recent revolution in Libya which began in February 2011 and ended with the death of Colonel Gaddafi in October 2011 is another

⁹⁷ Susan Rose-Ackerman, *Corruption and Government: Causes, Consequences, and Reform* (Cambridge University Press, 1999) 114-116.

⁹⁸ Herschel I. Grossman, 'Kleptocracy and Revolutions' (1999) 51 (2) *Oxford Economic Papers* 267.

⁹⁹ *ibid* 267-270.

¹⁰⁰ Niccolò Machiavelli, *The Prince* (Penguin Books, 2003) 57.

example. The Libyan uprising led to Gaddafi's kleptocratic regime¹⁰¹ being overthrown after more than four decades in power.¹⁰²

We can see from the examples cited in this section that kleptocracies may result in a number of different remote harms for society.¹⁰³

Bilateral monopolies

The second polar form mentioned by the post-revisionists is a bilateral monopoly. This describes a situation where there is a single seller and a single buyer of a given product in a market. When the supply of that product is restricted and there is no effective competition, the buyer and the seller may collude to form a bilateral monopoly in a joint profit maximisation scheme.¹⁰⁴

It is possible to find support for this view in other non-legal scholarship. For example, according to sociological theory, a monopoly is a form of social exclusion (the other forms of exclusion, which do not concern us, being solidarity and specialisation). Sociologists argue that a monopoly occurs when groups form in order to capture benefits for themselves at the

¹⁰¹ Libya has been described as a vast kleptocracy in which the Gaddafi family and their allies skimmed off hundreds of millions of dollars from oil revenue. This money was funnelled into overseas bank accounts and used to fund their lavish lifestyles; Neil Tweedie, 'Col Gaddafi killed: a narcissist who believed his deranged publicity and paid for it' *The Telegraph* (London, 20 October 2011) <<http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/8839957/Col-Gaddafi-killed-a-narcissist-who-believed-his-deranged-publicity-and-paid-for-it.html>> accessed 22 April 2012.

¹⁰² Shashank Joshi, 'After Gaddafi: Libyan revolution 'still has far to go'' *BBC News* (London, 21 October 2011) <<http://www.bbc.co.uk/news/world-africa-15398802>> accessed 22 February 2012.

¹⁰³ G. R. Sullivan, 'Reforming Bribery: Law Commission Consultation Paper 185: (2) Reforming the Law of Bribery (LCCP No 185): Bribery Outside England and Wales; Corporate Liability; Defences; Consent to Prosecution' [2008] (9) *Criminal Law Review* 687, 690.

¹⁰⁴ R. S. Khemani and D. M. Shapiro, 'Glossary of Industrial Organisation Economics and Competition Law' (OECD, 1993) <<http://www.oecd.org/dataoecd/8/61/2376087.pdf>> accessed 8 July 2012.

expense of others. The rent is shared by these groups at the expense of the other players in the monopoly system.¹⁰⁵

Regardless of whether one describes bilateral monopolies in economic or sociological terms, it is possible to reduce them to power sharing agreements. A bilateral monopoly promotes a horizontal network of exchanges. This is sometimes described as “integrative” corruption. That is, because it links people and groups into lasting networks of exchange and shared interests.¹⁰⁶ These networks develop because the parties realise that by co-operating with one another, they will be able to extract the maximum rent from the state.¹⁰⁷ So for example, a state may be dependent on the export of one or two minerals or agricultural products. It may establish long-term relationships with a few private multinational companies. The alliance which results may allow a seller (e.g. a ruler) to enter into an agreement to share the nation’s wealth at the expense of the ordinary people. Such misappropriation is bound to have a long-term detrimental impact for society for the simple reason that it constitutes a loss in revenue which therefore reduces the amount of money that is available for public expenditure. In simple terms, the existence of a bilateral monopoly means that money which should be used for the benefit of the public is illicitly diverted for private gain.

The size of each party’s slice will depend on their relative bargaining power. For example, if a company produces a raw material which is only available in a few places on earth, then the seller (i.e. the ruler) will be in a strong position to extract a large proportion of the benefits. If the company is unwilling to share the profits, the seller can negotiate with other interested parties. In this situation, the company has few alternatives given the scarcity of the raw material whilst the seller has a number of outside options. By contrast, if the company produces an agricultural product, such as bananas, and can easily go elsewhere, or if the raw material is ubiquitous, then it has the upper hand in the bargain. In this scenario, the seller

¹⁰⁵ Hilary Silver, ‘Reconceptualizing Social Disadvantage: Three Paradigms of Social Exclusion’ in Gerry Rodgers, Charles Gore and Jose B Figueiredo (eds), *Social Exclusion: Rhetoric, Reality, Responses* (International Labour Organisation, 1995) 57-80.

¹⁰⁶ Michael Johnston, ‘The Political Consequences of Corruption: A Reassessment’ (1986) 18 (4) *Comparative Politics* 459, 464.

¹⁰⁷ Raul Carvajal, ‘Large-scale Corruption: Definition, Causes, and Cures’ (1999) 12 (4) *Systemic Practice and Action Research* 335, 336.

will be keen to retain the company as otherwise the seller's ability to extract rent will be restricted.

In contrast to simple kleptocracies (i.e. where there is no sharing of rent), it is fairly obvious that bilateral monopolies will always result in reduced rent. This is because the seller has to share the benefits with the buyer. However, in common with kleptocracies, bilateral monopolies only enrich those at the top-level and function to the detriment of the general public.¹⁰⁸

When a country is managed by a weak ruler and the state machinery is disorganised, a company may be able to dominate by buying the co-operation of other officials. However, the company must be wary because too much disruption and instability can have a negative effect. That is, it can reduce the company's ability to purchase the co-operation of officials because when it buys the co-operation of one official, there is nothing to stop another from stepping forward and demanding the payment of an inducement. This is an undesirable scenario because it results in officials competing against one another for rent (thereby posing an additional financial burden on the company).¹⁰⁹ For this reason, the company will usually try to support a weak ruler where it finds that collaboration is an effective means of acquiring rent.¹¹⁰

However, Kang takes an alternative view. He argues that in bilateral monopolies, both the seller and buyer are in a strong position. This can lead to a situation of "mutual hostages". That is, a situation where both actors benefit from their opportunism and exploitation but need the other in order to generate rent.¹¹¹

We can see from our analysis that a bilateral monopoly is essentially an agreement between two parties to misappropriate the wealth of a country.

¹⁰⁸ Susan Rose-Ackerman, *Corruption and Government: Causes, Consequences, and Reform* (Cambridge University Press, 1999) 123.

¹⁰⁹ *ibid* 123.

¹¹⁰ Edward Dommen, 'Paradigms of Governance and Exclusion' (1997) 35 (3) *Journal of Modern African Studies* 485, 494.

¹¹¹ David C. Kang, *Crony Capitalism: Corruption and Development in South Korea and the Philippines* (Cambridge University Press, 2002) 9.

Competitive corruption

The final polar form mentioned by the post-revisionists is competitive corruption. This describes a situation in which low-level public officials engage in self-serving conduct instead of promoting the public interest.¹¹² There are three ways in which a public official may do this. First, a public official may demand an inducement for performing a function which he is required to perform without any additional reward. Second, a public official may demand an inducement for not performing a function which he is required to perform. Lastly, a public official may demand an inducement for committing an unlawful act.¹¹³ Public officials are able to act in these ways because they have bargaining power.

Low-level officials act in these ways when there is little risk of detection or censure. This is more likely to be the case in developing countries where the systems for detecting corruption are often decentralised and there are few effective checks and balances. As a result there is likely to be little threat from those institutions which are entrusted with the task of detecting corruption (such as the police) because they are also likely to be corrupt. The long-term impact of such corruption is a free-for-all in which low-level officials compete with one other for rent, thus creating a market of low-level corruption.

In the travelogue *Maximum City*, the author recounts the despair of trying to obtain a gas supply in Mumbai (Bombay). The bureaucrats at the local gas office tell him that they are unable to supply gas for several months because the city has exceeded its designated quota for domestic gas. When he mentions this to his friend's mother, she takes him to another gas office. She appeals to the female bureaucrats: "Two small children! They don't even have gas to boil milk! They are crying for milk!" The female bureaucrats duly oblige by pointing out that if the author were to order commercial gas cylinders instead of domestic ones, he could have immediate delivery. In order to do this, the bureaucrats pretend that his household is a business. But the author's relief is short lived. He soon discovers that the cylinders, which are supposed to last three months, last only three weeks. Somewhere along the chain of supply, most of the gas had been siphoned off and sold on the black market. To ensure a continuous

¹¹² Dennis F. Thompson, *Ethics in Congress: From Individual to Institutional Corruption* (Brookings Institution Press, 1995) 30.

¹¹³ Krushna Singh Padhy, *Corruption in Politics (A Case Study)* (BR Publishing, 1986) 3.

supply, everyone ran a scam whereby they had two cylinders in their name. They transferred one from an earlier address or bribed a bureaucrat to get a second one.¹¹⁴

In another example, the author visits the slums of Jogeshwari where he learns that the municipal water tap is only turned on for a few hours every day. Upon enquiring why, he is told that the local plumbers have bribed the local bureaucrats into disconnecting the water connection for most of the day. By doing this, the plumbers were able to charge the slum dwellers a premium for installing domestic water connections.¹¹⁵

As these two examples show, the corruption of some encourages the corruption of others until all but the most virtuous are participating in corruption.¹¹⁶ Even new recruits are likely to become corrupt when they discover that honest graft and good moral virtues do not help them to make a living.¹¹⁷

* * *

Even at the height of revisionism, there was considerable scepticism as to the alleged developmental benefits of corruption. The idea that corruption is beneficial has not only been proved as false by the post-revisionists, it has also been rejected by virtually every major jurisdiction around the world. The fact that most countries have some sort of anti-corruption legislation lends powerful support to this proposition.

By contrast, the post-revisionists' account is regarded as the superior account of the remote harm in corruption. Lawmakers from around the world rely upon the remote harms resulting

¹¹⁴ Suketu Mehta, *Maximum City: Bombay Lost and Found* (Review, 2005) 27-28.

¹¹⁵ *ibid* 59.

¹¹⁶ Susan Rose-Ackerman, *Corruption and Government: Causes, Consequences, and Reform* (Cambridge University Press, 1999) 124-125; Ajit Mishra, 'Persistence of Corruption: Some Theoretical Perspectives' (2006) 34 (2) *World Development* 349.

¹¹⁷ In India, official corruption is so widespread and pervasive that there have been protests by the general populace; Jim Yardley, 'Leader of Corruption Protest Arrested in India' *The New York Times* (New York, 17 August 2011) A4 <<http://www.nytimes.com/2011/08/17/world/asia/17india.html>> accessed 22 February 2012; Jason Burke, 'India corruption protesters dump snakes in busy tax office' *The Guardian* (London, 1 December 2011) 33 <<http://www.guardian.co.uk/world/2011/nov/30/india-corruption-protest-snakes-tax-office>> accessed 22 February 2012.

from corruption in order to justify the criminalisation of corruption. However, as we have seen from our review of the literature on political harm, the post-revisionists' account of harming assumes but omits to provide a detailed account of the harm and wrongdoing suffered by those innocent actors whose rights and interests are set back by the corrupt conduct of others.

2. ECONOMIC HARM

There is a formidable body of economic literature on the subject of corruption. However, a substantial proportion of this literature is not directly relevant to our project. For example, there are numerous game theoretical analyses which seek to predict the behaviour of the players in a variety of different corrupt games. There is, nonetheless, a large body of material which is concerned with the economic harm caused by acts of corruption. However, the same cannot be said for empirical research.¹¹⁸ In fact, there are very few case studies which place a precise value on the cost of corruption. There are a number of reasons for this.

First, corruption is typically a clandestine activity and is therefore difficult to detect. It embraces the purchase and sale of an array of different benefits such as government contracts, lower taxes, licenses, time (e.g. by speeding-up applications), legal outcomes, etc.¹¹⁹

Second, corruption is also very difficult to measure for the simple reason that it is not entirely clear what one should be measuring.¹²⁰ For example, whilst it may be possible to place a value on instances of corruption involving tangible benefits, the same cannot be said of corruption

¹¹⁸ Empirical research tends to take the form of questionnaires and interviews; Bertrand Venard and Mohamed Hanafi, 'Organizational Isomorphism and Corruption in Financial Institutions: Empirical Research in Emerging Countries' (2008) 81 (2) *Journal of Business Ethics* 481. However, such techniques are highly unlikely to uncover any kind of wrongdoing.

¹¹⁹ World Bank, 'Helping Countries Combat Corruption: The Role of the World Bank' (1997) <<http://www1.worldbank.org/publicsector/anticorrupt/corruptn/corrptn.pdf>> accessed 30 May 2006.

¹²⁰ Vito Tanzi, 'Corruption Around the World: Causes, Consequences, Scope, and Cures' in George T Abed and Sanjeev Gupta (eds), *Governance, Corruption, and Economic Performance* (International Monetary Fund, 2002) 38; Pranab Bardhan, 'The Economist's Approach to the Problem of Corruption' (2006) 34 (2) *World Development* 341.

involving intangible benefits. For example, in 2006 a senior immigration official was suspended from duty following claims that he had offered to speed up a Zimbabwean teenager's asylum claim in return for sexual intercourse.¹²¹ Obviously, placing a value on inducements of this type is both undesirable and very difficult. To further complicate matters, the economic impact of corruption is dependent on a number of variables such as the amount of rent extracted from each corrupt transaction, the frequency of the transactions, and the number of actors involved.¹²² Thus, we can see that gauging the extent to which corruption has affected the economic framework is a difficult task.¹²³

Third, on a practical level, it is difficult to define a benchmark, or ex ante position, against which to compare the effects of corruption.¹²⁴

Despite these challenges, economic theorists have embraced the subject of economic harm with real enthusiasm. They have preferred to approach corruption as a study in efficiency. That is to say, they are interested in whether corrupt conduct yields the maximum quantity of a given product or whether it results in a given quantity of a product being obtained using the minimum resources (an efficient use of resources) or whether it results in unused or misallocated resources or both (an inefficient use of resources).¹²⁵

The literature on the economic harm in corruption follows the same path as the political scientists. That is to say that it can be divided into the same rival schools of thought: the revisionists and the post-revisionists. The former claim that corruption is efficient in the sense of being productive. The latter deny this claim and argue that corruption can never be efficient (in the sense of being productive).

¹²¹ Sean O'Neill and Richard Ford, 'Reid Faces Questions on Sex-for-Visas Scandal' *The Times* (London, 22 May 2006) 4.

¹²² Raul Carvajal, 'Large-scale Corruption: Definition, Causes, and Cures' (1999) 12 (4) *Systemic Practice and Action Research* 335, 340.

¹²³ Paolo Mauro, 'Why Worry About Corruption?' (1997) 6 *Economic Issues* 1.

¹²⁴ Mushtaq H. Khan, 'The Efficiency Implications of Corruption' (1996) 8 (5) *Journal of International Development* 683, 685-686; Mushtaq H. Khan and Kazi A. Toufique, 'Sand or Oil in the Machine?: A Comment on Corruption and Entrepreneurship' (1995) 23 (1-2) *Bangladesh Development Studies* 129.

¹²⁵ Osvaldo H. Schenone and Samuel Gregg, *A Theory of Corruption* (Acton Institute, 2003) 21.

Before we set out the battle lines, it is important to note the common ground between these two groups of economic theorists as they both rely upon the same tools to mount their arguments.

First, the starting point for both sets of economists is the concept of self-interest (a person acts in self-interest when they make choices which they think are best for them).¹²⁶ From an economic point of view, self-interest is regarded as a spectrum of efficiency. At one end of the spectrum is a competitive market where self-interest is translated into productive activities which constitute an efficient use of resources. At the other end of the spectrum is war, which is a destructive struggle over wealth that ends up destroying the very resource base which motivated the conflict in the first place.¹²⁷

Second, a rational actor may choose to promote his self-interest in any number of ways. However, the most common method of doing this is through the pursuit of economic rent. Such conduct is more commonly known as rent-seeking.¹²⁸ In this context, the term rent¹²⁹ refers to the extra amount paid (over what would be paid for the best alternative use) for something useful which is limited either by nature or through human ingenuity.¹³⁰ In economic literature, rent-seeking can cover any pursuit of wealth through the capture of economic rent. This broad description includes both legal and illegal means such as corrupt conduct.

¹²⁶ Johan J. Graafland, 'Self-interest' in Jan Pell and Irene van Staveren (eds), *Handbook of Economics and Ethics* (Edward Elgar Publishing Ltd, 2009) 477-483.

¹²⁷ Susan Rose-Ackerman, *Corruption and Government: Causes, Consequences, and Reform* (Cambridge University Press, 1999) 2.

¹²⁸ Gordon Tullock, 'The Welfare Costs of Tariffs, Monopolies, and Theft' (1967) 5 (3) *Western Economic Journal* 224; Anne O. Krueger, 'The Political Economy of the Rent-Seeking Society' (1974) 64 (3) *American Economic Review* 291; Jagdish N. Bhagwati, 'Directly Unproductive Profit-Seeking (DUP) Activities' (1982) 90 (5) *Journal of Political Economy* 988.

¹²⁹ There are three types of economic rent: consumer surplus, producer surplus, and economic profit; Simon N. Patten, 'Cost and Utility' (1893) 3 (1) *Annals of the American Academy of Political and Social Science* 17; J. Fred Weston, 'A Generalized Uncertainty Theory of Profit' (1950) 40 (1) *The American Economic Review* 40; Miroslav Svoboda, 'History and Troubles of Consumer Surplus' (2008) 17 (3) *Prague Economic Papers* 230.

¹³⁰ Paolo Mauro, 'Why Worry About Corruption?' (1997) 6 *Economic Issues* 1, 2.

Third, economic theorists on both sides agree that rent may be obtained for goods and services which are limited either by nature or through human ingenuity. In the context of corruption, both sides accept that public officials are best placed to manipulate supply. This is because the government has a monopoly over the distribution of many goods and services and the imposition of onerous costs. The distribution of these benefits and costs is usually under the control of public officials who possess discretionary power, and are therefore best placed to manipulate supply.¹³¹ In this way, corrupt public officials (rent-seekers) are able to extract rents from those individuals and companies who are prepared to pay in order to bypass the shortage and obtain the goods and services required.¹³²

Fourth, although the ability to limit supply and earn rent is important, rent-seekers must also have an incentive to break the law by engaging in corruption. Economic theory tells us that a rational rent-seeker will only engage in corruption when the expected rent from engaging in corrupt conduct is greater than the expected cost of any potential punishment.¹³³ However, it is submitted that this view is incomplete as the rational rent seeker may also choose to engage in corruption when the chances of detection are slim.

That completes a summary of the common ground between the two rival groups of economic theorists. The battleground between them consists of a disagreement about where corruption lies on the spectrum of efficiency. For the revisionists, corruption is a productive activity which constitutes an efficient use of resources. For the post-revisionists, corruption lies at the

¹³¹ Raul A. Barreto and James Alm, 'Corruption, Optimal Taxation, and Growth' (2003) 31 (3) *Public Finance Review* 207, 207; Susan Rose-Ackerman, *Corruption and Government: Causes, Consequences, and Reform* (Cambridge University Press, 1999) 9.

¹³² There are three types of supply which may be manipulated: fixed supply, variable supply, and selective supply. A fixed supply describes a situation in which the amount of a good or service is fixed and the allocator has no discretion to alter the supply. In a variable supply market, those responsible for allocating a particular good or service are able to influence the quantity, the quality, and the identity of the beneficiaries. Selective supply describes a situation in which particular goods and services are available to all consumers who qualify; Susan Rose-Ackerman, *Corruption and Government: Causes, Consequences, and Reform* (Cambridge University Press, 1999) 12-15.

¹³³ Mushtaq H. Khan, 'Determinants of Corruption in Developing Countries: The Limits of Conventional Economic Analysis' in Susan Rose-Ackerman (ed), *International Handbook on the Economics of Corruption* (Edward Elgar Publishing, 2006) 216.

other end of the spectrum. They regard corruption as an unproductive use of resources and therefore inefficient.¹³⁴

Some of the literature in this area is of a highly technical nature. There are many analyses based on queuing models, game theory, and Bayes' theorem. The vast majority of these analyses are not concerned with the economic harm resulting from corruption. However, even amongst the literature that is of interest to us, there are some studies which rely upon complex mathematical formulae which clearly fall outside the ambit of a legal thesis. Accordingly, what follows is a distilled account of the main economic arguments insofar as they relate to the economic harm resulting from acts of corruption.

THE REVISIONISTS

The early scholarship on the economic harm in corruption was led by the revisionists (in tandem with the political scientists who were concerned with political harm). This is generally regarded as the minority view and fell out of vogue towards the end of the 1960s.

The revisionists argue that corruption may be efficient (productive) in certain circumstances. However, they are careful not to overstate their case. It is not their case that corruption is always efficient in the sense of being productive. According to the revisionists, there are a number of situations in which corruption may be efficient. It is sufficient to outline a selection of these.

First, corruption may be productive where government policies are imperfect. In such cases, corruption may allow the private sector to perform more efficiently by bypassing cumbersome government regulations and red tape. According to the revisionists, such conduct is conducive to economic growth because it allows goods and services to be accessed by individuals who

¹³⁴ Paolo Mauro, 'The Persistence of Corruption and Slow Economic Growth' (2002) IMF Working Paper No. WP/02/213 <www.imf.org/external/pubs/ft/wp/2002/wp02213.pdf> accessed 3 March 2008.

would otherwise be excluded. In other words, it allows entrepreneurs to enter the market when they would otherwise be excluded.¹³⁵

The revisionists argue that corrupt conduct can be as efficient as a legitimate market. We can demonstrate this proposition by using a simple example. Let us assume that the number of applicants who qualify for a particular benefit exceeds the available supply. In this situation, those who are unable to secure the said benefit through legitimate means (i.e. by satisfying the qualifying criteria) may resort to corruption in order to secure the benefit. Assuming that the corrupt market operates efficiently, the revisionists argue that the benefit will be awarded to the applicant who is willing to pay the highest bribe. If there is no price discrimination,¹³⁶ the market equilibrium price¹³⁷ will be equivalent to the price in an efficient market. In other words, the bribe will be the same as the price that could have been obtained if the benefit had been sold in a legitimate market.

Second, corruption allows the government to reduce its tax burden by paying public officials low wages in the knowledge that they will be able to supplement their income by soliciting bribes from the public. In this scenario, public officials extract rent by artificially restricting the supply of goods and services, and then demanding an inducement for dispensing the same. The revisionists argue that lowering the tax burden in this way can actually stimulate

¹³⁵ Joseph S. Nye, 'Corruption and Political Development: A Cost-Benefit Analysis' (1967) 61 (2) *American Political Science Review* 417, 420; Gabriel Ben-Dor, 'Corruption, Institutionalization, and Political Development: The Revisionist Theses Revisited' (1974) 7 (1) *Comparative Political Studies* 63, 70; Francis T. Lui, 'An Equilibrium Queuing Model of Bribery' (1985) 93 (4) *Journal of Political Economy* 760; Toke S Aidt, 'Economic Analysis of Corruption: A Survey' (2003) 113 (491) *The Economic Journal* 632, 633-635.

¹³⁶ Price discrimination is the practice of selling different units of a good or service for different prices (i.e. charging customers different prices for different quantities); Fritz Machlup, 'Characteristics and Types of Price Discrimination' in National Bureau of Economic Research (ed), *Business Concentration and Price Policy* (Princeton University Press, 1955) 397-399.

¹³⁷ The market equilibrium price (or market-clearing price) is the price at which a producer can sell all that he wants to produce and a consumer can buy all that he demands; Al Ehrbar, 'Supply' in David R Henderson (ed), *Concise Encyclopædia of Economics* (Library of Economics and Liberty, 2008) <<http://www.econlib.org/library/Enc/Supply.html>> accessed 20 December 2009.

growth.¹³⁸ Moreover, such corruption may increase the quality of public servants as talented officials may opt for government employment in the knowledge that they will be able to supplement their income through corruption.¹³⁹ It is said that this encourages public servants to be more productive.

Third, the revisionists argue that corruption results in infrastructure projects being completed efficiently. They point to the fact that in countries where corruption is prevalent, roads, schools, hospitals, and the like still get built. If anything, they argue that corruption speeds up the development of such projects because the individuals involved work harder than they would otherwise do.¹⁴⁰ The revisionists argue that this is proof of the fact that corruption can be efficient. They derive support for this proposition from traditional economic theory which holds that there is a direct relationship between capital spending (money spent on acquiring or upgrading physical assets such as buildings) and economic growth. In simple terms, the more a country engages in capital spending, the more likely it is to experience economic growth.¹⁴¹

THE POST REVISIONISTS

Not surprisingly, the post-revisionists reject revisionism as both out-dated and without empirical foundation.¹⁴² This view is also shared by policymakers around the world who

¹³⁸ Gary S. Becker and George J. Stigler, 'Law Enforcement, Malfeasance, and Compensation of Enforcers' (1974) 3 (1) *Journal of Legal Studies* 1; Gordon Tullock, 'Corruption Theory and Practice' (1996) 14 (3) *Contemporary Economic Policy* 6.

¹³⁹ David H. Bayley, 'The Effects of Corruption in a Developing Nation' (1966) 19 (4) *Western Political Quarterly* 719, 728.

¹⁴⁰ Paolo Mauro, 'Corruption and Growth' (1995) 110 (3) *Quarterly Journal of Economics* 681, 681-683; Omar Azfar, Young Lee and Anand Swamy, 'The Causes and Consequences of Corruption' (2001) 573 (1) *Annals of the American Academy of Political and Social Science* 42, 45.

¹⁴¹ Vito Tanzi and Hamid Davoodi, 'Corruption, Public Investment, and Growth' (1997) IMF Working Paper No. WP/97/139 <www.imf.org/external/pubs/ft/wp/wp97139.pdf> accessed 3 March 2008.

¹⁴² M. Shahid Alam, 'Anatomy of Corruption: An Approach to the Political Economy of Underdevelopment' (1989) 48 (4) *American Journal of Economics and Sociology* 441; Arthur A. Goldsmith, 'Slapping the Grasping Hand: Correlates of Political Corruption in Emerging Markets' (1999) 58 (4) *American Journal of Economics and Sociology* 865, 870-871.

regard post-revisionism as providing the superior account of the economic harm in corruption.¹⁴³

For the post-revisionists, corruption is always inefficient (in the sense of being unproductive). But more than that, the post revisionists argue that corruption can, in the long-term, have serious deleterious effects for society.¹⁴⁴ The post-revisionists respond to the revisionists' claims (discussed above) in the following ways.

First, they deny the revisionists' claim that corruption allows the private sector to perform more efficiently by bypassing cumbersome government regulations and red tape.¹⁴⁵ Instead, they argue that corruption encourages businesses to operate in the black market in violation of tax and regulatory laws. Such behaviour can retard foreign direct investment because investors are unlikely to be happy at the prospect of having to pay bribes in order to conduct business.¹⁴⁶ We might also add that the violation of tax laws means that some businesses will not pay taxes at all (or will pay a reduced amount in taxes). Such conduct obviously results in a loss of revenue and thereby reduces the amount available for public expenditure. As a direct result, the government may have to rely upon other sources of revenue which may, in turn, lead to a rise in inflation (which has the effect of acting as a tax on both consumption and investment).¹⁴⁷

The post-revisionists do not accept that a corrupt market can function as efficiently as a legitimate market. To this end, they argue that the revisionists' claims are flawed because they

¹⁴³ Omar Azfar, Young Lee and Anand Swamy, 'The Causes and Consequences of Corruption' (2001) 573 (1) *Annals of the American Academy of Political and Social Science* 42.

¹⁴⁴ Robert D. Tollison and Roger D. Congleton (eds), *The Economic Analysis of Rent Seeking* (Edward Elgar Publishing, 1995) xii; Paolo Mauro, 'The Persistence of Corruption and Slow Economic Growth' (2002) IMF Working Paper No. WP/02/213 <www.imf.org/external/pubs/ft/wp/2002/wp02213.pdf> accessed 3 March 2008.

¹⁴⁵ Sergei Guriev, 'Red tape and corruption' (2004) 73 (2) *Journal of Development Economics* 489.

¹⁴⁶ Susan Rose-Ackerman, *Corruption and Government: Causes, Consequences, and Reform* (Cambridge University Press, 1999) 2-3; Alfredo Del Monte and Erasmo Papagni, 'Public Expenditure, Corruption, and Economic Growth: the Case of Italy' (2001) 17 (1) *European Journal of Political Economy* 1, 2.

¹⁴⁷ Keith Blackburn and Jonathan Powell, 'Corruption, Inflation and Growth' (2011) 113 (3) *Economics Letters* 225.

fail to take account of the deadweight costs¹⁴⁸ of engaging in a corrupt market. Such markets are inefficient for a number of reasons. First, the illegality of corruption means that the actors involved in a corrupt transaction will necessarily spend some resources on trying to conceal their behaviour.¹⁴⁹ Second, the clandestine nature of corruption is such that information on the required level of bribe will not be readily available. The price (bribe) will therefore not respond to market forces as it would in a legitimate market. Third, some actors may refuse to engage in corrupt rent-seeking for fear of detection and prosecution. Others may refuse to engage in such conduct because it is morally offensive. Fourth, the cumulative effect of these costs means that allocators (rent-seekers) may restrict their corrupt dealings to a trusted circle of family, friends, and acquaintances.¹⁵⁰ Lastly, and most importantly, the post-revisionists argue that a corrupt market is inefficient because it results in the misallocation of rent. This is because the rent in a corrupt market is received and retained by the allocator. By contrast, in a legitimate market the rent is received by the government as revenue.¹⁵¹

Second, as to the revisionists' claim that corruption is efficient because it allows the government to reduce its tax burden by paying public officials low wages, the post-revisionists advance some formidable counter-arguments. They argue that bribes solicited in this way increase transaction costs because they operate as a type of tax. The victims of such corruption tend to be members of the public who are required to make additional payments (bribes) in order to obtain goods and services.¹⁵² Such bribes are regressive because the general public in developing countries tend to be very poor.¹⁵³ Moreover, this can discourage investment as

¹⁴⁸ Deadweight cost is a measure of inefficiency and refers to the total surplus (the sum of consumer surplus and producer surplus) lost relative to an efficient market due to market imperfections; John B. Taylor and Akila Weerapana, *Economics* (6th edn, Houghton Mifflin Company, 2009) 189-191.

¹⁴⁹ Keith Blackburn, Niloy Bose and M. Emranul Haque, 'The Incidence and Persistence of Corruption in Economic Development' (2006) 30 (12) *Journal of Economic Dynamics and Control* 2447, 2463.

¹⁵⁰ Susan Rose-Ackerman, *Corruption and Government: Causes, Consequences, and Reform* (Cambridge University Press, 1999) 12-13.

¹⁵¹ Pierre-Guillaume Meon and Khalid Sekkat, 'Does Corruption Grease or Sand the Wheels of Growth?' (2005) 122 (1/2) *Public Choice* 69.

¹⁵² Arvind K. Jain, 'Models of Corruption' in Arvind K Jain (ed), *Economics of Corruption* (Kluwer Academic Publishers, 1998) 25.

¹⁵³ Mushtaq H. Khan, 'Determinants of Corruption in Developing Countries: The Limits of Conventional Economic Analysis' in Susan Rose-Ackerman (ed), *International Handbook on the Economics of Corruption* (Edward Elgar Publishing, 2006) 216.

potential investors may be deterred by the burden of having to pay bribes.¹⁵⁴ In addition, corrupt rent-seeking by public officials is inefficient because it misallocates resources (which is unproductive) and deprives the state of valuable revenue.

Some commentators suggest that it may be possible to curb corrupt rent-seeking by public officials through the imposition of sanctions such as dismissal or heavy financial penalties.¹⁵⁵ However, such penalties are unlikely to have a deterrent effect unless they are properly enforced. It is here that the problem lies because governments in developing countries find it difficult to combat such corruption for the simple reason that public officials have little to lose if they are caught (because their wages are so low).¹⁵⁶

In short, the post-revisionists argue that the misallocation of rent deprives the state of valuable revenue which may, in turn, lead to a gradual decline in public services as the government has less revenue to spend. If revenue drops too much, the government may be forced to raise taxes in order to fulfil election promises and maintain public services.¹⁵⁷

Third, the post-revisionists deny that corruption is efficient insofar as it encourages the development of infrastructure projects. They argue that corruption in public investment is likely to result in reduced growth because, even though the share of public investment in the gross domestic product (the total of all goods and services produced in a country in a given

¹⁵⁴ Shang-Jin Wei, 'Why Is Corruption So Much More Taxing Than Tax? Arbitrariness Kills' (1997) National Bureau of Economic Research Working Paper No. 6255 <http://www.nber.org/papers/w6255.pdf?new_window=1> accessed 1 May 2010.

¹⁵⁵ Frank Flatters and W. Bentley MacLeod, 'Administrative Corruption and Taxation' (1995) 2 (3) *International Tax and Public Finance* 397.

¹⁵⁶ Keith Blackburn, Niloy Bose and M. Emranul Haque, 'Public Expenditures, Bureaucratic Corruption and Economic Development' (2005) University of Manchester, Centre for Growth and Business Cycle Research, Discussion Paper No. 2005/053 <<http://www.socialsciences.manchester.ac.uk/cgbc/dpcgbc/dpcgbc53.pdf>> accessed 1 January 2008.

¹⁵⁷ Vito Tanzi, 'Corruption Around the World: Causes, Consequences, Scope, and Cures' in George T Abed and Sanjeev Gupta (eds), *Governance, Corruption, and Economic Performance* (International Monetary Fund, 2002) 44; Keith Blackburn and Jonathan Powell, 'Corruption, Inflation and Growth' (2011) 113 (3) *Economics Letters* 225.

year) rises, the average productivity of that investment drops.¹⁵⁸ According to the post-revisionists, infrastructure projects are preferred not because of their intrinsic value to the economy but for the rather more prosaic reason that such projects provide ideal vehicles for concealing corrupt payments. For example, in 2007, a crackdown by the Office of Fair Trading (OFT) uncovered the existence of a multimillion pound price-fixing cartel (this is a type of bid rigging which, as we shall see, is regarded as a core case of corruption) in the UK construction industry. The Deputy Director of Cartel Investigations at the OFT told BBC Radio 4 that such conduct “distorts competition with the end result that the customer ends up paying a higher price”.¹⁵⁹

The post-revisionists identify a number of undesirable costs associated with corrupt infrastructure projects.¹⁶⁰ For example, when corruption is the driving force behind such projects, the rate of return as calculated by a cost-benefit analysis (a method for determining how much each unit of currency invested will increase output) ceases to be the criterion for project selection. The result is that some projects are completed but never used whilst others are so poorly built that they require continuous maintenance. A good example of this is the Bataan nuclear power station in the Philippines. Despite being completed in the 1980s for \$2 billion (£1 billion), it has never produced a single unit of electricity although it provided \$17 million (£10 million) in kickbacks for friends of the dictator, Marcos.¹⁶¹ In cases like these, capital spending is unlikely to generate growth.¹⁶²

¹⁵⁸ Vito Tanzi and Hamid Davoodi, ‘Corruption, Public Investment, and Growth’ (1997) IMF Working Paper No. WP/97/139 <www.imf.org/external/pubs/ft/wp/wp97139.pdf> accessed 3 March 2008; Vito Tanzi and Hamid Davoodi, ‘Roads to Nowhere: How Corruption in Public Investment Hurts Growth’ (1998) 12 *Economic Issues* 1, 1.

¹⁵⁹ Julian O’Halloran, ‘Builders’ Bid-Rigging ‘Endemic’ *BBC News* (London, 16 July 2007) <http://news.bbc.co.uk/1/hi/programmes/file_on_4/6284126.stm> accessed 20 July 2007.

¹⁶⁰ Vito Tanzi and Hamid Davoodi, ‘Roads to Nowhere: How Corruption in Public Investment Hurts Growth’ (1998) 12 *Economic Issues* 1.

¹⁶¹ Transparency International, *Global Corruption Report 2005* (Pluto Press, 2005) 20; David Nussbaum, ‘Money Versus Morality: Is Corruption Just a Matter of Misaligned Incentives?’ (18 October 2006) London School of Economics, Public Lecture <http://www2.lse.ac.uk/PublicEvents/pdf/20061018_Nussbaum.pdf> accessed 28 January 2007.

¹⁶² Vito Tanzi, ‘Corruption Around the World: Causes, Consequences, Scope, and Cures’ in George T Abed and Sanjeev Gupta (eds), *Governance, Corruption, and Economic Performance* (International Monetary Fund, 2002) 29-48.

In addition, new projects are often undertaken at the expense of the existing infrastructure which is left to deteriorate. The post-revisionists argue that this is because it is easier to extract rent from new construction projects rather than the existing infrastructure. For example, in 2005, a British bridge building company was investigated by the Serious Fraud Office for allegedly paying large bribes to secure lucrative bridge building projects in the Philippines. The affair, dubbed “bridges to nowhere” by the press, revealed how bridges had been constructed in isolated locations without any connecting roads. The company was handed the supply contracts for the bridges despite being more expensive than its competitors.¹⁶³

Of course, expenditure on new infrastructure projects is likely to have the effect of lowering operation and maintenance on the existing infrastructure which may cause it to fall into disrepair. This in turn provides further opportunities for rent-seeking when the existing infrastructure needs to be rebuilt.¹⁶⁴

Companies which engage in corruption are usually able to recover their “costs”. If a company has been given prior indication that it will “win” a bidding competition, it can include the cost of the bribe in its bid. If it is unable to do this, it may seek to recover the cost of the bribe by compromising on the quality of the materials and the standard of the work performed.

The post-revisionists maintain that corruption in the procurement process can result in severe remote harms to essential public services. An excellent example of the remote harms which flow from corruption is the case of Papua New Guinea. In 2002, the Government of Papua New Guinea was bribed into accepting an inflated bid for the construction of bridges. So much money was allocated to paying for the bridges that the country’s economy collapsed, schools were closed, and hospitals were unable to offer treatment to people. After the scandal came to light, Papua New Guinea’s finance director explained that the expenditure “blew out our budget [and was] something which we could not sustain. All our ... financial resources are

¹⁶³ David Leigh and Rob Evans, ‘British Family Firm Accused of Getting Rich by Building Bridges to Nowhere’ *The Guardian* (London, 20 December 2005) <<http://politics.guardian.co.uk/foi/story/0,9061,1671092,00.html>> accessed 12 January 2008; David Leigh and Rob Evans, ‘SFO Studies Corruption Claims Against UK Bridge Builders’ *The Guardian* (London, 21 December 2005) <<http://politics.guardian.co.uk/foi/story/0,9061,1671721,00.html>> accessed 12 January 2008.

¹⁶⁴ Vito Tanzi and Hamid Davoodi, ‘Roads to Nowhere: How Corruption in Public Investment Hurts Growth’ (1998) 12 *Economic Issues* 1, 6.

going into paying these debts which obviously denies any funding for our road maintenance, our health, [and] our education.”¹⁶⁵

It is clear from this example that the general public’s interests were set back in a remote sense insofar as the government was forced to suspend expenditure on vital public services such as maintenance of the infrastructure, the health service, and the provision of education. The strength of these counter-examples has allowed the post-revisionists to debunk the revisionists’ assertion that corruption is efficient insofar as it encourages the development of infrastructure projects. Rather, as the post-revisionists have shown, corruption in infrastructure projects is inefficient and therefore unproductive.

* * *

The economic harms which flow from corruption are plain to see, and the post-revisionists have helped to uncover some important truths about the remote harms which flow from such conduct. But as we have seen, the economic literature on the harm resulting from corruption is concerned solely with the question of efficiency. One reason for this preoccupation with efficiency may be the fact that economic theorists have tended to regard corruption as essentially a legal offence within the economic sphere.¹⁶⁶

Despite the focus on efficiency, it is clear from the literature that corruption results in remote harms to the efficient operation of the economy. But by concentrating on remote harms, the post-revisionist economic theorists have underemphasised the harm and wrongdoing caused to those innocent actors who have not engaged in corruption. In short, by treating corruption as a study in efficiency, the post-revisionists have omitted to explore the full reach of corruption. It is submitted that the failure of the post-revisionists to provide a detailed account of the harm and wrongdoing to these innocent actors renders the scholarship in this area incomplete.

¹⁶⁵ Fran Abrams, ‘Export Credits Guarantee Department’ (BBC Radio 4 Programme, Broadcast 30 November 2004) <http://news.bbc.co.uk/nol/shared/bsp/hi/pdfs/30_11_04_export_credit.pdf> accessed 12 January 2008.

¹⁶⁶ Seumas Miller, ‘Corruption’ in Edward N Zalta (ed), *Stanford Encyclopedia of Philosophy* (Spring 2011 edn) <<http://plato.stanford.edu/archives/spr2011/entries/corruption/>> accessed 19 March 2012.

3. MORAL WRONGDOING

Most observers would agree that corruption is a morally loaded notion. It is not a value neutral concept and is regarded by most as having negative connotations.¹⁶⁷ An allegation of corrupt conduct carries with it the suggestion of wrongdoing. However, despite this obvious observation, it is somewhat surprising to find that there is very little in the way of scholarship which systematically addresses the moral wrongdoing in corruption. This omission is all the more remarkable given the international interest in combatting corruption.

One reason for this omission may be historical. Prior to the 1960s, there was very little in the way of serious scholarship on the harm in corruption. As we have seen, during the 1960s, the scholarship consisted of a running battle between the revisionists and the post-revisionists; with the latter generally regarded as having triumphed. The decades thereafter were used by post-revisionist scholars to highlight the remote harm consequences of corruption. As a result, very little attention has been paid to the moral wrongdoing in corruption, and the subject has not received the kind of academic attention that we might otherwise have expected. Even when corruption has been identified as a moral issue (as opposed to an exclusively legal issue), scholars have still failed to provide an account of the moral wrongdoing.¹⁶⁸

Although the scholarship on corruption has largely ignored the question of moral wrongdoing (including the connection between harm and wrongdoing), the last decade has seen a small number of theorists taking up the challenge and exploring this issue in more detail. These theorists, though somewhat disparate, are concerned with understanding what makes corruption wrong. Let us consider their contributions.

¹⁶⁷ Michael S. Pritchard, 'Bribery: the Concept' (1998) 4 (3) *Science and Engineering Ethics* 281.

¹⁶⁸ Seumas Miller, 'Corruption' in Edward N Zalta (ed), *Stanford Encyclopedia of Philosophy* (Spring 2011 edn) <<http://plato.stanford.edu/archives/spr2011/entries/corruption/>> accessed 19 March 2012.

GREEN'S EVERYDAY NORMS

The chief proponent of the new philosophical approach, Green, examines the moral wrongdoing in bribery from a non-consequentialist (or deontological) viewpoint.¹⁶⁹ According to Green, what makes an act wrongful is some intrinsic violation of a freestanding moral rule or duty rather than the consequences of the act. To this end, he relies upon a series of everyday norms (such as cheating, deception, coercion, exploitation, disloyalty, promise-breaking, and disobedience) to examine different types of white collar crime offences.

Not everyone is convinced by Green's assertion that the contours of white collar crime are mirrored by everyday norms.¹⁷⁰ From our own point of view, it is worth pointing out that Green does not tell us precisely how these everyday norms are to be identified. Nor in fact, are we told how Green has come to identify them. Nonetheless, he prefers this approach over a rights-based approach because in his view, it is far more informative to say that a person has been cheated or deceived rather than simply saying that his rights have been violated. Green analyses the moral wrongdoing in bribery in two parts: passive bribery and active bribery. The former refers to the receipt of an inducement whereas the latter is concerned with the offer of an inducement. Let us consider both parts in turn.

Passive bribery: the receipt of an inducement

According to Green, what makes the receipt of an inducement wrongful is the disloyalty of the duty-holder.¹⁷¹ To this end, he identifies two types of loyalties. He explains that a loyalty can involve being true or faithful to someone¹⁷² (a principal) or something¹⁷³ (a principle). Green

¹⁶⁹ Stuart P. Green, *Lying, Cheating, and Stealing: A Moral Theory of White-Collar Crime* (Oxford University Press, 2006) 193-211.

¹⁷⁰ Mitchell N. Berman, 'On the Moral Structure of White Collar Crime' (2007) 5 (1) *Ohio State Journal of Criminal Law* 301.

¹⁷¹ This view mirrors the wrongdoing identified by the agency model which underpins the 1906 Act.

¹⁷² According to this view, the proper objects of loyalty are individuals, groups, and institutions; Marcia Baron, *The Moral Status of Loyalty* (Kendall Hunt Publishing, 1984).

¹⁷³ This view argues that the proper objects of loyalty are ideals, causes, and practices; John Ladd, 'Loyalty' in Paul Edwards (ed), *Encyclopedia of Philosophy*, Vol V (Routledge, 1972) 97-98.

adopts a middle ground and proceeds on the basis that a loyalty may be owed to both. That is, one may owe a duty of loyalty to both principals and principles.

However, we might formulate a counterexample along the following lines. It is a universal moral principle that we should not commit murder. That being so, it follows that if a contract killer is paid to kill a person, he breaches his duty of loyalty to that principle (i.e. not to commit murder). But we would not seriously argue that this is an example of bribery (it would, on any view, be a case of inappropriate labelling). Green recognises that this cannot be correct either and distinguishes this as an example of a non-positional moral duty. He argues that in order for a breach to constitute a breach of loyalty, the transaction must involve a breach arising out of some office or position or involvement in some practice.

Green tests his theory by reference to an example. He tells us to imagine a prisoner in a Nazi concentration camp. The prisoner offers an inducement to a Nazi officer in order to secure her freedom. If the officer accepts, then he is clearly in breach of duty. That is, he is simultaneously in breach of his duty of loyalty to the Nazi party (principal) and to the ideology of Nazism (principle). Notwithstanding this, most people would argue that the conduct of the Nazi officer is not morally wrong.

Green anticipates this objection and makes a distinction which lies at the heart of his theory. He argues that we must distinguish between loyalty in the descriptive (empirical) sense and loyalty in the normative (moral) sense. The former requires that the duty-holder feel obligated to act in the best interests of his principal (or principle). Loyalty in this sense does not require that the principal (or principle) be a good person (or the right cause). By contrast, loyalty in the normative sense requires that the duty-holder act in the best interests of his principal (or principle) and that his principal (or principle) be a good person (or the right cause).

So returning to the example of the Nazi officer, Green concedes that by accepting the inducement, the officer has acted in breach of his duty of loyalty in the descriptive sense. However, Green argues that the officer has not been disloyal in the normative sense because both the Nazi party (principal) and the ideology of Nazism (principle) are morally reprehensible. On this basis, Green argues that the officer has done the right thing by accepting the inducement and releasing the prisoner.

It is apparent from this account that Green views the wrongdoing in passive bribery (i.e. the receipt of an inducement) as disloyalty. It follows from this analysis that the duty-holder's disloyalty must be to either a principal or a principle. In other words, the victim of the duty-holder's wrongdoing is either a principal or a principle (or both).

Active bribery: the offer of an inducement

The second part of Green's thesis focuses on the offer of an inducement (active bribery). However, his analysis of this aspect is considerably less detailed than his analysis of receiving an inducement in breach of duty (passive bribery).¹⁷⁴ According to Green, the offer of an inducement is morally wrong because it induces a person to commit a wrongful act (i.e. engage in criminality). In the specific context of bribery, Green would argue that such conduct is morally wrong because it encourages a person to breach their duty of loyalty.

We can see from this short account of the wrongdoing in active bribery (i.e. the offer of an inducement) that Green views the victim as the duty-holder. That is, the person to whom the inducement is offered. But this conclusion is both surprising and illogical for the simple reason that we would not have much sympathy for the duty-holder if, having accepted an inducement of his own volition, he were subsequently charged with accepting a bribe. Absent duress, it is plainly incorrect to describe one of the principal participants of a corrupt transaction as being a victim of the same crime.

OTHER THEORISTS

The remaining theorists in this area are few in number. However, although their work is not as detailed as Green's, they do make some important contributions to the scholarship in this area.

¹⁷⁴ Of the 19 pages dedicated to the topic of bribery, only 3 pages are wholly concerned with active bribery; Stuart P. Green, *Lying, Cheating, and Stealing: A Moral Theory of White-Collar Crime* (Oxford University Press, 2006) 208-210.

Let us begin with the work of Philips.¹⁷⁵ Although Philips does not provide anything approaching a systematic analysis of the wrongdoing in corruption, he was to some extent ahead of his time. That is, because he wrote about wrongdoing in the 1980s at a time when the majority of scholars were concerned with trying to explain the remote harms which flow from acts of corruption.

For Philips, the receipt of an inducement (he is silent as to the offer of an inducement) is wrongful because it causes the recipient to make his decision based on the wrong sorts of reasons. Philips does not expand upon this although it is arguable that his conception of wrongdoing is similar to that employed by the improper conduct model which underpins the 2010 Act. That is, corruption is wrong because it causes the recipient to act in breach of a relevant expectation (i.e. acting for improper reasons).

Moving on, Turow,¹⁷⁶ who was also ahead of his time, approaches the matter from a different perspective and argues that corruption is objectionable because of its inherent favouritism. He borrows from Dworkin the idea that each of us stands as equal before the law. He argues that the payer of a bribe asks for that principle to be violated by offering an inducement and asking for preferential treatment. In other words, corruption is unfair because it creates an uneven playing field. It is worth pausing to consider Turow's argument since he makes a valuable point. In fixing on the idea of equality, Turow recognises that although most individuals and corporations would like an advantage when it comes to business, there is no lawful entitlement to preferential treatment in the usual course of events. This principle can be seen in play in other areas. For example, the Equality Act 2010 makes it unlawful for an authority (e.g. government departments, local authorities, and the police, etc.) when exercising public functions to treat a person unfairly (e.g. by reference to their race, religion, or gender). Turow's point is that equality demands that there should be a level playing field for all. This necessarily means that everyone should be afforded the same opportunities. Corruption upsets this balance because it secures for the bribe payer an unfair advantage. This unfair advantage morally wrongs those innocent actors who have not engaged in corruption because it sets back their interest in equal treatment. For example, they may be denied goods or services to which they are entitled, or they may be inconvenienced by delay, etc.

¹⁷⁵ Michael Philips, 'Bribery' (1984) 94 (4) *Ethics* 621.

¹⁷⁶ Scott Turow, 'What's Wrong With Bribery?' (1985) 4 (4) *Journal of Business Ethics* 249.

Although Turow does not offer an account of why it is wrong for a person to receive a bribe, it is possible to detect in his work an argument that such conduct is wrong because it compromises the recipient's integrity. This idea is not properly developed by Turow with the result that he sets no boundaries as to when the receipt of an inducement might be regarded as corrupt (thereby undermining the recipient's integrity).

It might be argued that this view of wrongdoing is somewhat circular because it views the recipient of the bribe as also being the victim of the corrupt transaction. In other words, the victim of passive corruption is the person who is committing the wrongdoing. However, it may be that we are being overly critical. Turow might rescue his position by arguing that the receipt of a bribe compromises the integrity of the recipient because it causes them to act for impermissible reasons. Altering the argument in this way means that the recipient is no longer treated as a victim. Turow might develop the point by arguing that when the recipient of a bribe acts for impermissible reasons, he violates his duty to act in good faith, impartially, or in accordance with a position of trust and, in so doing, morally wrongs the interests of the person to whom the duty is owed.

By contrast, Alldridge has sought to explain the wrongdoing in corruption by reference to the operation of markets.¹⁷⁷ His market model argues that corruption is wrong because it undermines the proper and efficient operation of markets. In this theory, the word market is used in two distinct but overlapping senses. First, it refers to the creation of a market in things which ought not to be sold. For example, attempts to buy or sell the functions of government. Second, it refers to any conduct which undermines the allocative rules (i.e. how competition is to work) of a legitimate market. Such conduct distorts the proper and efficient operation of markets and denies the benefits of competition to the end-user and competitors. The question of whether a given activity undermines the proper and efficient operation of a market is to be determined by reference to the rules of that market. These rules (or minimum standards) are to be found in a variety of sources such as European law, statutes, statutory instruments, prerogative powers, and even self-regulatory initiatives. The market model makes a

¹⁷⁷ Peter Alldridge, 'Reforming the Criminal Law of Corruption' (2000) 11 *Criminal Law Forum* 287; Peter Alldridge, 'The Law Relating to Free Lunches' (2002) 23 (9) *Company Lawyer* 264; Joint Committee on the Draft Corruption Bill, *Draft Corruption Bill: Report and Evidence* (2002-03, HL Paper 157, HC Paper 705) 80-84.

distinction between corruption in the public sector (i.e. things which ought not to be sold) and corruption in the private sector (i.e. conduct which distorts allocative rules).¹⁷⁸

It might be thought from this account that the victims of corruption are the end-users and competitors. Somewhat surprisingly, the market model takes a different view. Instead, it argues that the wrongdoing in corruption is not to the rights and interests of these end users and competitors. Rather, the wrongdoing in corruption lies in the creation of a market in things which ought not to be sold and the distortion of existing markets. This misidentification of the wrongdoing in corruption has led to the market model being rejected as a viable model of corruption.¹⁷⁹

As the Law Commission points out, not all examples of corrupt conduct are competition offences. Neither can it be said that a single act of corruption results in the creation of a market in things which ought not to be sold. Rather, it is an example of an act taking place within an existing market. According to the Law Commission, these objections render the market model circular.¹⁸⁰

It is not entirely clear what the Law Commission means by this. However, it may be that the Law Commission's objection is based on the market model's reliance upon minimum standards. That is, the market model only has effect when a given activity breaches a minimum standard that affects the proper and efficient operation of a market. It therefore follows that in the absence of a minimum standard, there can be no prosecution for corruption. That being so, there would effectively be no substantive law against corruption. Instead, corruption would simply consist of any conduct which breaches a minimum standard (including activities which are not commonly regarded as being corrupt such as deception, theft, and fraud). This obviously cannot be correct.

¹⁷⁸ Horder is dismissive of this distinction and argues that it is unsustainable given that the line between the public and private sector is so blurred; Jeremy Horder, 'Bribery as a Form of Criminal Wrongdoing' (2011) 127 (January) *Law Quarterly Review* 37.

¹⁷⁹ The market model was considered (and rejected) by both the Joint Committee on the Draft Corruption Bill and the Law Commission; Joint Committee on the Draft Corruption Bill, *Draft Corruption Bill: Report and Evidence* (2002-03, HL Paper 157, HC Paper 705); Law Commission, *Reforming Bribery: A Consultation Paper* (2007, Law Com Paper No 185).

¹⁸⁰ Law Commission, *Reforming Bribery: A Consultation Paper* (2007, Law Com Paper No 185) 34.

The final theorist in this area is Horder who argues that the wrongdoing in bribery (under the improper conduct model in the 2010 Act) is the abuse or misuse of a position rather than any kind of harm necessarily done. Horder argues that bribery is a criminal offence because it is wrongdoing that, if left unpunished, would result in an unacceptably enhanced risk that a whole variety of harms would become more widespread around the globe.¹⁸¹ This is obviously a reference to remote harms. Somewhat surprisingly, Horder concludes that the criminalisation of bribery (like many other crimes) can only be supported by remote harm justification.

* * *

It is clear from this analysis that there is one glaring omission in the literature on the moral wrongdoing in corruption. Despite an acknowledgement by some theorists that corruption results in harm to innocent actors, scholars in this area have failed to provide a detailed account of the wrongdoing to the rights and interests of these innocent actors. Moreover, the literature also fails to make any connection between the harm and the wrongdoing caused to these innocent actors by the corrupt acts of others. In this thesis, we shall argue that corruption is wrong because it results in inequality. As Turow argues, equality demands that there should be a level playing field, and that everyone should be afforded the same opportunities e.g. the right to access goods, services and opportunities on equal terms with other competitors. Corruption undermines this principle because it secures for the bribe payer an unfair advantage.

4. CONCLUSION

The principal aim of this chapter was to develop a context for our project. We have achieved this in two ways. First, by reviewing the literature on the harm and wrongdoing in corruption. Second, by identifying that there is a gap in the existing literature insofar as there are no complete accounts of the harm and wrongdoing suffered by those innocent actors whose rights and interests are set back by the corrupt acts of others. Our project will seek to plug this gap by articulating a coherent theory of the harm and wrongdoing in corruption.

¹⁸¹ Jeremy Horder, 'Bribery as a Form of Criminal Wrongdoing' (2011) 127 (January) *Law Quarterly Review* 37.

Our review began by noting two important limitations in the general literature on corruption. First, prior to the 1960s, corruption did not receive much in the way of academic attention. At the time, it was regarded by most as a type of social decay (some viewed it as a moral failing and a religious sin). Second, the general scholarship since the 1960s has consisted broadly of contributions from three different types of theorists: political scientists, economic theorists, and legal philosophers (with the latter only properly emerging during the last decade).

The political scientists fell into two rival groups: the revisionists and the post-revisionists. The early literature was led by the revisionists who made two main claims. First, they argued that corruption may make certain positive contributions to the political development of a developing country. Second, they argued that corruption is doomed to self-destruct as a country makes the transition from developing to developed status. Our review showed that the ideas of the revisionists have been largely discredited. For the post-revisionists, corruption is both dysfunctional and self-perpetuating. It results in remote harms insofar as it undermines the proper functioning of government and the rule of law. However, although post-revisionism is regarded as the superior account of corruption, it is deficient in one important respect. In short, it underestimates how corruption can set back the rights and interests of those innocent individuals who are affected by the corrupt acts of others.

This shortcoming is also to be found in the work of the economic theorists. Our review showed that the economic theorists fall to be divided into the same two groups: the revisionists and the post-revisionists. Both sides approach corruption as a study in efficiency. The dispute between them is a disagreement as to where corruption lies on the spectrum of efficiency. For the revisionists, corruption is a productive activity which constitutes an efficient use of resources. For the post-revisionists, corruption constitutes an unproductive use of resources and is therefore inefficient. Our review showed that the views of the post-revisionists are regarded as being the superior account. If further support is needed for this proposition, one need only refer to the multitude of national and international anti-corruption instruments which all rely upon the remote economic harms of corruption as a basis for criminalisation. However, like the political scientists, the economic theorists also underemphasise the harm and wrongdoing caused to those innocent actors whose rights and interests are set back by the corrupt acts of others.

We completed our literature review by examining a small body of emerging literature on the moral wrongdoing in corruption. This was evident from the limited number of theorists in

this area. Green developed an account based on his everyday norms approach and argued that the receipt of an inducement is wrong because it causes the recipient to act in breach of his duty of loyalty to his principal (or a principle). By contrast, he argued that the offer of an inducement is morally wrong because it induces the recipient to commit a wrongful act. However, Green's analysis is incomplete because he omits to explain how corruption sets back (harms) the interests of innocent actors (other than principals), and the connection between such harms and the wrongdoing in corruption.

We also looked at a small number of other theorists who offered differing accounts of the wrongdoing in bribery and corruption. The most recent contributor, Horder, argues that the wrongdoing in bribery is the abuse or misuse of a position rather than any kind of harm necessarily done. According to Horder, bribery is wrong because it is conduct that, if left unpunished, would result in an unacceptably enhanced risk that a whole variety of harms would become more widespread around the globe (i.e. it would result in remote harms to public interests). Whilst the remote harms relied upon by Horder are not disputed (in fact, the occurrence of remote harms is supported by both the political scientists and the economic theorists), it is submitted that corruption also harms the interests of other innocent actors.

It is clear from our literature review that the scholarship on the harm and wrongdoing in corruption is incomplete. The theorists in this area recognise that there are other innocent actors whose rights and interests may be set back by the corrupt acts of others. However, notwithstanding this, there are no accounts of the harm and wrongdoing in corruption which provide a full explanation of the impact on these innocent actors.

This thesis will plug this gap by developing a complete account of the harm and wrongdoing in core cases of corruption. In particular, we shall look to provide an account of the harm and wrongdoing suffered by those innocent actors whose rights and interests are set back by the corrupt acts of others.

III

ANALYTICAL FRAMEWORK

Having identified that there is a gap in the literature which prompts theoretical consideration, this chapter sets out a three-part analytical framework for analysing that gap.

The three-part analytical framework furnished in this chapter will allow us to: (1) identify whether a given type of conduct is a core case of corruption (the first part), (2) compare the corrupt conduct with the law in the USA to ascertain whether there are any differences in terms of coverage (the second part), and (3) analyse the corrupt conduct to see what makes it harmful and wrongful (the third part).

The first part of our analytical framework provides a mechanism for identifying core cases of corrupt conduct (i.e. conduct which falls within the smaller subset of bribery). This is a crucial step because we cannot begin to theorise about corruption until we know which types of conduct are to be regarded as cases of corruption. For the purposes of this thesis, we shall identify core cases of corruption by applying the improper conduct offences contained in the 2010 Act.¹⁸² In short, a given type of conduct will be regarded as a core case of corruption if it is caught by one of the offences contained in the 2010 Act. Of course, it does not automatically follow from this that conduct which is not caught by the 2010 Act is not an instance of corruption. It may be that such conduct, though not a core case of corruption, falls within the wider definition of corruption.

¹⁸² The 2010 Act has been well-received and commended as being fit for purpose by a number of important non-governmental agencies as well as academics; Transparency International, 'New Bribery Act will help Restore UK's International Reputation' (Press Release, 8 April 2010) <<http://www.transparency.org.uk/all-news-releases/134-new-bribery-act-will-help-restore-uks-international-reputation>> accessed 5 May 2012; G. R. Sullivan, 'The Bribery Act 2010: Part 1: An Overview' [2011] (2) Criminal Law Review 87; Stephen Gentle, 'The Bribery Act 2010: Part 2: the Corporate Offence' [2011] (2) Criminal Law Review 101; Organisation for Economic Co-operation and Development, 'Phase 3 Report on Implementing the OECD Anti-Bribery Convention in the United Kingdom' (March 2012) <<http://www.oecd.org/dataoecd/52/19/50026751.pdf>> accessed 5 May 2012.

Our reliance upon the improper conduct offences in the 2010 Act is based on a number of reasons. First, it avoids any criticism about any self-constructed model of corruption being stipulative. Second, it gives our project a practical dimension in that allows us to take the improper conduct offences in the 2010 Act and see how far these take us in answering our research aim. Third, it allows us to bypass the general dissatisfaction with the agency model under the old law.¹⁸³

As to the last point, we have already mentioned the difficulties with the agency model. But the old law was not unsatisfactory simply because of its reliance on the agency model. The case law was equally unhelpful in defining corruption. The general juristic consensus is that in the leading case of *Cooper v Slade*,¹⁸⁴ the House of Lords provided a circular and unhelpful definition when it held that the word “corruptly” meant “purposefully doing an act which the law forbids as tending to corrupt.”¹⁸⁵

However, this criticism is misconceived. Contrary to both the subsequent case law and the general literature on corruption, it is submitted that the House of Lords did not interpret the word “corruptly” in this way. Rather, that was the opinion of Willes J who was one of the eight attending judges.¹⁸⁶ The procedure in those days was for the House of Lords to be advised by a number of attending judges.¹⁸⁷ A careful reading of the decision shows that the court was constituted by Lord Cranworth (the Lord Chancellor) and Lord Wensleydale; both of whom came to a different conclusion. Lord Cranworth held that the word “corruptly” meant “a payment in violation of that which the statute was passed to prohibit”.¹⁸⁸ By contrast, Lord

¹⁸³ The Law Commission was highly critical of the agency model’s narrow scope in its consultation paper on bribery; Law Commission, *Reforming Bribery: A Consultation Paper* (2007, Law Com Paper No 185) 28-34.

¹⁸⁴ (1858) 6 HL Cas 746; 10 ER 1488.

¹⁸⁵ (1858) 6 HL Cas 746 at 773; 10 ER 1488 at 1499.

¹⁸⁶ *ibid.*

¹⁸⁷ Glenn Dymond, ‘The Appellate Jurisdiction of the House of Lords’ (20 November 2009) House of Lords Library Note No. 2009/010 <<http://www.parliament.uk/documents/lords-library/ln2009-010appellate.pdf>> accessed 8 January 2010; David Lewis Jones, ‘The Judicial Role of the House of Lords before 1870’ in Louis Blom-Cooper, Gavin Drewry and Brice Dickson (eds), *The Judicial House of Lords 1870-2009* (Oxford University Press, 2009).

¹⁸⁸ (1858) 6 HL Cas 746 at 788; 10 ER 1488 at 1504.

Wensleydale was less helpful and confessed “not exactly to understand the meaning of the term “corruptly””.¹⁸⁹

In a small number of subsequent cases, an attempt was made to define corruption. In *Bradford Election Petition (No. 2)*,¹⁹⁰ Martin B held that the word “corruptly” meant:

[A] thing done with an evil mind - done with an evil intention; and except there be an evil mind or an evil intention accompanying the act it is not corruptly done. And thus when the word corruptly is used it means an act done by a man knowing that what he is doing is wrong, and doing so with evil feelings and evil intentions.¹⁹¹

Similarly, in *Tamworth*,¹⁹² Willes J (who advised the House of Lords in *Cooper v Slade*) held that in order for treating to be corrupt:

[I]t must be under circumstances and in a manner that the person who treated used meat or drink with a corrupt mind - that is, with a view to induce people, by the pampering of their appetites, to vote, or to abstain from voting, and in so doing, to act otherwise than they would have done without the incitement of meat or drink.¹⁹³

In the early twentieth century, after the coming into force of both the 1889 and 1906 Acts, there was another attempt. In the first instance case of *Lindley*,¹⁹⁴ Pearce J directed the jury that in order to find the defendant guilty of corruption under the 1906 Act they had to be sure that he had dishonestly intended to weaken the loyalty of the servants to their master and to transfer that loyalty from the master to himself. This decision was followed in another first instance decision. In *Calland*,¹⁹⁵ Veale J directed the jury that corruption meant dishonestly trying to wheedle an agent away from his loyalty to his employer.

¹⁸⁹ (1858) 6 HL Cas 746 at 790; 10 ER 1488 at 1505.

¹⁹⁰ (1869) 19 LT 723.

¹⁹¹ *ibid* 727.

¹⁹² (1869) 20 LT 181.

¹⁹³ *ibid* 189.

¹⁹⁴ [1957] Crim LR 321.

¹⁹⁵ [1967] Crim LR 236.

But this divergence in the case law was short lived. In *Wellburn*,¹⁹⁶ the Court of Appeal expressly disapproved *Lindley* and *Calland* and reaffirmed the decision in *Cooper v Slade*. Thus, we can see that there were problems with the case law under the old law.

The second part of our framework consists of a summary of some carefully selected anti-corruption statutes from the USA. We shall apply these US anti-corruption statutes to the core cases of corrupt conduct identified by the first part of our analytical framework. The aim of this exercise is to ascertain whether there are any major differences between what is regarded as being a core case of corruption in England and Wales and what is regarded as a being a core case of corruption in the USA. The value of this endeavour is twofold. First, it will allow us to demonstrate that core cases of corruption travel well (thereby confirming the transnational nature of corruption). Second, it will allow us to articulate a theory of the harm and wrongdoing in core cases of corruption which is also of normative application.

The third part of our analytical framework provides us with the tools for gauging harm and wrongdoing. Our conception of both harm and wrongdoing will be a streamlined (and supplemented) version of Feinberg's defence of the harm principle. According to Feinberg, a person is harmed in the appropriate sense when his interests are harmed (i.e. set back) and he is wronged (i.e. his rights are indefensibly violated). The third part of our framework will explain the meaning of these key concepts and set out in detail how the harm principle operates. However, as previously mentioned, Feinberg's account suffers from two weaknesses. First, his account of harming does not tell us how to distinguish between the different types of harms which may arise from a given activity. Second, although Feinberg's account of wrongdoing tells us that one person wrongs another when his indefensible conduct violates the other's rights (legal or moral), his account is incomplete because it does not explain what rights are and what they do for those who hold them. This omission is unhelpful because we cannot articulate the wrongdoing in corruption without first outlining an account of what it means to be wronged.

Both of these omissions will be rectified by supplementing the harm principle. We shall attend to the first omission by providing an account of primary, indirect, and remote harms. This will allow us to distinguish between the different types of harm which may be caused by a

¹⁹⁶ (1979) 69 Cr App R 254.

given activity. The second omission is remedied by the provision of an account of both the form (i.e. a description of the internal structure of rights) and function (i.e. what rights do for those who hold them) of rights. Our account of the form of rights relies upon a refined version of Hohfeld's well-known analytical scheme whilst our account of the function of rights is an adoption of MacCormick's theory on the function of rights.

Following supplementation, the third part of our analytical framework will allow us to analyse corrupt conduct in order to articulate the harm and wrongdoing which results from such conduct. Given our research aim, our focus will primarily be on the harm and wrongdoing caused to those innocent actors whose rights and interests are set back by the corrupt acts of others.

1. PART ONE: THE 2010 ACT

In this section, we shall set out the full text of the four offences and the interpretation provisions contained in the 2010 Act. This will be followed by a short analysis of the 2010 Act. We shall conclude this section by providing working summaries of the four offences and the interpretation provisions which will be used in the remainder of this thesis. Let us now set out the full text of the 2010 Act:

SECTION 1 - OFFENCES OF BRIBING ANOTHER PERSON

- (1) A person ("P") is guilty of an offence if either of the following cases applies.

- (2) Case 1 is where -
 - (a) P offers, promises or gives a financial or other advantage to another person,
and
 - (b) P intends the advantage -
 - (i) to induce a person to perform improperly a relevant function or activity, or
 - (ii) to reward a person for the improper performance of such a function or activity.

- (3) Case 2 is where -
- (a) P offers, promises or gives a financial or other advantage to another person, and
 - (b) P knows or believes that the acceptance of the advantage would itself constitute the improper performance of a relevant function or activity.
- (4) In case 1 it does not matter whether the person to whom the advantage is offered, promised or given is the same person as the person who is to perform, or has performed, the function or activity concerned.
- (5) In cases 1 and 2 it does not matter whether the advantage is offered, promised or given by P directly or through a third party.

SECTION 2 - OFFENCES RELATING TO BEING BRIBED

- (1) A person (“R”) is guilty of an offence if any of the following cases applies.
- (2) Case 3 is where R requests, agrees to receive or accepts a financial or other advantage intending that, in consequence, a relevant function or activity should be performed improperly (whether by R or another person).
- (3) Case 4 is where -
- (a) R requests, agrees to receive or accepts a financial or other advantage, and
 - (b) the request, agreement or acceptance itself constitutes the improper performance by R of a relevant function or activity.
- (4) Case 5 is where R requests, agrees to receive or accepts a financial or other advantage as a reward for the improper performance (whether by R or another person) of a relevant function or activity.
- (5) Case 6 is where, in anticipation of or in consequence of R requesting, agreeing to receive or accepting a financial or other advantage, a relevant function or activity is performed improperly -
- (a) by R, or
 - (b) by another person at R’s request or with R’s assent or acquiescence.

- (6) In cases 3 to 6 it does not matter -
 - (a) whether R requests, agrees to receive or accepts (or is to request, agree to receive or accept) the advantage directly or through a third party,
 - (b) whether the advantage is (or is to be) for the benefit of R or another person.
- (7) In cases 4 to 6 it does not matter whether R knows or believes that the performance of the function or activity is improper.
- (8) In case 6, where a person other than R is performing the function or activity, it also does not matter whether that person knows or believes that the performance of the function or activity is improper.

SECTION 3 - FUNCTION OR ACTIVITY TO WHICH BRIBE RELATES

- (1) For the purposes of this Act a function or activity is a relevant function or activity if -
 - (a) it falls within subsection (2), and
 - (b) meets one or more of conditions A to C.
- (2) The following functions and activities fall within this subsection -
 - (a) any function of a public nature,
 - (b) any activity connected with a business,
 - (c) any activity performed in the course of a person's employment,
 - (d) any activity performed by or on behalf of a body of persons (whether corporate or unincorporate).
- (3) Condition A is that a person performing the function or activity is expected to perform it in good faith.
- (4) Condition B is that a person performing the function or activity is expected to perform it impartially.
- (5) Condition C is that a person performing the function or activity is in a position of trust by virtue of performing it.

- (6) A function or activity is a relevant function or activity even if it -
 - (a) has no connection with the United Kingdom, and
 - (b) is performed in a country or territory outside the United Kingdom.

(7) In this section “business” includes trade or profession.

SECTION 4 - IMPROPER PERFORMANCE TO WHICH BRIBE RELATES

- (1) For the purposes of this Act a relevant function or activity -
 - (a) is performed improperly if it is performed in breach of a relevant expectation, and
 - (b) is to be treated as being performed improperly if there is a failure to perform the function or activity and that failure is itself a breach of a relevant expectation.

- (2) In subsection (1) “relevant expectation” -
 - (a) in relation to a function or activity which meets condition A or B, means the expectation mentioned in the condition concerned, and
 - (b) in relation to a function or activity which meets condition C, means any expectation as to the manner in which, or the reasons for which, the function or activity will be performed that arises from the position of trust mentioned in that condition.

- (3) Anything that a person does (or omits to do) arising from or in connection with that person’s past performance of a relevant function or activity is to be treated for the purposes of this Act as being done (or omitted) by that person in the performance of that function or activity.

SECTION 5 - EXPECTATION TEST

- (1) For the purposes of sections 3 and 4, the test of what is expected is a test of what a reasonable person in the United Kingdom would expect in relation to the performance of the type of function or activity concerned.

- (2) In deciding what such a person would expect in relation to the performance of a function or activity where the performance is not subject to the law of any part of the United Kingdom, any local custom or practice is to be disregarded unless it is permitted or required by the written law applicable to the country or territory concerned.
- (3) In subsection (2) “written law” means law contained in -
- (a) any written constitution, or provision made by or under legislation, applicable to the country or territory concerned, or
 - (b) any judicial decision which is so applicable and is evidenced in published written sources.

SECTION 6 - BRIBERY OF FOREIGN PUBLIC OFFICIALS

- (1) A person (“P”) who bribes a foreign public official (“F”) is guilty of an offence if P’s intention is to influence F in F’s capacity as a foreign public official.
- (2) P must also intend to obtain or retain -
- (a) business, or
 - (b) an advantage in the conduct of business.
- (3) P bribes F if, and only if -
- (a) directly or through a third party, P offers, promises or gives any financial or other advantage -
 - (i) to F, or
 - (ii) to another person at F’s request or with F’s assent or acquiescence, and
 - (b) F is neither permitted nor required by the written law applicable to F to be influenced in F’s capacity as a foreign public official by the offer, promise or gift.
- (4) References in this section to influencing F in F’s capacity as a foreign public official mean influencing F in the performance of F’s functions as such an official, which includes -
- (a) any omission to exercise those functions, and

- (b) any use of F's position as such an official, even if not within F's authority.
- (5) "Foreign public official" means an individual who -
- (a) holds a legislative, administrative or judicial position of any kind, whether appointed or elected, of a country or territory outside the United Kingdom (or any subdivision of such a country or territory),
 - (b) exercises a public function -
 - (i) for or on behalf of a country or territory outside the United Kingdom (or any subdivision of such a country or territory), or
 - (ii) for any public agency or public enterprise of that country or territory (or subdivision), or
 - (c) is an official or agent of a public international organisation.
- (6) "Public international organisation" means an organisation whose members are any of the following -
- (a) countries or territories,
 - (b) governments of countries or territories,
 - (c) other public international organisations,
 - (d) a mixture of any of the above.
- (7) For the purposes of subsection (3)(b), the written law applicable to F is -
- (a) where the performance of the functions of F which P intends to influence would be subject to the law of any part of the United Kingdom, the law of that part of the United Kingdom,
 - (b) where paragraph (a) does not apply and F is an official or agent of a public international organisation, the applicable written rules of that organisation,
 - (c) where paragraphs (a) and (b) do not apply, the law of the country or territory in relation to which F is a foreign public official so far as that law is contained in -
 - (i) any written constitution, or provision made by or under legislation, applicable to the country or territory concerned, or
 - (ii) any judicial decision which is so applicable and is evidenced in published written sources.
- (8) For the purposes of this section, a trade or profession is a business.

SECTION 7 - FAILURE OF COMMERCIAL ORGANISATIONS TO PREVENT BRIBERY

- (1) A relevant commercial organisation (“C”) is guilty of an offence under this section if a person (“A”) associated with C bribes another person intending -
 - (a) to obtain or retain business for C, or
 - (b) to obtain or retain an advantage in the conduct of business for C.
- (2) But it is a defence for C to prove that C had in place adequate procedures designed to prevent persons associated with C from undertaking such conduct.
- (3) For the purposes of this section, A bribes another person if, and only if, A -
 - (a) is, or would be, guilty of an offence under section 1 or 6 (whether or not A has been prosecuted for such an offence), or
 - (b) would be guilty of such an offence if section 12(2)(c) and (4) were omitted.
- (4) See section 8 for the meaning of a person associated with C and see section 9 for a duty on the Secretary of State to publish guidance.
- (5) In this section -
 - “partnership” means -
 - (a) a partnership within the Partnership Act 1890, or
 - (b) a limited partnership registered under the Limited Partnerships Act 1907,or a firm or entity of a similar character formed under the law of a country or territory outside the United Kingdom,
 - “relevant commercial organisation” means -
 - (a) a body which is incorporated under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere),
 - (b) any other body corporate (wherever incorporated) which carries on a business, or part of a business, in any part of the United Kingdom,
 - (c) a partnership which is formed under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere), or

(d) any other partnership (wherever formed) which carries on a business, or part of a business, in any part of the United Kingdom,

and, for the purposes of this section, a trade or profession is a business.

SOME OBSERVATIONS

We can see from the full text set out above that the 2010 Act contains two general offences and two discrete offences (they make no distinction between the public sector and the private sector).¹⁹⁷ The first offence covers the offering, promising or giving of an advantage (section 1). The second offence deals with requesting, agreeing to receive or accepting an advantage (section 2). The third offence criminalises the bribery of foreign public officials (section 6). The fourth offence proscribes the failure of commercial organisations to prevent bribery (section 7). The interpretation provisions are to be found in sections 3 to 5.

Perhaps the first thing to note about the four offences is that they can be committed on an accessorial (secondary) liability basis as aiding and abetting under the Accessories and Abettors Act 1861, inchoately as conspiracy contrary to the Criminal Law Act 1977, as a criminal attempt under the Criminal Attempts Act 1981, and as assisting and encouraging crime under the Serious Crime Act 2007.¹⁹⁸

Turning to the two general offences (sections 1 and 2), it is clear that these do not extend the field of criminal liability in any significant sense when compared to the old law¹⁹⁹ (which complied with all of the UK's international obligations).²⁰⁰ Rather, what is new is the way in which coverage is achieved. Whereas under the old law the tribunal of fact was required to determine whether a given type of conduct had been performed "corruptly", the 2010 Act sets

¹⁹⁷ Law Commission, *Reforming Bribery* (2008, Law Com Report No 313) 20; Jeremy Horder, 'Bribery as a Form of Criminal Wrongdoing' (2011) 127 (January) *Law Quarterly Review* 37, 45.

¹⁹⁸ Rudi Fortson QC, 'Understanding the Bribery Act 2010' (1 July 2011) <http://www.rudifortson4law.co.uk/legaltexts/Bribery_Act_2010_R.Fortson_QC_1stJuly2011_v2.pdf> accessed 26 August 2012.

¹⁹⁹ G. R. Sullivan, 'The Bribery Act 2010: Part 1: An Overview' [2011] (2) *Criminal Law Review* 87, 94.

²⁰⁰ Home Office, *Bribery: Reform of the Prevention of Corruption Acts and SFO Powers in Cases of Bribery of Foreign Officials: A Consultation Paper* (December 2005) 8-9.

out a number of cases in which an advantage should not be offered or accepted (the 2010 Act is concerned with conduct not results).²⁰¹ In short, a bribe under the 2010 Act is not limited to a single case but several. In such cases, the task for the tribunal of fact is to determine whether an advantage was offered or accepted together with the relevant mens rea (using the more familiar concepts of intent, knowledge and belief).²⁰²

Of course, whether a “financial or other advantage” constitutes a bribe depends on the underlying aim of the offer or receipt. For the purposes of both section 1 and 2, an offer or receipt of an advantage will constitute a bribe only when it simultaneously constitutes the improper performance of a “relevant function or activity” (sections 6 and 7 are different). That is, a function or activity which is of a public nature, connected with a business, performed in the course of employment, or performed on behalf of a body of persons (corporate or unincorporate) and which imposes on the person performing it a duty to act in good faith, impartially, or in accordance with a position of trust.

The 2010 Act deliberately limits the application of the 2010 Act to functions and activities which are essentially of a commercial or public nature. Otherwise, the reach of the 2010 would be extended to private transactions which are not the concern of the criminal law. For example, no-one would seriously argue that a mother who offers her child a reward for performing well in their exams should be guilty of bribery.

It will be apparent from the full text set out above that some of the cases in the 2010 Act require the satisfaction of both subjective and objective tests before criminal liability can be imposed. The subjective test is a reference to the fact that both section 1 (cases 1 and 2) and section 2 (case 3 only) contain mens rea requirements. For the purposes of section 1, the bribe payer must intend to induce (case 1) or act with knowledge or belief (case 2). Similarly, section 2 states that the recipient of the bribe must act with intention (case 3). In these cases, the tribunal of fact will need to look at the intentions of the bribe payer (or the recipient of the

²⁰¹ Director of the Serious Fraud Office and the Director of Public Prosecutions, *Bribery Act 2010: Joint Prosecution Guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions* (30 March 2011) 5.

²⁰² G. R. Sullivan, ‘The Bribery Act 2010: Part 1: An Overview’ [2011] (2) *Criminal Law Review* 87, 87-88.

bribe) and the knowledge that he possessed at the time of the corrupt transaction.²⁰³ Of course, this leaves open the possibility of a defendant arguing that he did not intend to induce (or be induced) by the provision (or receipt) of a financial or other advantage. The 2010 Act is silent as to this particular difficulty.²⁰⁴

The objective test is required in order to determine what is expected in relation to the performance of a relevant function or activity. In other words, does the relevant function or activity impose upon the person performing it a duty to act in good faith, impartially, or in accordance with a position of trust? Without an objective test, it would be open to a defendant to mount a technical defence on the basis that he thought that he (or the recipient of a financial or other advantage) was not expected to act in good faith, impartially, or in accordance with a position of trust. The 2010 Act overcomes this potential obstacle by imposing an objective test which requires the tribunal of fact to ask what a reasonable person in the UK would expect in relation to the performance of the function or activity concerned.

As we can see, the improper conduct in the 2010 Act consists of a person (who is performing a relevant function or activity) failing to act in good faith, impartially, or in accordance with a position of trust. Whether a person has acted improperly is an objective test which requires the tribunal of fact to determine: (a) whether the person was under a duty, and (b) whether that duty was breached. The focus is therefore on the conduct of the alleged wrongdoer rather than the impact on any potential victim.

Accordingly, it is not possible to make a direct link between the impropriety of the conduct for the purposes of the 2010 Act (the first part of our analytical framework), and the wrongness of that conduct for the purposes of the harm principle (the third part of our analytical framework - discussed later in this chapter). Whereas the former is concerned with the conduct of the alleged wrongdoer, the latter is concerned with harm to persons other than the wrongdoer. This difference may point to different victims e.g. the conduct may be

²⁰³ Nick Kochan and Robin Goodyear, *Corruption: The New Corporate Challenge* (Palgrave Macmillan, 2011) 75.

²⁰⁴ Rudi Fortson QC, 'Understanding the Bribery Act 2010' (1 July 2011) <http://www.rudifortson4law.co.uk/legaltexts/Bribery_Act_2010_R.Fortson_QC_1stJuly2011_v2.pdf> accessed 26 August 2012.

improper because the wrongdoer has acted in breach of a public duty, however the primary harm may be to an individual interest.

We can demonstrate this point with a simple example. Let us imagine a public official (R) who is responsible for allocating a limited number of permits. Let us further assume that R accepts a bribe from a person (P) in return for allocating the last permit to P. In this scenario, it is submitted that R has acted improperly for the purposes of the 2010 Act because he has failed to act in good faith and impartially. This constitutes a set back to the public's interest in the proper administration of government. However, it is arguable that the primary victim in this example, for the purposes of the harm principle, is the innocent actor who was deprived of the opportunity of applying for a permit.

It does not follow from this that there is no connection at all between the impropriety of R's conduct, and the harm and wrongdoing inflicted upon the innocent actor. It is submitted that by acting in bad faith and partially, R has morally wronged our innocent actor's right to be treated on equal terms with others i.e. to be afforded the right to access goods, services and opportunities on equal terms with others. This argument is considered in further detail below in our discussion of wrongs under the harm principle.

It is also important to note that we are not suggesting that a tribunal of fact must (although it may) find that an alleged wrongdoer has acted improperly simply because his conduct also amounts to a separate and distinct criminal offence. In order for conduct to be improper under the 2010 Act, the alleged wrongdoer must have acted in bad faith, partially, or in breach of trust. This is a question of fact for the tribunal of fact.

Not all of the cases contained in the 2010 Act require proof of mens rea. There is a resonance with the presumption of corruption under the old law insofar as some of the cases specified in section 2 are of strict liability. It is clear from a careful reading of section 2 that no fault is required when conduct falls within the ambit of cases 4 to 6. This is confirmed by section 2(7) which states that in cases 4 to 6 it does not matter whether the recipient of the bribe knows or believes that the performance of the function or activity is improper.

This analysis is not accepted by all. Sullivan disagrees with the effect of section 2(7) and argues that in cases 4 to 6, the prosecution must prove that the request or receipt of the advantage itself was not made in good faith, impartially, or in accordance with a position of trust. He

argues that it is impossible that the liability of a recipient could be established without proof that the recipient was aware of the facts that made the actual or contemplated performance of the relevant function or activity improper.²⁰⁵ Whilst Sullivan makes a valuable point, his interpretation flies in the face of the clear wording of section 2(7) of the 2010 Act. In any event, whether Sullivan's interpretation is correct is not something which we can conclusively determine in this thesis. Until such time as either Parliament amends the 2010 Act or the courts interpret section 2(7) so as to confirm Sullivan's interpretation, we must proceed on the basis that Parliament intended by section 2(7) to impose strict liability in respect of cases 4 to 6.

We should not be surprised by the fact that Sullivan disagrees as to the precise impact of the 2010 Act. There is good reason for this. One of the surprising features of the 2010 Act is the fact that so many of its central elements are left undefined.²⁰⁶ Even a straightforward concept such as a "financial or other advantage" is not defined. Instead, the Explanatory Notes to the 2010 Act tell us that this to be determined as a matter of common sense by the tribunal of fact.

Moving on, the offence of bribing a foreign public official (section 6) is a simple restatement of the old law. Like the general offences under sections 1 and 2, it does not extend the ambit of criminal liability any more than the old law. Unlike sections 1 and 2, the improper aim in section 6 (and section 7) is the obtaining or retaining of business or an advantage in the conduct of business. However, section 6 is not completely rigid. It contains an important exception which allows for the payment of an advantage to a foreign public official (which would otherwise be proscribed by section 6) where such payment is permitted by the written law in the foreign public official's country. This exemption allows for genuine payments which are permitted by law whilst excluding payments made on the basis that there is a custom or practice of offering such payments in a given country.

The innovation under the 2010 Act is section 7 which makes it an offence for commercial organisations to fail to prevent active bribery (but not passive bribery). Section 7, which

²⁰⁵ G. R. Sullivan, 'The Bribery Act 2010: Part 1: An Overview' [2011] (2) *Criminal Law Review* 87, 90-93.

²⁰⁶ Although Dennis was commenting on the draft bill contained in the Law Commission's report on bribery, his observations are applicable to the 2010 Act which is in almost identical terms; Ian Dennis, 'It Looks Like Bribery, Therefore it is' [2009] (2) *Criminal Law Review* 61, 62.

imposes strict liability,²⁰⁷ has no equivalent under the old law. It is arguable that section 7 constitutes an indirect attempt to prevent corruption from occurring in the first place. That is because it is a defence for a commercial organisation charged with an offence under section 7 to show that it had in place adequate procedures designed to prevent bribery. This is obviously an incentive for commercial organisations to ensure that they have in place proper procedures (such as anti-corruption policies and regular training) to ensure that their employees do not engage in conduct which might fall foul of the 2010 Act. The result, it is hoped, will be an improvement in standards and a decline in corruption. Of course, only time will tell whether section 7 actually has this effect.

A WORKING SUMMARY

It is fair to say that the drafting in the 2010 Act has attracted criticism. For example, Colin Nicholls QC, a leading criminal silk, confessed that “the drafting, I am afraid, as a criminal lawyer ... I find impossible. Maybe I am just not very good about it, except that I notice that the senior partners of Herbert Smith were having problems on this issue.”²⁰⁸ He was not alone as Lord Thomas of Gresford (a member of the Joint Committee on the Draft Bribery Bill) said that he “found it equally as confusing as Mr Nicholls.”²⁰⁹

In order to aid clarity, let us summarise the offences contained in the 2010 Act together with the interpretation provisions. The remainder of this thesis will rely upon these summaries with reference to the full text only when needed.

Section 1: Offences of bribing another person

In order to be guilty of bribing another person contrary to section 1, a person (P) must act in the ways set out in paragraphs (1) and (2) below, and satisfy either case 1 or case 2 (i.e. subparagraphs (a) or (b) below):

²⁰⁷ Stephen Gentle, ‘The Bribery Act 2010: Part 2: the Corporate Offence’ [2011] (2) Criminal Law Review 101, 102.

²⁰⁸ Nicholls was commenting on the drafting in the Bribery Bill (Ministry of Justice, *Bribery: Draft Legislation (Draft Bill)* (2009, Cm 7570). However, the drafting in the 2010 Act is virtually identical; Joint Committee on the Draft Bribery Bill, *Draft Bribery Bill: First Report of Session 2008-09* (HC 430-II, HL Paper 115-II) 19.

²⁰⁹ *ibid* 19.

(1) P offers, promises, or gives an advantage (whether by P or through a third party),

(2) to another person:

(a) with the intention of inducing that person (or another person) to perform a relevant function or activity improperly (case 1), or

(b) in the knowledge or belief that the acceptance of the advantage would itself constitute the improper performance of a relevant function or activity (case 2).

Section 2: Offences relating to being bribed

In order to be guilty of being bribed contrary to section 2, a person (R) must act in the ways set out in paragraph (1) below and satisfy either case 3, 4, 5, or 6 (i.e. subparagraphs (a) to (d) below). Only case 3 requires proof of mens rea. Cases 4 to 6 are strict liability.

(1) R requests, agrees to receive, or accepts an advantage:

(a) with the intention of performing a relevant function or activity improperly (whether by R or another person) (case 3),

(b) the request or receipt of the advantage itself constitutes an improper performance of a relevant function or activity (case 4),

(c) as a reward for having improperly performed a relevant function or activity (whether by R or another person) (case 5), or

(d) in anticipation of receiving an advantage performs a relevant function or activity improperly (whether by R or another person at R's request) (case 6).

Section 6: Bribery of foreign public officials

Under section 6, a person (P) who offers, promises or gives an advantage to a foreign public official (F) with the intention of influencing F in order to obtain or retain business or an

advantage in the conduct of business, is guilty of bribery unless the payment of the advantage is permitted by the written law applicable to F.

Section 7: Failure of commercial organisations to prevent bribery

In order for a commercial organisation (C) to be guilty of failing to prevent bribery contrary to section 7 of the 2010 Act, a person (A) associated with C must bribe another person intending to obtain or retain business or an advantage in the conduct of business for C. However, it is a defence for C to show that it had in place adequate procedures designed to prevent such conduct.

Sections 3 to 5: The interpretation provisions

Only some of the offences under the 2010 Act require proof of mens rea. Offences falling within section 1 (cases 1 and 2) and section 2 (case 3 only) all require mens rea. Cases 1 and 3 require proof of intention. By contrast, case 2 requires evidence of the briber payer's knowledge or belief. We can deal with these matters fairly swiftly. Intention is a familiar (though not necessarily settled)²¹⁰ concept in English criminal law and for this reason, the 2010 Act offers no definition. We know that a person intends a consequence if he wants that consequence to follow from his action. He may also be found to have acted with intent where consequences (which he may not want) follow his actions which he knows are virtually certain to occur.²¹¹ For the purposes of the 2010 Act, intention is to be judged subjectively on the basis of what the bribe payer (case 1) or the recipient of the bribe (case 3) intended rather than what actually occurred as a result of their conduct. Knowledge plays the same role in relation to circumstances as intention plays in relation to consequences. One knows something if one is absolutely sure that it is so although, unlike intention, it is of no relevance whether one wants or desires the thing to be so.²¹² Belief adds very little to the definition of knowledge; although it is worth noting that one can have a genuine but mistaken belief whereas knowledge implies correctness of belief.²¹³

²¹⁰ Inconsistencies in the case law may be due to the fact that the majority of authorities concern murder cases; Victor Tadros, *Criminal Responsibility* (Oxford University Press, 2005) 232.

²¹¹ *R v Woollin* [1999] AC 82.

²¹² Hooper LJ and David Ormerod, *Blackstone's Criminal Practice 2012* (Oxford University Press, 2012) 25-26.

²¹³ *ibid* 26.

Under the 2010 Act, a relevant function or activity is one which is of a public nature, connected with a business, performed in the course of employment, or performed on behalf of a body of persons (corporate or unincorporate), and which imposes upon the person performing it a duty to act in good faith, impartially, or in accordance with a position of trust.

In order to decide whether a person has performed a duty in good faith, impartially, or in accordance with a position of trust, the test is what a reasonable person in the UK would expect in relation to the performance of the function or activity concerned. Where the function or activity is conducted abroad, any local practice or custom must be excluded unless it is permitted or required by the written law of the foreign jurisdiction in question.

2. PART TWO: THE LAW IN THE USA

The US criminal law of corruption consists of a complex collection of overlapping and interlocking statutes and regulations enacted at both federal and state level.²¹⁴ Our aim in this section is to carefully select and summarise some federal and state level anti-corruption statutes. This will allow us to compare and contrast the core cases of corrupt conduct identified by the first part of our analytical framework with the law in the USA. By doing this, we shall be able to ascertain whether core cases of corruption travel well and whether there are any major differences in terms of coverage.

The discussion in this section will cover four federal statutes (18 USC § 201, 15 USC § 78dd, 15 USC § 1, and 15 USC § 78j) and the law in the state of California (Cal. Penal Code § 641.3). Before we consider these, it is necessary to say something about why we have selected these particular statutory provisions.

In terms of the federal statutes, we have selected 18 USC § 201 and 15 USC § 78dd because they are the main general anti-corruption statutes in the USA. 18 USC § 201 proscribes cases of domestic corruption whereas 15 USC § 78dd is concerned with the bribery of foreign public officials. The remaining federal statutes contain discrete offences. 15 USC § 1 deals exclusively with bid rigging whilst 15 USC § 78j tackles the problem of insider dealing. These two statutes

²¹⁴ Law Commission, *Reforming Bribery: A Consultation Paper* (2007, Law Com Paper No 185) 249.

have been selected because they are pertinent to the case studies which have been identified for analysis in chapter IV.

Lastly, it is necessary to rely upon the law at state level for the simple reason that there is a gap in terms of coverage at federal level. As we shall see, the federal statutes are silent as to corruption which occurs exclusively within the private sector. In this section, we shall plug this gap by reference to the California Penal Code § 641.3. Of course, the question arises as to why we have selected California as opposed to some other state. The simple answer is that the criminal law of corruption in the state of California is clear and well-developed. We shall not consider the law in other states because this thesis is not intended to be a truly comparative study.

18 USC § 201: BRIBERY

Let us begin by looking at the offences which are proscribed by 18 USC sections 201(b)(1) to 201(b)(4). These are concerned with the bribery of public officials, jurors, and witnesses in the domestic context. What follows is a simplified working summary.

According to sections 201(b)(1) and 201(b)(3), a person is guilty of bribery if he (directly or indirectly):

- (1) corruptly gives or offers anything of value,
- (2) to a public official, a juror, or a witness,
- (3) in order to influence:
 - (a) the public official or juror in his official capacity, or
 - (b) the testimony of the witness or for ensuring that witness absents himself from any proceedings.

There are mirror offences contained in sections 201(b)(2) and 201(b)(4). It is clear from these that a public official, juror, or witness is guilty of bribery if he (directly or indirectly):

- (1) corruptly seeks or accepts anything of value (for himself or on behalf of another),

(2) in return for:

- (a) being influenced in his capacity as a public official or juror, or
- (b) being influenced in his testimony as a witness or for absenting himself from any proceedings.

The term “public official” has been interpreted widely and includes any person acting on behalf of any branch of the government in any official function. It also includes persons who are not government employees. In other words, it is enough for a person to occupy a position of trust with official federal responsibilities. Thus, in *Dixson v United States*²¹⁵ it was held that employees of a private non-profit corporation that administered a sub-grant from a municipal federal block grant were public officials.

The phrase a “thing of value” is obviously a reference to an inducement and includes both tangible and intangible benefits. In common with English law, there is no de minimis exception.

As to the meaning of the word “corruptly”, in the case of *United States v Sun-Diamond Growers*²¹⁶ it was held that this meant a “specific intent to give or receive something of value in exchange for an official act.” This is often referred to as a quid pro quo requirement. Thus, a vague or generalised expectation of future benefits is not sufficient to make a payment a bribe.²¹⁷ In short, the bribe payer (or receiver) must give (or receive) an inducement in exchange for an official act. Of course, that does not mean that there must be reciprocity. For example, a bribe payer would still be guilty even if the public official refused the inducement.

15 USC § 78dd: THE FOREIGN CORRUPT PRACTICES ACT 1977

The second federal statute which we shall consider is the Foreign Corrupt Practices Act 1977 (the FCPA). The FCPA was enacted after evidence of improper conduct emerged during the hearings of the Select Committee on Presidential Campaign Activities (set up after the Watergate scandal). Subsequent investigations revealed that impermissible contributions

²¹⁵ (1984) 465 US 482.

²¹⁶ (1999) 526 US 398 at 404-405.

²¹⁷ *United States v Arthur* (1976) 544 F 2d 730.

totalling over \$300 million had been made by a number of US companies. These included payments to President Nixon's re-election campaign as well as bribes to foreign public officials. The US Congress took an interest in these findings and subsequently enacted the FCPA.²¹⁸

The substantive provisions of the FCPA take both a direct and indirect route to prohibit the bribery of foreign public officials. As to the former, the FCPA contains a direct prohibition on the bribery of foreign public officials. As to the latter, the FCPA requires US companies to prepare accurate accounting statements (sometimes referred to as the "books and records" requirement).²¹⁹ This is an indirect method of ensuring that corrupt payments are not concealed through inventive accounting.

The key provisions of the FCPA are to be found in 15 USC sections 78dd(1) to 78dd(3). What follows is a simplified working summary. According to sections 78dd(1) to 78dd(3), a person (or organisation) is guilty of an offence if he (or it):

- (1) corruptly,
- (2) gives or offers anything of value,
- (3) to a foreign public official (or any other person in the knowledge that it will be passed on to the foreign public official) for the purposes of:
 - (a) influencing any decision of the foreign public official in his official capacity,
 - (b) inducing the foreign public official to act in violation of his lawful duty,
 - (c) securing any improper advantage, or
 - (d) inducing the foreign public official to use his influence to affect any act of a foreign government,
- (4) for the purpose of obtaining business.

²¹⁸ Thomas F. Mcinerney, 'The Regulation of Bribery in the United States' (2002) 73 (1) *International Review of Penal Law* 81.

²¹⁹ *ibid* 83.

There are three important exceptions. First, the FCPA does not apply to any facilitation payments made for the purposes of expediting or securing the performance of “routine governmental action” by a foreign public official. However, it is important to note that this exception only applies to ministerial duties involving something to which one is already entitled (as opposed to matters of discretion such as whether to enter into a contract with a particular party). So for example, a payment made to expedite the installation of a telephone line in a country where this might otherwise take a considerable period of time would be regarded as a facilitation payment made in order to secure routine governmental action.²²⁰ Second, the FCPA also excludes the giving or offering of inducements which are lawful according to the written laws of a particular foreign country so long as the inducements relate to reasonable and bona fide expenditure. This restrictive definition is meant to exclude mere custom or practice within a foreign jurisdiction. Third, the FCPA does not criminalise the conduct of foreign public officials.²²¹ In other words, the FCPA applies exclusively to US citizens and corporations (i.e. the bribe payers) and leaves the punishment of foreign public officials to the relevant foreign jurisdiction.

A person has “knowledge” if he is aware that what he has given or offered is an inducement which will be passed onto a foreign public official. This is a rather vague definition which emphasises the subjective nature of the knowledge criterion. By contrast, the term “corruptly” is not defined by the FCPA.²²² However, according to the legislative history, the term corruptly is said to mean an evil motive, purpose or intent to wrongfully influence the recipient.²²³ In *Arthur Andersen LLP v United States*,²²⁴ the Supreme Court held that the criminal prohibition against corrupt conduct requires a consciousness of wrongdoing. However, it declined to expand upon this or to provide a more detailed definition of the term corruptly.

²²⁰ *ibid* 85.

²²¹ *United States v Blondek* (1990) 741 F Supp 116.

²²² Robert W. Tarun, *The Foreign Corrupt Practices Act Handbook: A Practical Guide for Multinational General Counsel, Transactional Lawyers and White Collar Criminal Practitioners* (American Bar Association, 2010) 10-12.

²²³ S Rep, No 114, 95th Cong, 1st Sess 10 (1977).

²²⁴ 125 S Ct 2129 (2005).

15 USC § 1: THE SHERMAN ACT 1890

The next federal statute which we shall consider is the Sherman Act 1890. This is concerned with bid rigging (which, as we shall see, is regarded as being a core case of corruption). The Sherman Act 1890 contains two prohibitions. Section 1 prohibits contracts, combinations, and conspiracies in restraint of trade. By contrast, section 2 is concerned with monopolisation. For our purposes, only the former is of interest.

Section 1 states that every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce is an offence. But such a broad prohibition would, if applied literally, capture almost all commercial arrangements. Accordingly, the courts have held that only unreasonable restraints of trade are proscribed by section 1.²²⁵

However, in determining what constitutes an unreasonable restraint of trade, the courts have applied two approaches. The first, known as the “per se” approach, is akin to strict liability in English law. In short, some commercial agreements are deemed to be so harmful to competition that they are prohibited outright (e.g. price fixing, bid rigging, and group boycotts). The second, known as the “rule of reason” approach, applies to those restraints of trade which are not caught by the per se approach. In such cases, the courts determine whether the arrangement is illegal by balancing the harms and benefits of the arrangement. If the harms caused by the arrangement outweigh its benefits, it is deemed to be an illegal restraint of trade.²²⁶

15 USC § 78J: THE SECURITIES EXCHANGE ACT 1934

The last of federal statutes which we shall consider is the Securities Exchange Act 1934. This is concerned with the problem of insider dealing (which is also regarded as a core case of corruption). Under the powers conferred by section 10(b) of the Securities and Exchange Act 1934, the US Securities and Exchange Commission enacted a number of rules to deal with the problem of insider dealing. These rules are to be found in the Code of Federal Regulations (C.F.R.) which is much like secondary legislation in England and Wales.

²²⁵ *Standard Oil Company of New Jersey v United States* 221 US 1 (1911).

²²⁶ Robert W. Emerson, *Business Law* (5th edn, Barron’s Educational Series, 2009) 517-522.

The most important of these rules is 17 C.F.R. § 240.10b-5. This makes it unlawful for a person (P) to engage in any act or omission which operates as a fraud upon any person in connection with the purchase or sale of any security. In order to bring a successful prosecution, it must be shown that P engaged in a fraudulent act (or omission) in connection with the purchase or sale of securities.

Rule 10b-5 applies to both classical insiders (e.g. directors, officers, and large shareholders)²²⁷ as well as third parties to whom insider information is disclosed.²²⁸ However, in order for a third party to be liable, it must be shown that he knew or had reason to believe that P was in breach of a fiduciary duty by disclosing the insider information. In addition, in such scenarios it must be shown that P also received some personal benefit (either tangible or intangible).²²⁹

* * *

We can see from our summary that the four federal statutes set out above are very specific. They criminalise the bribery of specific groups (public officials, foreign public officials, jurors, and witnesses) and activities (restraints of trade and insider dealing). But none of these federal statutes is exclusively concerned with the bribery of individuals who fall exclusively within the private sector (foreign or domestic).²³⁰ In fact, there are no federal statutes which expressly proscribe such conduct.

As to the former (i.e. foreign private sector bribery), US prosecutors are forced to rely on a cumbersome workaround. They prosecute overseas private sector bribery using 18 USC § 1952 (the Travel Act 1961).²³¹ This makes it an offence to engage in any interstate or foreign travel, or to use any mail or facility in interstate or foreign travel, with the intention of carrying out any “unlawful activity.”

²²⁷ *Chiarella v United States* 445 US 222 (1980).

²²⁸ *Dirks v Securities and Exchange Commission* 463 US 646 (1983).

²²⁹ Stephen M. Bainbridge, ‘An Overview of US Insider Trading Law: Lessons for the EU?’ (2005) 2 (1) *European Company Law* 22.

²³⁰ Thomas L. Carson, ‘Bribery, Extortion, and the Foreign Corrupt Practices Act’ (1985) 14 (1) *Philosophy and Public Affairs* 66, 76.

²³¹ D. Bruce Gabriel, ‘The Scope of Bribery under the Travel Act’ (1979) 70 (3) *The Journal of Criminal Law and Criminology* 337.

The phrase “unlawful activity” has been defined so as to include a range of different crimes such as gambling, narcotics, prostitution, extortion, arson, and bribery. In order for the Travel Act 1961 to take effect, the predicate offence must be proscribed by the law of the state in which the activity occurs or by the federal law of the USA. Thus, if a US citizen from the state of California were to offer a bribe to an individual in a foreign private sector, the Travel Act 1961 would make that an offence because bribery is a criminal offence in California.

This workaround is unsatisfactory for two reasons. First, it means that the mischief proscribed by the Travel Act 1961 is not the bribe. Rather, it is the international travel, telephone call, or wire transfer involved in completing the bribe. Second, the Travel Act 1961 only applies when there is a statute prohibiting corruption in a given state. Unfortunately, private sector bribery is not an offence in every state of the USA²³² (neither is it an offence at federal level). The coverage of the Travel Act 1961 is therefore patchy at best.

As for domestic private sector bribery, such conduct may be prosecuted under state law (assuming that the state in question proscribes such conduct) or at federal level using the Travel Act 1961. Whilst it is beyond the scope of this thesis to embark upon a comprehensive study of US state law, our analysis would be incomplete without some consideration of private sector bribery at state level. Let us therefore present a short working summary of a commercial bribery statute from the state of California.

CALIFORNIA PENAL CODE § 641.3

In the state of California, bribery in the private sector is criminalised by section 641.3 of the California Penal Code. This creates two separate offences depending on who is being charged. The first states that a person (P) is guilty of bribery if he:

- (1) corruptly gives or offers to an employee (R) who is not his own,
- (2) anything of value (other than in trust for R’s employer),

²³² General commercial bribery is a criminal offence in 34 of the 50 states of the USA; Thomas F. Mcinerney, ‘The Regulation of Bribery in the United States’ (2002) 73 (1) *International Review of Penal Law* 81, 104.

(3) without the consent of R's employer, and

(4) in return for R using his position for the benefit of P.

Similarly, an employee (R) is guilty of bribery if he:

(1) corruptly solicits, accepts, or agrees to accept from a person (P) who is not his employer,

(2) anything of value (other than in trust for his employer),

(3) without the consent of his employer, and

(4) in return for using his position for the benefit of P.

There are a number of points to note about section 641.3. First, the offences in section 641.3 are based on the fiduciary duty which exists between an employer and an employee. This imposes a duty on the latter to act in the best interests of the former. Second, the term "corruptly" is defined so as to mean that the person charged (P or R) must have intended to injure or defraud either his own employer, the employer of the person to whom the thing of value is given or from whom the thing of value is received, or any competitor of the aforementioned employers. Third, unlike federal law, section 641.3 contains a de minimis exception which ignores anything which is worth less than \$250. This is obviously intended to exclude routine corporate hospitality. However, it may cause difficulties in the case of intangible benefits which cannot be valued in monetary terms (such as sexual favours). Fourth, the fiduciary nature of section 641.3 means that it is possible for an employee to run a defence based on consent. That is, so long as the employee acts with the consent of his employer when receiving an inducement, he cannot be guilty of receiving a bribe.

3. PART THREE: HARM AND WRONGDOING

In this section, we shall set out the third and final part of our analytical framework. That is, an account of what we mean by harm and wrongdoing. The analysis in this section relies upon a streamlined (and supplemented) version of the harm principle.

The harm principle can be traced back to Mill who was concerned with “the nature and limits of the power which can legitimately be exercised by society over the individual.”²³³ Mill asserted that “the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others.”²³⁴ The harm principle is not without its critics.²³⁵

But the harm principle also has its fair share of admirers. The most detailed and compelling defence of the harm principle was furnished by Feinberg. In examining the harm principle, Feinberg adopted a narrower position than Mill by limiting his project to the criminal law.²³⁶ He offers a sophisticated and refined account which states that:

It is always a good reason in support of penal legislation that it would probably be effective in preventing ... harm to persons other than the actor (the one prohibited from acting) and there is probably no other means that is equally effective at no greater cost to other values.²³⁷

Feinberg argues that it is always a good reason in support of criminal legislation that it prevents harm to persons other than the wrongdoer. It is important to labour this point because Feinberg does not argue (as Mill did) that the prevention of harm to others is the only basis for criminalisation. Rather, Feinberg recognises that there are many other social reasons, or liberty-limiting principles as he calls them, that a state may appeal to in order to justify criminalisation of a particular activity. For example, the prevention of hurt or offence (as opposed to injury or harm) to others (the offence principle), the prevention of harm to the person who is prohibited from acting (legal paternalism), and the prevention of inherently

²³³ John Stuart Mill, *On Liberty and Other Writings* (Cambridge University Press, 1989) 5.

²³⁴ *ibid* 13.

²³⁵ For example, Harcourt criticises the harm principle on the basis that it is silent on how to weigh, balance, and judge harms; Bernard E. Harcourt, ‘The Collapse of the Harm Principle’ (1999) 90 (1) *Journal of Criminal Law and Criminology* 109. By contrast, Ripstein calls for the abandonment of the harm principle altogether on the basis that it is unable account for harmless wrongdoing; Arthur Ripstein, ‘Beyond the Harm Principle’ (2006) 34 (3) *Philosophy and Public Affairs* 215.

²³⁶ Joel Feinberg, *Harm to Others* (The Moral Limits of the Criminal Law, Oxford University Press, 1984) 3.

²³⁷ *ibid* 26.

immoral conduct whether or not such conduct is harmful or offensive to anyone (legal moralism).²³⁸

According to Feinberg, there are two senses of the word “harm”. The first is a non-normative sense which is used to describe a setback to interests. The second is a normative sense which describes conduct which is wrong (i.e. indefensible conduct which violates a person’s rights).²³⁹ Feinberg argues that a person is harmed in the appropriate sense when these two senses of the word harm coincide. In other words, a person is harmed in the appropriate sense when (1) his interests are (2) wrongfully (3) set back. Let us consider these three elements in more detail.

INTERESTS

A person has an interest in something if he has a stake in its well-being. That is, he stands to gain or lose depending on the nature or condition of that something.²⁴⁰ Put simply, a person’s interests comprise the things that make his life go well.²⁴¹ Feinberg distinguishes between two types of interests: private interests and public interests.

Private interests

Private interests are those things in which a person has an exclusive stake. In simple terms, they are things that concern an individual directly. There are two types of private interests: welfare interests and ulterior interests.

Welfare interests

Welfare interests are the most important interests that a person has. They include such things as an interest in one’s own life, physical health, a tolerable social and physical environment,

²³⁸ Joel Feinberg, *Offense to Others* (The Moral Limits of the Criminal Law, Oxford University Press, 1985) ix-xiv.

²³⁹ Joel Feinberg, *Harmless Wrongdoing* (The Moral Limits of the Criminal Law, Oxford University Press, 1990) xxvii-xxix.

²⁴⁰ Joel Feinberg, *Harm to Others* (The Moral Limits of the Criminal Law, Oxford University Press, 1984) 33-34.

²⁴¹ A. P. Simester and G. R. Sullivan, *Criminal Law: Theory and Doctrine* (3rd edn, Hart Publishing, 2007) 584.

etc. These are basic interests that are shared by nearly all individuals. They are generalised means to the realisation and achievement of more ultimate goals (ulterior interests) in life. Welfare interests are so important that they simultaneously give rise to moral rights. When welfare interests are set back, a person is very seriously harmed because his more ultimate aspirations are defeated too. By contrast setbacks to ulterior interests alone do not inflict the same degree of damage to the whole network of a person's interests.²⁴²

Ulterior interests

Ulterior interests are a person's ultimate goals and aspirations in life. For example, to write a good novel, secure a well-paid job, to be wealthy, etc.²⁴³ Most ulterior interests are only indirectly invadable. The usual way of setting back a person's ulterior interests is by invading a welfare interest whose maintenance at a minimal level is a necessary condition for the advancement of ulterior interests.²⁴⁴ For example, if a person's physical health is impaired (a welfare interest) then it is likely that a large proportion of his ulterior interests will also be set back.

Public interests

By contrast, public interests are interests of a widely shared character. They are things in which a person has an interest by virtue of his membership of society. There are two types of public interests: community interests and governmental interests.

Community interests

These are specific interests of the same kind which are possessed by most, if not all people. The interests in this category do not necessarily belong to everyone, but they could belong to anyone, without further specification. Setbacks to community interests result in direct harm to individual members of the community. For example, we all have a shared interest in public

²⁴² Joel Feinberg, *Harm to Others* (The Moral Limits of the Criminal Law, Oxford University Press, 1984) 37.

²⁴³ *ibid* 37.

²⁴⁴ *ibid* 112.

peace, security from foreign enemies, a sound economy, etc. If one of these interests were set back, we would all be personally affected.

Governmental interests

By contrast, governmental interests are generated by the activities of governing. They are common interests shared by all or most people in precisely the same thing. For example, the promotion of economic prosperity, the collection of taxes, the proper functioning of the courts, etc. The difference is that setbacks to governmental interests result in indirect harm to individual members of the community. For example, tax evasion harms members of society in a remote sense in that it deprives the government of revenue which would otherwise be available for public expenditure. But if such conduct were allowed to spread it could threaten direct harm by endangering the proper functioning of government in whose efficient functioning we all have a stake.²⁴⁵

Exceptions

A person may have an interest in all manner of things. However, the harm principle rejects (as valid) cruel, sadistic, wicked, sick, and morbid interests. According to Feinberg, these interests are morally disreputable and no-one has a moral right to their protection.²⁴⁶ In this context, a moral right is a claim backed by valid reasons and addressed to the conscience of other individuals or to public opinion. Feinberg's argument is that no-one has a valid claim backed by valid reasons for the protection of such interests.

WRONGS

As mentioned, it is not enough for an interest to be set back. The harm principle states that a person's interests must be wrongfully set back. It is this act of setting back an interest (e.g. thwarting, impairing, defeating an interest, etc.) which makes an act wrongful. However, Feinberg qualifies this by excluding cruel, sadistic, wicked, sick, and morbid interests on the basis that these are morally disreputable, and no-one has a moral right to the protection of

²⁴⁵ *ibid* 63-64 and 221-225.

²⁴⁶ *ibid* 111-112.

such interests. Thus, we can see that Feinberg makes a connection between interests and moral rights. According to Feinberg, morally disreputable interests aside, a person has a valid moral claim (a claim is a type of right) against others for their respect and non-interference with his interests. In short, Feinberg argues that one person “wrongs” another when his indefensible (unjustifiable and inexcusable) conduct violates the other’s interests (i.e. those interests which he has a moral right to claim).²⁴⁷ Of course, it will frequently be the case that a moral right is also protected by law; thereby simultaneously giving rise to a legal right.²⁴⁸ Unfortunately, Feinberg does not offer a theory of rights (either as to form or function). This omission is rectified later in this section.

Two points arise from this formulation. First, Feinberg is careful not to define a “wrong” simply as the violation of a legal right. He recognises that this would lead his project into circularity or, as he calls it, the “mistaken premise”. The mistaken premise states that:

- (1) we cannot know which harms may be criminalised until we know which harms are wrongs,
- (2) we cannot know which harms are wrongs until we know which harms people have a legal right not to have inflicted upon them (the mistaken premise),
- (3) but we cannot know which harms people have a legal right not to have inflicted upon them until we know which harms they can claim protection for from the state.²⁴⁹

This completes the circle and leads to the conclusion that we cannot know which harms are wrongs until we know which harms are wrongs. However, as we have seen, Feinberg resolves this difficulty by stipulating that a wrong is the indefensible (unjustifiable and inexcusable) violation of another’s interests. By this he means those interests which form the basis of a valid moral claim against others for their respect and non-interference. As we have noted, it will

²⁴⁷ *ibid* 34 and 105.

²⁴⁸ *ibid* 110-112.

²⁴⁹ *ibid* 110-111.

frequently be the case that a moral right will also be protected by law; thereby simultaneously giving rise to a legal right.

Second, although Feinberg does not make it clear, it is important to remember that interests and rights are distinct concepts. For example, let us imagine that X is a businessman who runs a shop. His business premises are situated in a location where there are a number of competitors. However, although X may have an interest in the absence or reduction of competition, he has no moral right to this.

It is convenient to pause at this stage in order to provide some examples of the types of interests which may be relevant to our analysis of wrongdoing in chapter IV. To this end, it is submitted that any indefensible (i.e. unjustifiable and inexcusable) violation of a welfare interest will constitute a wrong. The reason for this is that welfare interests are the most important interests that a person has. They are generalised means to the realisation and achievement of more ultimate goals in life. When welfare interests are indefensibly set back, a person is very seriously harmed because his more ultimate aspirations are defeated too. Feinberg tells us that welfare interests are so important that they simultaneously give rise to moral claims against others for their respect and non-interference. Most welfare interests are also legal rights e.g. the right to liberty is both a moral and a legal right.

Some of the more common welfare interests include an interest in one's liberty, in one's family life, an interest in a fair trial, and financial interests. It is submitted that an indefensible setback to any of these interests constitutes a wrong. Another important welfare interest is the right to equal treatment. This is particularly relevant in the discourse relating to corruption because it helps explain why corruption is objectionable in the commercial world. Recall Turow's argument that equality demands that there should be a level playing field, and that everyone should be afforded the same opportunities. That is, the right to access goods, services and opportunities on equal terms with other competitors. Corruption undermines this principle, and thereby sets back the rights of innocent actors by securing for the bribe payer an unfair advantage.

This principle holds true even where two or more competitors have engaged in corruption but only one has succeeded in securing an advantage. For example, let us suppose that two competitors, X and Y, have both offered bribes to Z in order to secure a contract. Let us suppose that X is successful. In this scenario, it is submitted that X has set back Y's interests.

By this, we mean Y's legitimate interests rather than illegitimate interests (i.e. in successfully bribing Z). The fact that Y was also engaged in corruption does not alter the fact that Y's legitimate interests (as opposed illegitimate interests) were set back. Y would, of course, be guilty of attempting to bribe Z. But this is a separate offence.

It is possible to provide a rough sketch of some of the wrongs which will be central to our discussion of wrongdoing in chapter IV. In the main, these tend to fall into one or both of two groups. The first group consists of cases where an agent owes a moral or legal duty to a principal. In these cases, it is submitted that the agent has a duty to act with integrity and not to bring his principal into disrepute. When the agent solicits or accepts a bribe, he acts in bad faith, partially, or in breach of trust (i.e. improperly for the purposes of the 2010 Act), and thereby morally wrongs his principal.

The second group consists of cases where a person (P) owes a moral duty to third parties to act in good faith, impartially, or in accordance with a position of trust. In other words, P is under a moral duty to treat these third parties equally. When P solicits or accepts a bribe, he breaches this duty and acts improperly for the purposes of the 2010 Act. That is, because he has created an uneven playing field by giving the bribe payer preferential treatment. This wrongs the innocent third parties because it breaches their moral right to be treated on equal terms i.e. to be afforded the right to access goods, services and opportunities on equal terms with other competitors.

However, we must be careful not to be over-categorical as there may be other moral wrongs involved. For example, recall the case of Munir Patel from chapter I. The imposition of penalty points was a relevant matter for the insurance companies because bad drivers pose a higher risk than good ones. As a result of Patel's misconduct, the insurance companies carried risks at an inappropriate cost by insuring bad drivers as if they were good ones.

But the wrong to the insurance companies does not fall into the two groups which we have identified. They were not Patel's principals, and this was not a case where there was a denial of a right to equal treatment. Rather, it is submitted that the insurance companies were morally wronged because they had a direct financial interest in the integrity of the administration of the criminal justice system. This reliance generated a moral right that public officials working in the system (such as Patel) would act with integrity. Patel violated this by accepting a bribe.

Exceptions

We must note two exceptions. First, conduct is not indefensible (i.e. wrong) if the wrongdoer is justified or has an excuse. So for instance, a police officer acting in the course of his duty is justified in detaining a suspect (who it subsequently transpires is innocent) even though this sets back the suspect's welfare interest in liberty. Second, it is impossible for a person to consent to being wronged. To do so would be to consent to being treated contrary to one's wishes, which is a contradiction in terms.²⁵⁰

SETBACKS

The final part of the harm principle states that a person's interests must also be set back. The test for establishing whether an interest has been set back is whether that interest is in a worse condition than it would otherwise have been had the invasion not occurred at all.²⁵¹ A person's interests are set back when the invader of a personal interest:

- (1) modifies an interest directly so that it comes into conflict or competition with another interest, or else modifies the circumstances to make scarcer the means of joint satisfaction of two or more already competing interests,
- (2) diminishes the extent to which prudential interests are protectively diversified, or
- (3) directly impairs a welfare interest thereby diminishing the person's means to advance his various ulterior interests.²⁵²

Exceptions

Not all setbacks to interests are caught by the harm principle. Some setbacks invade another's interests excusably or justifiably. For example, a judge who sentences an offender to a custodial sentence inevitably sets back the offender's welfare interests. But the judge is

²⁵⁰ *ibid* 115.

²⁵¹ *ibid* 34.

²⁵² *ibid* 41-42.

justified in depriving the offender of his liberty because he is acting in accordance with the law. This simple example demonstrates that it is possible to set back an interest without falling foul of the harm principle.

In addition, consent can also take a setback outside the ambit of the harm principle. A person cannot rely on the harm principle for protection in circumstances where he has consented to being harmed. This includes harms voluntarily inflicted by the actor upon himself, or the risk of which the actor freely assumed, and harms inflicted upon him by the actions of others to which he has freely consented.²⁵³

Lastly, as we have already noted, there are some interests which a person has no right to have respected (cruel, sadistic, wicked, sick, and morbid interests). Such interests are morally disreputable and no-one has a moral right to their protection.²⁵⁴ Accordingly, setbacks to such interests are excluded by the harm principle.

MEDIATING MAXIMS

The harm principle as set out offers a guide for justifying the imposition of criminal sanctions. However, its utility can only be realised by tempering it with a number of mediating maxims. First, legislators must look at the risk of a given harm. This is a compound of the probability of the harm occurring and the magnitude of the harm (subject to the de minimis principle). Second, legislators should balance the risk of the harm against the value of the risk-creating conduct before deciding whether to criminalise a given activity on the basis that it causes wrongful harm to others.²⁵⁵

WIGMOREAN ANALYSIS

The intricacies of the harm principle are easier to understand when presented in a visual format. This allows us to see how the various components of the harm principle interact with

²⁵³ *ibid* 35-36 and 115-117.

²⁵⁴ *ibid* 111-112.

²⁵⁵ *ibid* 187-193.

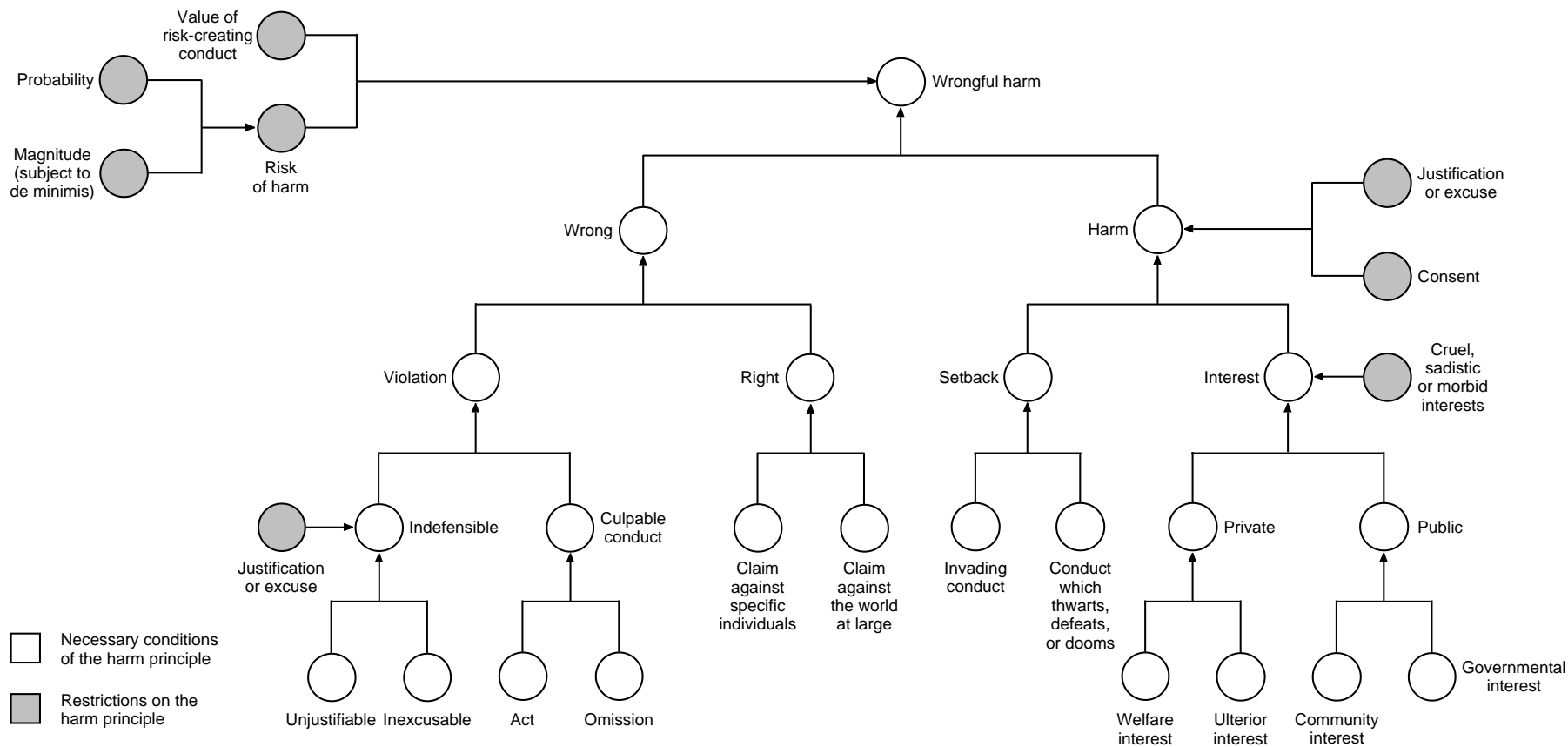
one another. To this end, it is possible to present the harm principle in the form of a simplified Wigmorean chart.

If we turn to the Wigmorean chart on the next page, the white circles represent the necessary or essential elements of the harm principle. The grey circles represent exceptions and mediating maxims which restrict and temper the application of the harm principle.

We can demonstrate the application of our Wigmorean chart with a short example. We know that the harm principle is only concerned with “wrongful harms”. If we look at the top of our chart, we can see that a “wrongful harm” consists of a “wrong” and a “harm”. If we carry on with the example, we can see that a “wrong” is the “violation” of a “right”. We can break down a “violation” into “indefensible” and “culpable conduct”. Our chart tells us that conduct is “indefensible” when it is “unjustifiable” and “inexcusable”. However, as we can see from the chart, a “violation” will not be indefensible if there is “justification or excuse”.

The usefulness of the Wigmorean chart lies in its ability to present a visual account of all the necessary elements of the harm principle. It allows us to see, at a glance, how the various elements interact with one another and how the exceptions and mediating maxims fit in.

WIGMOREAN CHART OF THE HARM PRINCIPLE ²⁵⁶



²⁵⁶ Based on a simplified version of Wigmore's chart method; Terence Anderson, David Schum and William Twining, *Analysis of Evidence* (2nd edn, Cambridge University Press, 2005) 123-144.

PRIMARY, INDIRECT, AND REMOTE HARMS

We mentioned at the outset of this chapter that the harm principle suffers from two weaknesses. The first of these, which we shall attend to now, is its inability to distinguish between the different types of harm which may arise from a given activity.

Primary and indirect harms

Let us begin with an uncontroversial example. Criminal damage is harmful because it results in unlawful physical damage to another's property. However, this is not the only harm to result from such conduct. It is easy to imagine harm in other dimensions. For example, criminal damage may also cause immediate inconvenience if the property is rendered unusable by the damage. It may also cause financial hardship insofar the property has to be repaired or replaced. Thus, we can see that criminal damage may simultaneously give rise to a number of different harms.

The harm principle does not tell us how to differentiate between these different harms. It does not tell us whether we ought to take some or all of these harms into consideration for the purposes of criminalisation. This omission has the potential to dilute the effectiveness of the harm principle.

Von Hirsch and Jareborg recognise that an activity may result in harm to different dimensions.²⁵⁷ They refer to the immediate harm which flows from an activity as the "primary harm". They refer to all other harms as "indirect harms" and regard such harms as features which aggravate the primary harm. So if we recall our example of criminal damage, the primary harm would be the physical damage to property (i.e. a setback to proprietary interests). By contrast, the indirect harm would be the other harms which we identified such as the financial hardship incurred in repairing or replacing the property. There is no mechanical procedure for distinguishing between primary and indirect harms. It is, to a large extent, a matter of judgement.

²⁵⁷ Andrew von Hirsch and Nils Jareborg, 'Gauging Criminal Harm: A Living-Standard Analysis' (1991) 11 (1) Oxford Journal of Legal Studies 1, 31-32.

Let us adopt this distinction between primary and indirect harms. In the remainder of this thesis, the phrase “primary harm” will be used as a shorthand to refer to the immediate harm which flows from an activity. The phrase “indirect harm” will be used to describe the other harms which occur either with or as a direct result of the primary harm.

Before proceeding any further, it is important to clarify two matters. First, the label “primary harm” is not a synonym for the most serious harm which results from corruption. The most serious harm which results may be any one of the three types of harm which we have identified: primary, indirect, and remote.

So for example, let us suppose that a judge has accepted a bribe from a claimant to find in his favour. In this example, we might argue that the primary harm was to the interests of the defendant whose right to a fair trial was set back. Equally, we might be able to identify indirect harms to the defendant such as a setback to his financial interests (if he has paid damages – especially if he was not liable), or the time and expense incurred in appealing (or judicially reviewing) the judge’s decision. But the most serious harm in this example is arguably the remote harm to the public interest. That is, a setback to the public’s interest in the fair and proper administration of justice.

Second, it is important to say something about the relationship between primary and indirect harms and Feinberg’s welfare and ulterior interests. Whilst primary harms will usually consist of a setback to welfare interests (e.g. a setback to financial interests), they are not limited in this way, and may also include setbacks to ulterior interests (e.g. being unfairly deprived of the offer of a place at university). By contrast, indirect harms may consist of a setback to any of Feinberg’s interests: welfare interests, ulterior interests, community interests, and governmental interests.

We can better demonstrate this by recalling our example of criminal damage. It will be recalled that the primary harm was the unlawful physical damage to property (a welfare interest). However, the indirect harm consisted of both inconvenience and financial hardship. Whilst an interest in one’s financial wellbeing is a welfare interest, it is artificial to describe the avoidance of inconvenience as an ulterior interest. Thus, we can see that primary and indirect harms are not synonyms for welfare and ulterior interests.

It is also worth reiterating that there is no mechanical procedure for identifying primary, indirect, and remote harms. This does not undermine our thesis as Feinberg himself was unable to articulate a mechanical procedure for identifying and distinguishing welfare, ulterior, community, and governmental interests.

As we can see from this short discussion, the nexus between primary and indirect harms is that they both constitute a direct setback to individual interests. It is important to stress this connection because it is what distinguishes primary and indirect harms from remote harms which affect only public interests. Let us consider remote harms in further detail.

Remote harms

In a subsequent article, von Hirsch argues that the usefulness of the harm principle may be blunted if it is not limited to primary harms.²⁵⁸ Von Hirsch's concern was with "remote harms". That is, conduct which is remote in the sense that it depends on certain contingencies. For example, the possession of a gun is, by itself, a harmless activity. However, if the gun is mishandled, it may result in injury or death to others (thereby activating the operation of the harm principle).

The harm principle recognises the existence of remote harms. Recall that one of the mediating maxims which governs the operation of the harm principle is the risk of a given harm. This is a compound of the probability of the harm occurring and the magnitude of the harm (subject to the de minimis principle). Feinberg tells us to balance the risk of the harm occurring against the value of the risk-creating conduct before deciding whether to criminalise the said conduct on the basis that it causes wrongful harm to others.

Von Hirsch develops the idea of remote harms and identifies three different types of contingencies:

- (1) Abstract endangerment (e.g. driving whilst intoxicated may present a danger to other road users and pedestrians).

²⁵⁸ Andrew von Hirsch, 'Extending the Harm Principle: 'Remote' Harms and Fair Imputation' in AP Simister and ATH Smith (eds), *Harm and Culpability* (Clarendon Press, 1996) 259-265.

- (2) Intervening choices (e.g. gun possession may result in death or injury if the weapon is handled or used in a certain way).
- (3) Accumulative harms (e.g. conduct which only results in harm when combined with the similar acts of others).

We can demonstrate von Hirsch's argument more clearly by reference to a simple nursery rhyme:

For want of a nail, the shoe was lost
For want of a shoe, the horse was lost
For want of a horse, the rider was lost
For want of a rider, the battle was lost
For want of a battle, the kingdom was lost
And all for the want of a horseshoe nail

Let us assume that the farrier who shod the horse intentionally used two nails instead of the usual six. That being so, it is arguable that his misconduct led to the loss of the kingdom. Von Hirsch's point is that we would not seriously argue that the farrier's conduct should be criminalised on the basis of the remote consequences outlined in the nursery rhyme. To do so would be to distort the usefulness of the harm principle. We can derive support for this view from the rules of remoteness in civil law. If a wrongdoer were responsible *ad infinitum* for all the consequences of his actions (however remote in time or indirect the causation), all human activity would be unreasonably hampered. The law must draw a line somewhere, simply for practical reasons.²⁵⁹

We cannot deny the strength of these arguments. If the harm principle were extended to cover remote harms its utility would be blunted and the possibilities for criminalisation would be endless.²⁶⁰ Von Hirsch argues that the operation of the harm principle should be restricted to primary harms. He tells us to disregard remote harms when considering whether to criminalise a given activity.

²⁵⁹ W. V. H. Rogers, *Winfield & Jolowicz on Tort* (16th edn, Sweet & Maxwell, 2002) 223.

²⁶⁰ Andrew Ashworth, *Principles of Criminal Law* (5th edn, Oxford University Press, 2006) 41-42.

Since our project is not concerned with the justification for criminalising corruption, we need not dwell on the merits of von Hirsch's arguments. However, let us borrow from von Hirsch the idea of remote harms. In the remainder of this thesis, the phrase "remote harm" will be used as a shorthand to describe harms which may occur if corruption were to become endemic.

ANALYSIS OF RIGHTS

The second weakness in Feinberg's version of the harm principle is the lack of a detailed account of the form and function of rights (Feinberg does, in fairness, touch upon these issues). According to the harm principle, one person wrongs another when his indefensible conduct (unjustifiable and inexcusable) violates the other's rights (legal or moral).²⁶¹ Notwithstanding this, the harm principle does not provide us with a complete account of what rights are and what they do for those who hold them. In this section, we shall rectify this weakness. After all, we cannot analyse the wrongdoing in corruption unless we have a complete idea of what it means to be wronged.

By recognising that a person may be harmed when their interests are wrongfully set back, the harm principle implicitly acknowledges that such conduct constitutes an invasion of a person's autonomy. Ashworth argues that wrongfulness is an important concept which needs to be analysed in terms of the interests of others and conceptions of their personhood and autonomy.²⁶² The role of rights in moral philosophy is primarily to justify action and restraints upon action rather than to describe states of affairs. Thus, the idea that has come to be centrally important to rights in moral arguments is that of being entitled. Rights are not only things which we can assert and demand, they are also something which we must be morally accorded. In short, to assert a right is to say that we are entitled to that right and that others are morally obliged to act in ways which are consistent with that right. When we are denied our rights, we are victims of an injustice.

²⁶¹ Joel Feinberg, *Harm to Others* (The Moral Limits of the Criminal Law, Oxford University Press, 1984) 34.

²⁶² Andrew Ashworth, *Principles of Criminal Law* (5th edn, Oxford University Press, 2006) 31.

It is in this way that rights are closely associated with the concept of autonomy.²⁶³ The clearest way to give moral standing to human beings, to respect them as persons, is to accord them rights.²⁶⁴ When others interfere with our rights, they interfere with our ability to make self-regarding decisions (even if those decisions are ill-considered or substantively unwise).

Unfortunately, Feinberg does not develop these ideas in any detail although he does make it clear that the harm principle's reliance upon moral rights does not mean that it is committed to a natural law theory of rights.²⁶⁵ Let us address this weakness by furnishing an account of both the form and function²⁶⁶ of rights. By form we mean a description of the internal structure of rights. By function we mean an explanation of what rights do for those who hold them.²⁶⁷

Our understanding of both these concepts is remarkably fragile and we fall into trouble when we try to say what legal rights and duties are.²⁶⁸ According to Dworkin, in most cases, when we say that someone has a right to do something, we imply that it would be wrong to interfere

²⁶³ Autonomy consists of an external and an internal dimension. The former refers to the fact that individuals require space in which to shape their lives as they choose. The latter recognises that individuals are capable of making their own choices and decisions; Richard H. Fallon Jr, 'Two Senses of Autonomy' (1994) 46 (4) *Stanford Law Review* 875.

²⁶⁴ Peter Jones, *Rights* (Palgrave, 1994) 48-50 and 120-142.

²⁶⁵ Joel Feinberg, *Harm to Others* (The Moral Limits of the Criminal Law, Oxford University Press, 1984) 111.

²⁶⁶ The function of rights has given rise to a long-running debate between two competing theories: the will (or choice) theory and the interest (or benefit) theory. This is not a debate that we can hope to explore in any meaningful way within the confines of this thesis. The will theory argues that a right confers on a right-holder a choice as to whether or not to do something. It accentuates freedom and self-fulfilment; Hart; H. L. A. Hart, 'Are There Any Natural Rights?' (1955) 64 (2) *Philosophical Review* 175. By contrast, the interest theory states that the function of a right is to protect, not a right-holder's choices, but certain of his interests; Neil MacCormick, 'Rights, Claims and Remedies' (1982) 1 (2) *Law and Philosophy* 337; Joseph Raz, 'On the Nature of Rights' (1984) 93 *Mind* 194; Joseph Raz, 'Legal Rights' (1984) 4 (1) *Oxford Journal of Legal Studies* 1. The interest theory is generally regarded as the superior account of what having a right entails. Although these theories are not necessarily opposed, the longstanding debate as to which account is correct remains one of the major unresolved issues in legal philosophy; Raymond Wacks, *Philosophy of Law* (Oxford University Press, 2006) 52-74; Michael Freeman, *Lloyd's Introduction to Jurisprudence* (8th edn, Sweet & Maxwell, 2008) 394-396.

²⁶⁷ Leif Wenar, 'Rights' in Edward N Zalta (ed), *Stanford Encyclopedia of Philosophy* (Fall 2010 edn) <<http://plato.stanford.edu/archives/fall2010/entries/rights/>> accessed 21 November 2010.

²⁶⁸ Ronald Dworkin, *Taking Rights Seriously* (Duckworth, 2004) 14.

with their exercise of that right, or at least that some special grounds are needed to justify any interference.²⁶⁹ As we have seen, corruption sets back the interests of innocent actors. At the very least, those who engage in corrupt conduct bear a burden of justification for what they do.²⁷⁰

The form of rights: Hohfeld's analytical scheme

It is generally accepted that the starting-point for any discussion about the form of rights is Hohfeld's analytical scheme.²⁷¹ There are many types of "rights" and the concept is often used ambiguously.²⁷² Hohfeld sought to introduce some clarity and precision to rights-talk by reducing legal rights to their lowest common denominator.²⁷³

Although Hohfeld was concerned with legal rights, his analysis is equally applicable to discussions about moral rights.²⁷⁴ His analytical scheme is a useful tool for demonstrating the different ways in which the term "right" can be used and its interplay with other important concepts. In this section, we shall furnish a refined account of Hohfeld's analytical scheme. In particular, we shall adopt the refinements suggested by Wenar²⁷⁵ (although these are not accepted by all).²⁷⁶

²⁶⁹ *ibid* 188-189.

²⁷⁰ Michael S. Pritchard, 'Bribery: the Concept' (1998) 4 (3) *Science and Engineering Ethics* 281, 281.

²⁷¹ Michael Freeman, *Lloyd's Introduction to Jurisprudence* (8th edn, Sweet & Maxwell, 2008) 398.

²⁷² *ibid* 396.

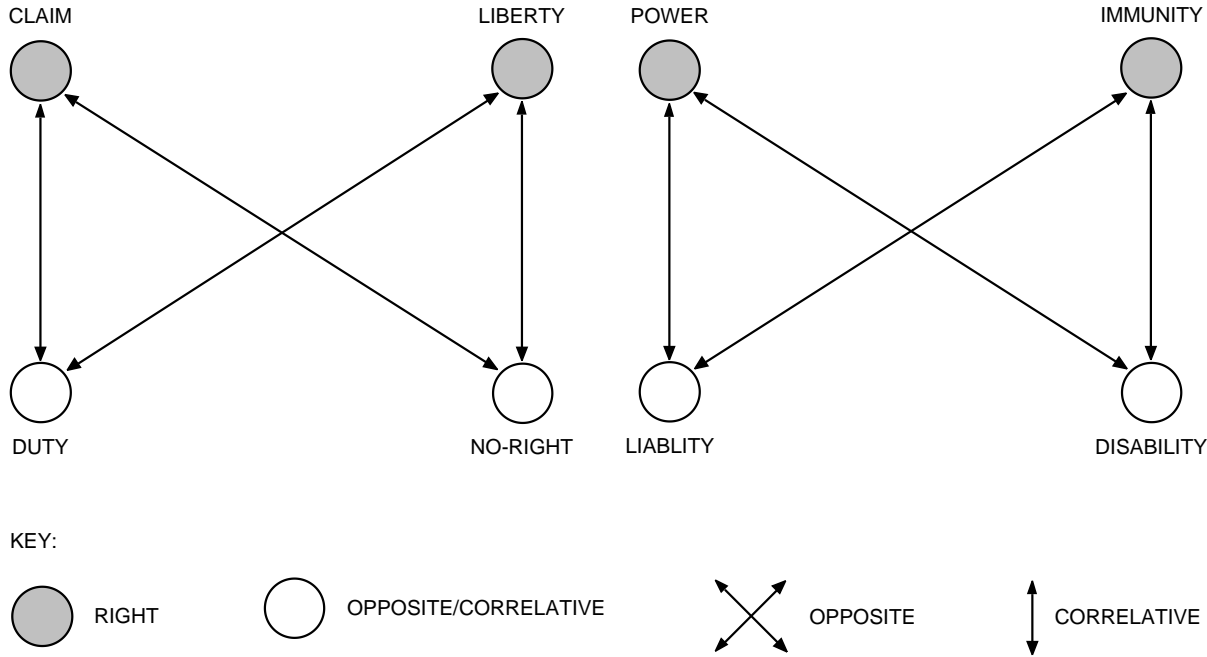
²⁷³ Wesley Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 (1) *Yale Law Journal* 16; Wesley Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1917) 26 (8) *Yale Law Journal* 710; Wesley Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (Yale University Press, 1919).

²⁷⁴ Matthew H. Kramer, 'Rights Without Trimmings' in Matthew H Kramer, N E Simmonds and Hillel Steiner (eds), *A Debate Over Rights: Philosophical Enquiries* (Clarendon Press, 1998) 8; James G. S. Wilson, 'Rights' in R. E. Ashcroft and others (eds), *Principles of Health Care Ethics* (2nd edn, John Wiley & Sons Ltd, 2007) 239.

²⁷⁵ Leif Wenar, 'The Nature of Rights' (2005) 33 (3) *Philosophy & Public Affairs* 223.

²⁷⁶ For example, Kramer and Steiner argue that Wenar's refinements oversimplify the involutions of Hohfeldian relations. Their main concern, however, is with a different aspect of Wenar's work. That is, to deny Wenar's claim that his refined account (or several-functions theory) represents a middle ground in the longstanding debate between the will and the interest theory; Matthew H. Kramer and Hillel Steiner, 'Theories of Rights: Is There a Third Way?' (2007) 27 (2) *Oxford Journal of Legal Studies* 281.

According to Hohfeld, the word “right” has four different meanings. In other words, it can be used to describe at least four types of legal relations: (1) claims, (2) liberties,²⁷⁷ (3) powers, and (4) immunities. Each of these rights (or Hohfeldian incidents) is said to have an opposite and a correlative. The scheme is best presented in the form of a simple chart:



Claims

A claim-right implies two things. First, that the claim-holder has a right against other individuals (duty-holders). Second, that the duty-holder owes a corresponding duty²⁷⁸ to the claim-holder to do something (positive) or refrain from doing something (negative). Claim-rights are rights in the strict sense. So for example, let us assume that X lends money to Y. In this example, X has a right to be repaid. Moreover, X’s right imposes a corresponding duty on Y to repay X.

²⁷⁷ Hohfeld uses the term “privilege” but most scholars prefer the term “liberty”; Glanville Williams, ‘The Concept of Legal Liberty’ (1956) 56S (8) Columbia Law Review 1129.

²⁷⁸ This is sometimes known as the doctrine of logical correlativity; Joel Feinberg, ‘Duties, Rights, and Claims’ (1966) 3 (2) American Philosophical Quarterly 137; Joel Feinberg, ‘The Nature and Value of Rights’ (1970) 4 The Journal of Value Inquiry 243.

Wenar argues that claim-rights can have three different functions. They may entitle the right-holder to protection against harm or paternalism, to provision in the case of need, or to insist upon the specific performance of some agreed-upon action.²⁷⁹

Liberties

A liberty-right is a right to do or not to do something (or both). In other words, there is no duty on the right-holder to the contrary. Liberty-rights vest only in the right-holder and do not impose a corresponding obligation on anyone else. To use Hart's well-known example, a man has a right to look over the garden fence at his neighbour in that he is under no duty not to do that. However, that does not mean that the man's neighbour is under a correlative duty to allow herself to be looked at or not interfere with the man's exercise of his liberty. The neighbour is at liberty to erect a screen on her side of the fence to obstruct the man's gaze if she so chooses.²⁸⁰

Sometimes, a liberty-right may confer a single liberty on the right-holder in the form of an exemption from a general duty. So for example, James Bond's licence to kill grants him a single liberty in that it exempts him from a general duty not to kill.²⁸¹

However, a liberty-right may also be paired. That is, the right-holder may simultaneously have a right to both do or not do something. So for example, a chess player has the right to either capture or not capture his opponent's pawn en passant.²⁸² This is a paired liberty-right in that the player has a right to capture en passant (because there is no duty on him not to capture) and a right not to capture en passant (because there is no duty requiring him to capture). In other words, the player has a discretion whether to capture his opponent's pawn. The function

²⁷⁹ Leif Wenar, 'The Nature of Rights' (2005) 33 (3) *Philosophy & Public Affairs* 223, 229-230.

²⁸⁰ H. L. A. Hart, *Essays on Bentham* (Clarendon Press, 1982) 166-167.

²⁸¹ Leif Wenar, 'The Nature of Rights' (2005) 33 (3) *Philosophy & Public Affairs* 223, 226.

²⁸² A pawn attacking a square crossed by an opponent's pawn, which has advanced two squares in one move from its original square, may capture the opponent's pawn as though the latter had moved only one square; World Chess Federation, 'FIDE Laws of Chess' (adopted at the 79th FIDE Congress between 23-25 November 2008, entered into force 1 July 2009) <<http://www.fide.com/component/handbook/?id=124&view=article>> accessed 29 December 2010.

of a right that is a paired privilege is to endow the liberty-right holder with a discretion over some action.²⁸³

Powers

A power-right allows the right-holder to alter his claim-rights and liberty-rights (or those of others). More specifically, a power-right is the ability within a set of rules to change a legal relation. So for example, a judge has the power-right to pass a sentence of immediate imprisonment and so deprive a convicted defendant of his claim-right to liberty.

Power-rights are often qualified and do not apply equally to all citizens.²⁸⁴ So to continue with our example, a layman is unable to pass a valid sentence of imprisonment because he is not legally qualified and has not been appointed to the bench.

There are two types of authority which may be conferred by a power-right. A single power-right confers on the right-holder a non-discretionary authority. So for example, in certain cases, a judge may be required to pass an immediate custodial sentence. In such cases, the judge has no discretion not to pass an immediate custodial sentence. By contrast, a paired power-right confers on the right-holder discretionary authority.²⁸⁵ If we remain with our example, a judge may have a power-right to pass either an immediate custodial sentence or some other sentence (such as a suspended sentence of imprisonment).

Immunities

A right-holder has an immunity-right whenever another person lacks the ability within a set of rules to change the right-holder's legal relations. That is, to alter the right-holder's claim-rights and liberty-rights. In simple terms, immunity-rights entitle their holders to protection against harm or paternalism.²⁸⁶ So for example, a defendant who is convicted of a summary

²⁸³ Leif Wenar, 'The Nature of Rights' (2005) 33 (3) *Philosophy & Public Affairs* 223, 227.

²⁸⁴ Peter Jones, *Rights* (Palgrave, 1994) 22-24.

²⁸⁵ Leif Wenar, 'The Nature of Rights' (2005) 33 (3) *Philosophy & Public Affairs* 223, 230-237.

²⁸⁶ *ibid* 230-237.

offence punishable by a fine only, has an immunity-right against being sentenced to an immediate custodial sentence.

* * *

As we can see from this outline, rights (i.e. claims, liberties, powers, and immunities) may be found in isolation, with other incidents, or all together. Any assertion of a right can be translated into an assertion about a single Hohfeldian incident, or into an assertion about a complex of incidents, or into a set of alternative assertions about such incidents.

But what do these rights mean to those who hold them? This is a question about the function of rights. Let us turn to this now.

The function of rights: MacCormick's theory

The function of rights has given rise to a long-running debate between two competing theories: the will (or choice) theory and the interest (or benefit) theory. The former argues that a right confers on a right-holder a choice as to whether or not to do something. It accentuates freedom and self-fulfilment. The latter argues that the function of a right is to protect, not a right-holder's choices, but certain of his interests. Which theory is correct remains one of the major unresolved debates in legal philosophy.

It is beyond the scope of this thesis to embark upon a deep philosophical study of these theories. Neither is it necessary for us to resolve this debate (if that were even possible) in order to furnish an account of the function of rights. This thesis will rely upon the interest theory for an account of the function of rights. In particular, we shall rely upon the ideas of the prominent interest theorist, MacCormick. It is neither necessary nor possible, within the confines of this thesis, to set out a detailed account of MacCormick's ideas. What follows therefore is a summary of his theory.

Features common to all types of rights

MacCormick argues that all rights (legal and moral) have a number of features in common.²⁸⁷ First, he argues that rights can only exist within the confines of a normative order. Second, rights can only vest in those individuals (both natural and artificial persons) that are recognised by the given normative order. Third, the vesting of rights in an individual is dependent upon rules which are universal in tenor (i.e. they apply equally to all who qualify). Fourth, having a right relates to something which in normal circumstances is deemed to be good for the individual who possesses it. MacCormick's point is that the possession of a right itself is generally a good thing. It is important to make this clear because it does not necessarily follow from this that every right which a person possesses is actually good for him. For example, an adult individual has the right to purchase and smoke cigarettes even though it is a well-known fact (and stated very clearly on every cigarette packet) that smoking is harmful to one's health. Fifth, not everything which is good for an individual is automatically his as of right. Only those things which are actually secured to him under some rule of a normative order are his by right.

The last point requires a little more elaboration. In simple terms, to say that a person holds a particular right is to accept that that right has been secured in some way. So how does a person secure a right? MacCormick argues that it can be done in one of four ways.²⁸⁸ First, he argues that the most basic concept of any normative order is reasonable clarity about wrongs and offences (i.e. the things it is wrong to do or not to do). Thus, if something is not wrong to do, then one is normally at liberty to do that something. It is this realm of secured normative liberty that gives rise to the very existence of rights (both legal and moral). Second, the fact that an individual has a right to do something implies, at least, that doing it is not wrong. In such cases, the normative order ensures that the individual's exercise of his right is recognised and respected. Thus, the realm of normative liberty secures for the individual a sphere of competence and decision-making within which he is sovereign. Third, most normative orders provide legal remedies by which an individual may protect his rights from unjustified interference by others. Fourth, the security of an individual's rights lies in restricting the ability of all or most other individuals to change the norms under which such rights are

²⁸⁷ Neil MacCormick, 'Rights, Claims and Remedies' (1982) 1 (2) *Law and Philosophy* 337, 337-338.

²⁸⁸ *ibid* 338-346.

constituted. Thus, to the extent that a person's position is immune from change, his rights, which are already secured by the first three methods, are even more firmly secured.

The autonomous moral agent

The picture painted so far shows that human beings are autonomous moral agents. By this we mean that human beings are able to engage in practical reasoning through their capacity for self-command and self-government when dealing with dilemmas and decisions in their lives.²⁸⁹

This capacity for self-command and self-government means that a moral agent may choose to act in a particular way for a number of different reasons. He may act for self-regarding reasons which promote his self-interest. Equally, he may act for other-regarding reasons due to his commitment to others. Lastly, he may choose to act for community-regarding reasons (i.e. for the common good of the community).²⁹⁰ These three reasons can be woven into the harm principle in the following way. We might argue that self-regarding motives are welfare and ulterior interests. Similarly, we might say that other-regarding reasons are community interests, whilst community-regarding motives are governmental interests under the harm principle.

But an autonomous moral agent's capacity for self-command and self-government is not completely unfettered. We know that a moral agent has normative liberty when conduct is not wrong in that what to do is at his discretion. In short, all non-wrong options are available. But when an act is wrong, it is excluded from deliberation as an available course of action by any moral agent committed to the normative order within which it is wrong.²⁹¹

But as we have seen, this realm of normative liberty can only be secured by restricting the ability of other moral agents to change the norms under which such rights are constituted. In other words, by restricting the rights of others.

²⁸⁹ Neil MacCormick, *Practical Reason in Law and Morality* (Oxford University Press, 2008) 2.

²⁹⁰ *ibid* 16-17.

²⁹¹ *ibid* 49-50.

MacCormick argues that the insight that one is oneself autonomous entails recognition of the like autonomy of every other person.²⁹² In other words, we must recognise that other people have rights also. In this way, moral rights are dual in aspect. That is, they are reciprocal in that the wrongness of one person attacking another person entails the equal and similar wrongness of the latter attacking the former. We can mesh this idea with Hohfeld's analytical scheme which tells us that rights are corresponding. For example, a claim-right implies that the claim-holder has a right against other individuals and that those other individuals owe a corresponding duty to the claim-holder either to do or not to do something.

The recognition that other people are also autonomous has two consequences. First, it amounts to a self-imposed restriction on what we can rightly permit ourselves to do. Second, it demarcates a domain of normative liberty where we are free to act as we think best once we are satisfied that will not violate any duty or obligation or commit some crime or other form of legal wrong. The disapproval of the people with whom we live and work means that we have a self-regarding reason to respect the rights of others. This is in addition to legal sanctions which provide another self-regarding reason for abiding by the law.²⁹³

The acceptance of these two truths implies a commitment to the principles of obedience, freedom, and engagement. So far as concerns obedience, these are basic moral duties that we must fulfil to each other and that cannot legitimately be neglected or defied. So long as we fulfil these basic duties, we have freedom and, as free moral agents, are at liberty to pursue the good as we see it. But we also have the ability to limit this freedom in favour of others under the principle of engagement. That is, through promises, contracts, and many other kinds of voluntary arrangements, we can enter into obligations to others, who may also reciprocally obligate themselves in our favour.²⁹⁴

²⁹² *ibid* 93-94.

²⁹³ *ibid* 22-24.

²⁹⁴ *ibid* 3.

4. CONCLUSION

The aim of this chapter was to set out a three-part framework for analysis which would allow us to: (1) identify whether a given type of conduct is a core case of corruption (the first part), (2) compare core cases of corruption with the law in the USA to ascertain whether there are any differences in terms of coverage (the second part), and (3) analyse core cases of corruption so as to articulate the harm and wrongdoing which results from such conduct (the third part). It is submitted that the three-part framework which we have furnished satisfies all of these aims. Let us briefly review the three parts of our analytical framework.

The first part of our framework allows us to identify core cases of corrupt conduct through the application of the improper conduct offences in the 2010 Act. By applying these offences to a given type of conduct, we will be able to ascertain whether we are in fact dealing with a core case of corruption. Our decision to adopt the improper conduct offences is strengthened by the fact that the 2010 Act has been very well-received by both academics and non-governmental anti-corruption organisations alike.

The second part of our analytical framework consists of some carefully selected anti-corruption statutes from the USA. By applying these to the corrupt conduct identified by the first part of our analytical framework, we will be able to determine whether there are any major differences in terms of coverage between what is regarded as a core case of corruption in England and Wales and what is regarded as a core case of corruption in the USA.

Assuming that there are no major differences in terms of coverage, we can then begin to look at the harm and wrongdoing which results from corruption. The third part our analytical framework allows us to assess the harm and wrongdoing arising from corrupt conduct by using a streamlined and supplemented version of the harm principle. The harm principle provides us with the tools to articulate how corruption sets back the rights and interests of innocent actors. It allows us state with precision how these innocent actors are harmed (i.e. how their interests are set back) and wronged (i.e. how their rights are indefensibly violated).

Let us apply this analytical framework to a range of different case studies and embark upon the kind of systematic analysis which is currently missing from the general literature on corruption.

IV

CASE STUDIES

In this chapter, we shall apply the three-part analytical framework set out in chapter III to a range of different case studies (we shall, so far as possible, rely upon actual rather than hypothetical examples). The aim of this chapter is articulate a complete account of the harm and wrongdoing in core cases of corruption. The pattern of examination for each case study will be as follows.

First, we shall begin by determining whether our case study is a core case of corruption (there being no universally agreed list of corrupt conduct). In short, if our case study falls within the ambit of one of the improper conduct offences contained in the 2010 Act, it will be treated as a core case of corruption (i.e. bribery). This approach will ensure that we focus our attention on those case studies which are commonly regarded as being forms of corruption. This does not mean that those case studies which are not caught by the 2010 Act are automatically deemed not to be forms of corruption. It may be that these case studies are examples of corruption in the wider sense. However, as this thesis is concerned with the harm and wrongdoing in core cases of corruption, there will be no discussion about whether conduct which is not caught by the 2010 Act is or ought to be regarded as a type of corruption (in the wider sense).

Having identified that a particular case study is a core case of corruption, the second part of our analytical framework will allow us to explore whether the case study is also caught by the criminal law of corruption in the USA (at either federal or state level). The purpose of this endeavour is to gauge whether there are any major differences in terms of coverage between the law in England and Wales and the law in the USA (it goes without saying that there are likely to be some minor differences between the two jurisdictions). The aim of this comparison is to show that core cases of corruption travel well (i.e. they are transnational in nature) and therefore do not vary in any major sense between the two jurisdictions.

The third part of our analytical framework is the application of a supplemented version of the harm principle to our case studies. This is the most important part of our analysis because it will allow us to undertake the type of systematic examination of the harm and wrongdoing in corruption which is currently missing from the general literature.

The application of the third part of our analytical framework will demonstrate two important points. First, that core cases of corruption typically (though not always) give rise to three different types of harm: primary, indirect, and remote. These harms are descriptive (rather than definitional) features of core cases of corruption. Second, that there is a nexus between such harming and the wrongdoing which results from corruption. Our analysis will focus on those innocent actors whose rights and interests are set back by the corrupt acts of others. It is worth repeating that it is not our contention that primary harms are the most serious harms which flow from acts of corruption. Rather, primary harms are simply the most direct harms to result from such conduct. In any given case, the most serious harm could be any of the three harms with which we are concerned: primary, indirect, and remote.

It is also worth reiterating that there is no mechanical procedure for identifying primary, indirect, and remote harms. It is, to a large extent, a matter of judgement. This does not undermine our thesis as Feinberg himself was unable to articulate a mechanical procedure for identifying and distinguishing welfare, ulterior, community, and governmental interests.

1. BRIBERY

The paradigm form of corruption is bribery. But bribery can take many different forms. One distinction that is often made, both in the literature and in many jurisdictions such as the USA, is between bribery in the public sector and bribery in the private sector. The 2010 Act makes no such distinction on the basis that the divide between the public and private sector is difficult to demarcate and, in any event, there is no compelling reason why any distinction needs to be made. Nonetheless, since the literature and the law in the USA make this distinction, let us consider some examples from both sectors.

BRIBERY OF A PUBLIC OFFICIAL

Let us begin by examining the paradigm form of bribery: bribery of a public official. Since the coming into force of the 2010 Act on 1 July 2011, there has been one successful prosecution under the 2010 Act for bribery of a public official.

The facts can be stated fairly shortly.²⁹⁵ The defendant, Munir Patel, was employed as an Administrative Officer at Redbridge Magistrates' Court. A member of the public, Jayraj Singh, telephoned the court and spoke to Patel in connection with a summons that he had received for a road traffic offence. Later that day, Patel returned Singh's telephone call and offered to "get rid of" the summons in return for £500. Singh said that he would think about it but instead contacted *The Sun* newspaper to report the matter. A reporter from *The Sun* newspaper devised a sting operation. As part of the sting, Singh met with Patel and handed over £500. The latter was covertly filmed accepting the bribe. Patel explained that he got rid of summonses by omitting to enter their details into the court's computer database.²⁹⁶ Following the transaction, the police were furnished with the evidence gathered during the sting.

As a direct result, the police subsequently arrested and charged Patel with one count of bribery contrary to section 2 of the 2010 Act and one count of misconduct in a public office (for advising members of the public on how to avoid being summonsed to court for road traffic offences). In addition, Patel was also charged with seven counts of possession of an article for use in fraud (a search of his premises revealed a number of blank invoices from a garage which were intended to help members of the public avoid prosecutions for road traffic offences). He pleaded guilty to both bribery and misconduct in a public office. The seven counts of possession of an article for use in fraud were left to lie on the file (i.e. not to be proceeded with without leave of the Crown Court or the Court of Appeal).

Following an adjournment for a pre-sentence report, Patel was sentenced to three years' imprisonment for bribery and six years' imprisonment for misconduct in a public office to run concurrently (the latter was subsequently reduced on appeal to four years' imprisonment).²⁹⁷ In passing sentence, HHJ McCreath made, inter alia, the following remarks:

²⁹⁵ Summarised from *R v Munir Patel* [2012] EWCA Crim 1243.

²⁹⁶ Owen Bowcott, 'Magistrates' Court Clerk is First to be Convicted Under Bribery Act' *The Guardian* (London, 14 October 2011) <<http://www.guardian.co.uk/law/2011/oct/14/magistrates-court-clerk-bribery-act>> accessed 14 April 2012; Frances Gibb, 'Clerk of Court is Convicted of Bribery' *The Times* (London, 15 October 2011) <<http://www.thetimes.co.uk/tto/news/uk/crime/article3195319.ece>> accessed 14 October 2012.

²⁹⁷ *R v Munir Patel* [2012] EWCA Crim 1243.

Your position as a court clerk had at its heart a duty to uphold and protect the integrity of the criminal justice process. What you did was to undermine it in a fundamental way.

By doing what you did, you created a danger not only to the integrity of the process but also to public confidence in it. The harm you did was not just to the process. It extended more widely because by your actions a number of people who should have been subject to monitoring and control by way of the imposition of penalty points avoided that. The penalty point system has two aspects. The obvious one is that it puts bad drivers off the road for a period of time. The other one is that it is a wake-up call to many. We all know of motorists whose driving habits are transformed when points are added to their licences through fear of the consequences of further offending.

And it should not be forgotten that the imposition of penalty points is a relevant matter for insurance companies. Bad drivers pose a higher risk than good ones. One of the effects of your offending was that insurers were carrying risks at an inappropriate cost, insuring bad drivers as if they were good ones.²⁹⁸

Let us apply our analytical framework to this set of facts.

Part 1: The 2010 Act

The facts of this case will obviously fit the first part of our analytical framework. We know that it falls within the ambit of the improper conduct offences because it was successfully charged and prosecuted under section 2 of the 2010 Act. We can therefore be brief in our analysis.

Recall that Patel was charged with an offence of being bribed contrary to section 2. Our working summary tells us that a person is guilty of being bribed if he requests, agrees to

²⁹⁸ Judiciary of England and Wales, 'R v Munir Patel (Southwark Crown Court): Sentencing Remarks of HHJ Alistair McCreath' (Press Release, 18 November 2011) <<http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/munir-patel-sentencing-remarks.pdf>> accessed 19 November 2011.

receive, or accepts an advantage in one of four scenarios. First, with the intention of performing a relevant function or activity improperly (case 3). Second, where the request or receipt of the advantage itself constitutes an improper performance of a relevant function or activity (case 4). Third, as a reward for having improperly performed a relevant function or activity (case 5). Fourth, in anticipation of receiving an advantage performs a relevant function or activity improperly (case 6).

There is little difficulty in establishing that Patel either requested, agreed to receive, or accepted an advantage from Singh. It is clear from the evidence that he not only requested a financial advantage of £500 but he also accepted the same. However, in order to satisfy section 2, we must also satisfy one of cases 3 to 6. In the present case, it is submitted that cases 3 and 4 are applicable. It is important to remember that there is a fundamental difference between cases 3 and 4. Whereas the former requires proof of mens rea (intention), the latter is strict liability. Let us consider both.

In order to satisfy case 3, it must be shown that Patel received the advantage with the intention of performing a relevant function or activity improperly. In the context of the present example this is fairly easy to satisfy. We know that Patel requested and accepted an advantage of £500 in return for not entering the details of Singh's summons into the court's computer database. Moreover, given that Patel contacted Singh and instigated the transaction, it is submitted that a tribunal of fact would have little hesitation in inferring that Patel's intention in requesting the payment of £500 was to perform a relevant function or activity improperly.

There is also no doubt that Patel was performing a relevant function or activity. It is clear from the evidence that he was engaged in a function of a public nature. That is, because he was employed as a public official and was responsible for inputting details of summonses into the court's computer database. It is submitted that this imposed on him a duty to act in good faith. He had no discretion in the matter. A reasonable person looking at the facts would have no hesitation in finding that Patel had breached this duty to act in good faith when he solicited a payment of £500 in return for not entering the details of Singh's summons into the court's computer database. It is immaterial that Patel did not actually fulfil his end of the bargain since the 2010 Act is concerned with corrupt conduct rather than results.

However, even if we are wrong about this, it is arguable that the facts of the present case also satisfy case 4 (which imposes strict liability). Section 2 states that a person is guilty of being

bribed if he requests, agrees to receive, or accepts an advantage in circumstances where the request or receipt of the advantage itself constitutes an improper performance of a relevant function or activity (case 4). It is trite that a public official should neither solicit nor accept bribes in the performance of their duties. That being so, it follows that Patel's request (let alone his acceptance) of an advantage constituted an improper performance of his function as a public official.

As a matter of completeness, it is worth pointing out that both Singh and *The Sun* newspaper could also have been prosecuted under the 2010 Act. Singh's behaviour in paying a bribe of £500 to Patel in order to induce the latter not to enter the details of his summons into the court's computer database constituted the offer of a bribe contrary to section 1 (either case 1 or case 2). As to *The Sun* newspaper, it arguably committed an offence of failing to prevent bribery contrary section 7 insofar as its employees (the reporter and the editor) authorised the payment of £500 to Singh who in turn paid Patel. However, in the context of the present case, it is clear that such prosecutions would not have been in the public interest.

Part 2: The law in the USA

Let us now consider whether Patel's case is caught by the law in the USA. Of the two general federal anti-corruption statutes, we can immediately discount the FCPA as our example does not involve the bribery of a foreign public official. Let us see whether the second general anti-corruption statute, 18 USC § 201(b)(2), is applicable.

It will be recalled that 18 USC § 201(b)(2) makes it an offence for a public official to corruptly accept anything of value in return for being influenced in his capacity as a public official. In the present case, it is arguable that Patel satisfies all of these elements. He was a public official who corruptly (i.e. with a consciousness of wrongdoing) accepted an inducement of £500. The wrongdoing consisted of Patel's promise that he would, in return for the payment of £500, omit to properly perform his duty as a public official by not entering the details of Singh's summons into the court's computer database.

Thus, we can see that in terms of coverage, bribery of a public official is contrary to the criminal law in both England and Wales and the USA. As the paradigm form of bribery, this is to be expected. But this coverage also lends support to our claims that core cases of corruption

travel well, and that our account of the harm and wrongdoing in corruption in England and Wales has normative force.

Part 3: Harm and wrongdoing

Let us now apply the third part of our analytical framework. At first sight, it might be thought that Patel's offending was harmless. After all, Singh suffered no loss and the other unidentified defendants whom Patel assisted actually benefited from Patel's actions. However, this view of harming is incomplete. As we shall see, Patel's conduct caused harm in a number of different dimensions. Some of these harms were referred to by HHJ McCreath when he sentenced Patel.

Let us begin by identifying the primary harm which resulted from Patel's misconduct. The obvious victim in our example is Singh. However, if we pause to consider the facts, this description seems artificial. There is no doubt that Singh was inconvenienced but to describe him as a victim may be stretching matters too far. We can support this view by noting that Patel's misconduct did not directly set back any identifiable welfare or ulterior interests which Singh may have had. In other words, the harm principle tells us that Singh did not suffer any personal setbacks to his interests.

In the alternative, it might be argued that the victims of Patel's misconduct were the other defendants who had been summonsed to court but were unable to avail themselves of Patel's services. However, this argument is flawed because it presupposes that what Patel was doing was lawful. Given that Patel was not providing a lawful service, it follows that the other defendants were not entitled to use his services. In short, they received sentences which were entirely commensurate with their own misdoing, and there were no direct setbacks to their interests as a result of Patel's misconduct.

The other candidate for a victim is the public at large. There is little doubt that Patel's misconduct undermined the proper functioning of the administration of justice in which we all have an interest. However, the harm principle tells us that this is a generalised harm to the public interest.

In the context of the present case, it is submitted that the primary victims were those insurance companies whose interests were wrongfully set back by Patel's corrupt conduct. As HHJ McCreath noted, the imposition of penalty points is a relevant factor for insurance

companies. Bad drivers pose a higher risk than good drivers. As a direct result of Patel's misconduct, these insurance companies were carrying risks at an inappropriate cost and effectively insuring bad drivers as if they were good drivers.

Moreover, the insurance companies no doubt charged reduced premiums in the case of these bad drivers because they assumed, as a result of Patel's misconduct, that they were good drivers. Not only did this deprive these insurance companies of valuable revenue, it also meant that they were exposed to a risk (i.e. the likelihood of the insured driver being at fault for a road traffic accident) which they had not fully appreciated (due to Patel's misconduct).

In short, as HHJ McCreath remarked, bad drivers pose a higher risk than good ones. It is for this reason that insurance companies tend to charge higher premiums in the case of bad drivers. As a result of Patel's action, these insurance companies suffered a financial loss. This loss was incurred in at least three ways. First, as we have mentioned, a loss in revenue through the charging of reduced premiums. Second, the insurance companies may also have had to settle insurance claims on behalf of bad drivers whom, in the ordinary course of events, they would have declined to insure. Third, they may have had to settle insurance claims on behalf of bad drivers who should not have been driving at all (i.e. because they would have been disqualified from driving but for Patel's failure to enter the details of their summonses into the court's computer database).

For an insurance company, any setback to its financial interests constitutes a setback to its welfare interests. If an insurance company is unable to charge the correct premiums, and is required to regularly pay out on claims that it would ordinarily not be responsible for, it goes without saying that it is unlikely to flourish as a business. Thus, we can see that Patel's misconduct harmed the financial interests of these insurance companies.

As to the indirect harm resulting from Patel's misconduct, we have already alluded to this. It is submitted that the public have an interest in the proper functioning of the administration of justice. Most people (though not necessarily all people) have an interest in a fair and impartial criminal justice system. Patel set back this important public interest by engaging in corrupt conduct which undermined the proper administration of justice. In addition, as HHJ McCreath remarked, Patel's actions also undermined the integrity of the criminal justice system and the public's confidence in it.

Let us now consider some of the remote harms stemming from Patel's misconduct. At this point, our analysis neatly dovetails with the general literature on corruption. It is submitted that if the bribery of public officials became commonplace, the criminal justice system would cease to be fair and impartial. Moreover, it would most likely lose legitimacy in the eyes of the public. In addition, the corruption of some public officials may cause others to act in a similar fashion thereby leading to a spillover into other areas of government. If this were to happen, the government itself would lose legitimacy in the eyes of the people thereby leading to civil unrest.

Thus far, we have discussed the harms arising from Patel's misconduct. We have not enquired into the wrongfulness of Patel's conduct. In order to identify the wrongdoing, we must recall that the primary victims were those insurance companies whose financial interests were set back by Patel's corrupt conduct. By denying these insurance companies the opportunity to charge increased premiums of bad drivers, Patel set back their financial interests. As against Patel, the insurance companies had a right to non-interference with this important interest. The harm principle tells us that financial interests are to be regarded as welfare interests. Moreover, the harm principle tells us that welfare interests are so important that any setback to these interests constitutes a wrong. Thus, we can see that Patel wronged these innocent insurance companies insofar as his misconduct interfered with their financial interests and thus deprived them of valuable revenue. The fact that the loss was likely to have been relatively small does not detract from the fact that the insurance companies were wronged in this way. In short, it is clear that there is a nexus between the primary harm and the wrongdoing suffered by the insurance companies. By virtue of his misconduct, Patel not only harmed the financial interests of these insurance companies, he also wronged them.

Additionally, it might be argued that the insurance companies were also wronged in another way. It is clear that they had a financial interest in the penalty points system, and therefore a real interest in the integrity of the criminal justice system. It is submitted that this in turn generated a moral right that the actors working in the system (such as Patel) would act with integrity. Patel's misconduct breached that moral right.

BRIBERY IN THE PRIVATE SECTOR

Let us now consider an example of bribery in the private sector. By this we mean a commercial transaction which takes place between two actors in the private sector.

In 2002, an undercover reporter from *The Sunday Times* approached two senior members of staff at Pembroke College, Oxford.²⁹⁹ Posing as a wealthy banker, he offered to make a donation of £300,000 in order to secure a place for his (fictitious) son on a law degree course. The banker explained that his son wished to attend Oxford but was not certain of achieving the required grades. He was informed by John Platt (a former admissions tutor and senior fellow at the college) and Mary-Jane Hilton (the college's chief fundraiser) that they could create an extra place for his son on the law degree course in return for the donation.

Platt revealed that similar deals had been struck in the past owing to the poor financial health of the college. He explained that there was normally a quota for the law degree course and that those places were awarded to the best students. However, if the banker were to make a donation, pressure could be brought to bear upon tutors to create an extra place (under the college admissions system, the tutors make the final decision on which students are awarded a place).

We should add that no donation was actually made and the college did not create or offer a place on the law degree course. Let us see how this example of bribery in the private sector fares against our analytical framework.

Part 1: The 2010 Act

There is no dispute that Platt and Hilton were both approached by the undercover reporter and offered a bribe. It therefore follows that we are dealing with a case of passive bribery (i.e. an offence of being bribed). As to this, section 2 of the 2010 Act states that a person is guilty of being bribed if two conditions are met. First, he requests, agrees to receive, or accepts an advantage. This criterion is easily satisfied on the facts of the present case as both Platt and Hilton made it clear in no uncertain terms that they were agreeable to accepting an inducement from the banker in the form of a donation to the college. There is no suggestion that either Platt or Hilton intended to keep any of the money for themselves. Rather, it is abundantly clear that they intended for the college to benefit from the donation. However,

²⁹⁹ Jonathan Calvert, 'Revealed: Degrees for Sale at Oxford College' *The Sunday Times* (London, 24 March 2002) News 1; Jonathan Calvert, 'Money Talks at Oxford' *The Sunday Times* (London, 24 March 2002) News 3.

this is immaterial as the 2010 Act allows for the payment of an advantage to another (in this case the college).

The second part of section 2 requires the satisfaction of one of cases 3 to 6. In the present example, it is submitted that only cases 3 and 4 are applicable. It will be recalled that the one of the main differences between the two lies in the fact that case 3 requires proof of mens rea (intention) whereas case 4 is strict liability.

In order to satisfy case 3, we must show that Platt and Hilton agreed to accept the advantage with intention of performing a relevant function or activity improperly (whether by themselves or by another person). In the present case, we know Platt and Hilton were both employed by the college and spoke to the reporter in course of their employment (a relevant function or activity). Moreover, it is submitted that a reasonable person would hold that both Platt and Hilton, by virtue of their positions, were required to act in good faith (as with all employees). The evidence shows that they failed to do this. Instead, they made it clear to the reporter that they would be willing to bend the rules in return for the donation. This was not just an empty promise. It will be recalled that Platt revealed that similar deals had been struck in the past owing to the poor financial health of the college. In short, it is submitted that on the facts of the present example, the second part of section 2 (case 3) is also satisfied.

As to case 4, it will be recalled that this imposes strict liability. In order to satisfy case 4, it must be shown that the request or receipt of the advantage itself constituted an improper performance of a relevant function or activity. This need not detain us for long. We have already concluded that both Platt and Hilton were performing a relevant function or activity which imposed upon them a duty to act in good faith. In other words, they were required to act in a lawful manner. By agreeing to accept a bribe, they breached this duty. Thus, we can see that case 4 is also satisfied.

Before moving on to the second part of our analytical framework, we must say something about the liability of both the undercover reporter and the college. The position of the undercover reporter is fairly easy to deal with as his conduct is caught by section 1. It is clear that he offered an advantage with the intention of inducing Platt and Hilton to perform a relevant function or activity improperly (case 1). However, as with our previous example, it is submitted that it is not generally in the public interest to prosecute investigative journalists. By contrast, the college would not be caught by section 7 (failing to prevent bribery) since

neither Platt nor Hilton were involved in active bribery (they were guilty of being bribed contrary to section 2).

Part 2: The law in the USA

Since we are dealing with a case of private sector bribery, we must turn to the California Penal Code § 641.3 for assistance. Section 641.3 states that a person (R) is guilty of being bribed if he: (1) corruptly solicits, accepts, or agrees to accept from a person (P) who is not his employer, (2) an inducement (other than in trust for his employer), (3) without his employer's consent, (4) in return for using his position for the benefit of P.

Dealing with the first criterion, we know that Platt and Hilton agreed to accept a substantial inducement from a person other than their employer. The crucial question is whether this agreement to accept an inducement was corrupt. Section 641.3(d)(3) states that to be corrupt, the recipient must have intended to injure or defraud his employer or any competitor of his employer. At first sight, it might be thought that this is not satisfied as there was no intention by Platt and Hilton to injure the college. Rather, it is clear that they intended to benefit the college. However, whilst this may be true, it is submitted that Platt and Hilton's conduct did result in injury to the other constituent colleges of the University of Oxford. The receipt of an additional £300,000 would have allowed Platt and Hilton's employer, Pembroke College, to outmuscle other colleges in terms of attracting academic staff and students (i.e. by offering higher salaries and scholarships). Of course, the difficulty for us is showing that Platt and Hilton intended to injure the other constituent colleges. In the absence of further evidence, it is difficult to establish this as their intention and so satisfy the first criterion.

Turning to the second criterion, it might seem like this is not satisfied on the facts. However, although Platt and Hilton agreed to receive an inducement of £300,000 for the benefit of the college, it cannot be said that this was received in trust. By breaching their fiduciary duty to the college, they acted in bad faith and therefore in a way which was not in the college's best interests. Let us therefore hold that the second criterion is satisfied.

The third and fourth criteria are dealt with more easily. It is clear from the facts of our example that Platt and Hilton were acting without the consent of the governing body of the college. In addition, we know that in return for receiving the inducement, they agreed to pressure college tutors into creating an extra place on the law degree course.

We can see from this analysis that our current example is not caught by section 641.3(d)(3). However, it is submitted that this difference in coverage is due only to the stricter culpability requirements in section 641.3(d)(3) as opposed to any other reason (i.e. the need to show that R intended to injure or defraud his employer or a competitor of his employer).

Part 3: Harm and wrongdoing

Unlike our previous example, the primary victim of Platt and Hilton's misconduct is far easier to identify. It is fairly obvious that Platt and Hilton's behaviour resulted in a set back to the interests of their employer, Pembroke College. It also goes without saying that a scandal played out on the front page of a national newspaper obviously constituted a serious setback to the reputation and integrity of the college. It is submitted that these two interests are of paramount importance to the college as they help to ensure that it attracts not only the best students but also valuable research grants. In order to survive as a commercial entity, the college needs to consistently attract the best students and research grants. Given the importance of these interests to the college's financial health, it is submitted that they are best viewed as welfare interests. In short, by engaging in corrupt conduct, Platt and Hilton breached their duty of loyalty to the college and thereby set back its reputation and integrity.

Let us now consider the indirect harm which resulted from Platt and Hilton's misconduct. There are two possible groups of actors who might have suffered indirect harm. The first group consists of students. There is no question of any potential applicants to the college being harmed since the extra place was created improperly. In the normal course of events, there would have been no additional place and therefore no expectation of applying for it. However, as to the existing students, it is arguable that the damage to college's reputation and integrity may have resulted in a drop in revenue. This may, in turn, have resulted in reduced opportunities for the students (e.g. in the form equipment, materials, academic staff, etc.). However, as this is speculative, we can discount this group.

The second group of victims consists of the other constituent colleges of the University of Oxford. These colleges must have suffered setbacks to their reputation and integrity as a result of Platt and Hilton's misconduct. Although the harm to these colleges would not have been as pronounced, their membership of the federal University of Oxford means that they would have suffered some harm to their reputation and integrity. The unwanted and adverse publicity may have caused some students to rethink their choice of university and set back the

ability of these constituent colleges to attract research grants. After all, organisations that are prepared to fund expensive research would want to be sure that their investment is funding the most academically able minds rather than those with the deepest pockets.

The remote harm resulting from Platt and Hilton's misconduct is fairly simple to identify. Pervasive corruption in the education system is likely to result in a number of undesirable consequences. First, it devalues the education system with the result that employers may be hesitant about employing graduates as there would be no guarantee as to quality and standards. Second, it may lead to a reduction in the number of overseas students applying to study in the UK. Given the revenue generated by overseas students studying in the UK's higher education system, any decline in numbers would constitute a huge financial loss to the UK's economy.

We can derive support for these claims from the Russian education system which is so corrupt that teachers and administrators are sustained by bribes from students. In fact, corruption is so widespread that students can buy good grades. As a result, degrees are awarded to those who are most able to pay a bribe rather than to the smartest students.³⁰⁰

Let us now consider the wrongdoing arising from our example. In order to articulate this, we must recall the primary harm. We previously argued that the primary harm arising from our example consisted of Platt and Hilton breaching their duty of loyalty to their employer by omitting to act in good faith. In so doing, they set back the college's welfare interests. Put simply, Platt and Hilton were not entitled to act in the way that they did. Their actions constituted a breach of the duty of loyalty which they owed to their employer, Pembroke College. The college not only had a right to their loyalty, it also had a right to non-interference with its welfare interests; especially by employees who ought to have realised the ramifications of their behaviour. In short, Platt and Hilton were obliged to act in ways which promoted the college's welfare interests. As a direct result of their misconduct, Platt and Hilton set back the college's welfare interests and thereby wronged it.

³⁰⁰ Sabrina Tavernise, 'A Russian Tilts at Graft (It Could be a Quixotic Task)' *The New York Times* (New York, 10 February 2003) 3.

2. NOBLE CAUSE

Noble cause is the use of improper means to secure what would, but for the impropriety, be regarded as a legitimate aim. The noble aspect of noble cause is said to be the furtherance of the common good.³⁰¹ However, not everyone views noble cause in this way. For example, the Commissioner for the Metropolitan Police has previously acknowledged that there are a small number of corrupt police officers who commit crimes and neutralise evidence in important cases.³⁰²

The most typical example consists of a police officer who fabricates evidence in order to help convict a suspect he believes to be guilty. Other examples include lying on reports, perjury, the use of excessive force, illegal surveillance tactics, and racial profiling. Although the scholarship in this area is almost exclusively concerned with the conduct of police officers, it is arguable that anybody can act for a “noble” cause (e.g. expert witnesses, politicians, judges, etc.).

The reader may be sceptical about whether noble cause is properly described as a type of corruption. However, it is apparent from the general literature that noble cause is not only regarded as being a type of corruption, it is regarded as being a core case of corruption based on analogical reasons.³⁰³ In short, it is said to be a core case of corruption because it shares some (though not all) of the characteristics of bribery.

Miller argues that when police officers act in accordance with the law they simultaneously perform three tasks. They do what is morally right, they act in ways which are lawful, and they act in accordance with the will of the community.³⁰⁴ When a police officer engages in noble cause corruption, he violates all three of these duties. Since the 1970s, there have been a number of high profile miscarriage of justice cases in which the presence of noble cause corruption has subsequently been discovered. Some well-known examples include the cases of

³⁰¹ Thomas J. Martinelli, ‘Unconstitutional Policing: The Ethical Challenges in Dealing with Noble Cause Corruption’ (2006) 73 (10) *Police Chief* 146.

³⁰² Select Committee on Home Affairs, *Police Disciplinary and Complaints Procedure* (1997-98, HC 258-I) 1.

³⁰³ Edwin J. Delattre, *Character and Cops: Ethics in Policing* (American Enterprise Institute, 1989); John Kleinig, ‘Rethinking Noble Cause Corruption’ (2002) 4 (4) *International Journal of Police Science and Management* 287.

³⁰⁴ Seumas Miller, ‘Noble Cause Corruption in Policing’ (1999) 8 (3) *African Security Review* 12.

the Guildford Four,³⁰⁵ the Birmingham Six,³⁰⁶ and Judith Ward.³⁰⁷ In the cases of the Guildford Four and the Birmingham Six, it subsequently emerged on appeal that police officers had used improper methods to secure convictions.³⁰⁸ We can only speculate as to their reasons for resorting to noble cause corruption. However, it is possible that these police officers were motivated by a desire to promote the public interest based on their (erroneous) belief of the defendants' guilt. Of course, it is equally possible that they simply bowed to the immense public pressure to make arrests.

Let us analyse the cases of Judith Ward and the Birmingham Six by reference to our analytical framework.

JUDITH WARD

In September 1973, a bomb exploded at Euston Station injuring several people and causing damage. In February 1974, a second bomb exploded on a coach carrying soldiers and their families along the M62 motorway. Twelve people died. A week later a third bomb exploded at the National Defence College in Latimer injuring a number of people and causing damage. The explosions were all attributed to the IRA.³⁰⁹

Soon afterwards, the police arrested Judith Ward and charged her with 12 counts of murder and three counts of causing an explosion. The prosecution's case at trial was largely based upon confessions and admissions which Ward had made in interviews with the police. It was the prosecution's case that these admissions were substantially supported by the scientific evidence. To this end, they called a number of forensic scientists who testified that traces of nitroglycerine had been found on Ward's hands after both the Euston and National Defence College explosions, and inside her caravan (and on various possessions) after the coach explosion on the M62. The defence argued that Ward had been suffering from a severe mental

³⁰⁵ *R v Richardson, Conlon, Armstrong, and Hill*, The Times, 20 October 1989 (CA).

³⁰⁶ *R v McIlkenny, Hill, Power, Walker, Hunter, and Callaghan* [1991] 93 Cr App R 287.

³⁰⁷ *R v Ward* [1993] 1 WLR 619.

³⁰⁸ Ian Dennis, 'Miscarriages of Justice and the Law of Confessions: Evidentiary Issues and Solutions' [1993] Public Law 291, 291-297.

³⁰⁹ *ibid* 298-299.

disorder which meant that the admissions she had made could not be relied upon as being true.

The jury rejected the defence and found Ward guilty on every count. She was sentenced by Waller J to life imprisonment on each of the 12 counts of murder and a total determinate sentence of 30 years' imprisonment for the three counts of causing an explosion.

In 1992, after serving nearly 18 years in prison, Ward's convictions were quashed as unsafe by the Court of Appeal.³¹⁰ During the appeal, it emerged that, inter alia, three of the forensic scientists called by the prosecution had taken "the law into their own hands, and concealed from the prosecution, the defence and the court, matters which might have changed the course of the trial."³¹¹ For example, they had suppressed data and knowingly placed a false and distorted scientific picture before the jury. The Court of Appeal held that they had misled both the prosecution and the defence in order to promote a cause which they had made their own, namely that Ward had been in contact with nitroglycerine.

We can see from the facts of this example that the three forensic scientists resorted to the use of improper means in order to promote an otherwise legitimate aim (assisting with a criminal prosecution). In other words, they were engaged in noble cause corruption. Let us see how the behaviour of the forensic scientists fares against our analytical framework.

Part 1: The 2010 Act

Perhaps the first thing to note is that it is not immediately apparent whether our example falls within the ambit of section 1 (offences of bribing another person) or section 2 (offences relating to being bribed). However, upon reflection, it is submitted that section 2 is not applicable as the forensic scientists neither requested, agreed to receive, nor accepted an advantage. Rather, it is submitted that it was they who conferred an advantage. Let us see whether the conduct of the forensic scientists is caught by section 1.

³¹⁰ *R v Ward* [1993] 1 WLR 619.

³¹¹ *ibid* at 674.

Recall our working summary of section 1. This states that a person (P) is guilty of bribing another person if two conditions are satisfied. First, P offers, promises, or gives an advantage to another person (R). Second, P does this with the intention of either inducing R to perform a relevant function or activity improperly (case 1) or in the knowledge or belief that the acceptance of the advantage would itself constitute the improper performance of a relevant function or activity improperly by R (case 2).

The first criterion essentially deals with the actus reus of section 1. Although the forensic scientists did not offer or promise an advantage to another person, it is arguable that they gave an intangible advantage to another person (i.e. prosecution counsel). That is, by suppressing data and knowingly placing a false and distorted scientific picture before the jury, they furnished prosecution counsel with an evidential advantage.

Of course, the sceptical reader will point to the fact that prosecution counsel was no doubt unaware that he had been furnished with an advantage. Whilst this might seem like an attractive counter-argument, it does not impact upon the operation of section 1. The reason for this is that the focus of section 1 is on the conduct of P rather than R (it will be recalled that the 2010 Act is concerned with conduct and not results).³¹² In short, it is not a requirement of section 1 that R (i.e. prosecution counsel) must be aware that he has been provided with an advantage for the purposes of inducing him into performing a relevant function or activity improperly.

We can demonstrate this point more clearly with a simple example. Let us suppose that P offers an advantage to R in order to induce him into performing a relevant function or activity improperly. Let us further suppose that R is unaware as to the quality of the offer (i.e. he does not appreciate that he is being offered a bribe). In this scenario, we would have no hesitation in holding that P is guilty of bribery contrary to section 1 (case 1). That being so, it is submitted that the same applies to the present example. The forensic scientists furnished prosecution counsel with an advantage. The fact that prosecution counsel was unaware that

³¹² Director of the Serious Fraud Office and the Director of Public Prosecutions, *Bribery Act 2010: Joint Prosecution Guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions* (30 March 2011) 5.

an advantage had been conferred does not detract from the fact that the forensic scientists had provided him with an advantage. Let us therefore hold that the first criterion is satisfied.

We must now turn to the second criterion. This essentially deals with the mens rea of section 1. In short, P's offering, promising, or giving of an advantage must have been made with the intention of either inducing R to perform a relevant function or activity improperly (case 1) or in the knowledge or belief that the acceptance of the advantage would itself constitute the improper performance of a relevant function or activity by R (case 2).

Let us begin by looking at case 1. It is submitted that the central question in this respect is whether the forensic scientists intended by their misconduct to induce prosecution counsel into performing a relevant function or activity improperly. Whilst there is no suggestion that prosecution counsel was privy to the forensic scientists' misconduct, it must follow that as a result of the forensic scientists' misconduct, prosecution counsel was misled into presenting a case which he would otherwise not have presented. Moreover, this must have been the intention of the forensic scientists as it is the only logical explanation for their misconduct.

There is support for this in the judgment of the Court of Appeal which found that the forensic scientists' had deliberately concealed from the prosecution, the defence, and the court, matters which might have changed the course of the trial.³¹³ They had suppressed data and knowingly placed a false and distorted scientific picture before the jury. The only party that could have benefited from this misconduct was the prosecution.

That being so, the next question is whether the forensic scientists' misconduct resulted in prosecution counsel performing a relevant function or activity improperly. We can be fairly confident in asserting that prosecution counsel was performing a function or activity of a public nature. However, even if we are wrong about that, there is no doubt that prosecution counsel was acting in the course of employment. Moreover, it is submitted that by virtue of his position, prosecution counsel was under a duty to act impartially. There is ample support for this proposition in the case law. For example, in *Puddick*³¹⁴ it was held that prosecution counsel is a minister of justice and should not struggle for a conviction.

³¹³ *R v Ward* [1993] 1 WLR 619 at 674.

³¹⁴ (1865) 4 F & F 497.

In view of this, it is submitted that a reasonable person would have no hesitation in holding that the forensic scientists' misconduct caused prosecution counsel to inadvertently breach his duty of impartiality. Let us therefore hold that the misconduct of the forensic scientists is caught by section 1 (case 1) of the 2010 Act as a core case of corruption.

However, even if we are wrong about the application of case 1, it is submitted that case 2 is also satisfied. It will be recalled that case 2 states that P's offering, promising, or giving of an advantage must have been provided in the knowledge or belief that the acceptance of the advantage would itself constitute the improper performance of a relevant function by R. We can deal with this fairly quickly. It must have been obvious to the forensic scientists that it was improper for prosecution counsel to place misleading evidence before the jury, whether knowingly or not. Thus, we can see that case 2 is also satisfied.

Part 2: The law in the USA

Let us now apply the second part of our analytical framework. As our example is not concerned with the bribery of a foreign public official, a restraint of trade, insider dealing, or private sector bribery, we can discount the FCPA, the Sherman Act 1890, the Securities Exchange Act 1934, and the California Penal Code § 641.3. Let us move straight on to 18 USC § 201. This federal statute states that a person is guilty of bribery if he corruptly gives anything of value to a public official in order to influence the public official in his official capacity. Section 201 is remarkably similar to section 1 (case 1) of the 2010 Act.

Taking matters out of turn, it is helpful to begin with the question of whether prosecution counsel can be described as a "public official". It will be recalled that the term "public official" has been interpreted widely so as to include any person acting on behalf of any branch of the government in any official function. It is submitted that this interpretation is wide enough to include counsel engaged in the prosecution of a criminal trial.³¹⁵

That being so, let us now consider whether the forensic scientists gave anything of value to prosecution counsel in order to influence him in his official capacity (we shall return to the

³¹⁵ The only minor difference is that in England and Wales prosecutions are brought on behalf of the Crown whereas in the USA they are brought on behalf of the state or the federal government.

question of whether the forensic scientists acted “corruptly”). As to this, we have already established that the forensic scientists gave prosecution counsel “a thing of value” in the form of an evidential advantage. Under section 201, a thing of value includes both tangible and intangible items. It is arguable that the forensic scientists’ misleading testimony is an intangible thing of value.

Any hesitation as to this conclusion can be dispelled by looking at the matter from a different perspective. Let us imagine that prosecution counsel was privy to the forensic scientists’ misconduct and knowingly placed misleading testimony before the jury. In this situation, we would have no hesitation in holding that prosecution counsel had been influenced in his capacity as a public official. That being so, it is submitted that the same applies even though prosecution counsel was unaware that the forensic scientists had given misleading evidence.

However, it is not enough for a thing of value to have been provided to prosecution counsel. Section 201(b)(1) states that a thing value must have been given “corruptly” in order to influence a public official in his official capacity. It will be recalled the term “corruptly” means a specific intent to give or receive something of value in exchange for an official act. In short, it imposes a quid pro quo requirement.

In the present case, there is little difficulty in satisfying this since it is clear that prosecution counsel (unintentionally) presented an unfair case against Ward (which resulted in her conviction and imprisonment) as a direct result of the forensic scientists’ misconduct. Moreover, there can be little doubt that this is what the forensic scientists intended to achieve. It is important to note that the quid pro quo requirement in section 201(b)(1) does not require any knowledge or reciprocation on the part of the public official. It is sufficient that the forensic scientists intended to influence prosecution counsel in his official capacity.³¹⁶

We can see from this analysis that the present example is caught by section 201. Let us now consider the harm and wrongdoing resulting from the forensic scientists’ misconduct.

³¹⁶ *United States v Labovitz* 251 F.2d 393 (3d Cir. 1958).

Part 3: Harm and wrongdoing

The primary victim of the forensic scientists' corruption was, on any view, Ward. As a direct result of their misconduct, she was wrongfully imprisoned for almost 18 years. The harm principle tells us that this resulted in a very grave and serious setback to Ward's entire network of interests. In fact, as a result of being imprisoned, a large tranche of her interests were set back including her welfare and ulterior interests (i.e. her more ultimate aims and aspirations in life). However, it is sufficient for our purposes to select the most important of these in order to illustrate the harm suffered by Ward. It is submitted that of all the setbacks to Ward's interests, the most serious setback was to her right to liberty. This welfare interest is so important (to most if not all people) that when it was unlawfully taken away from Ward, almost all her other interests were set back. We can see from this brief sketch that the primary harm resulting from the forensic scientists' misconduct was to Ward's right to liberty.

But this brief sketch only touches upon the harms suffered by Ward. If we look a bit harder, we can see that there are other innocent actors who were indirectly harmed by the corrupt acts of the forensic scientists. These include Ward's immediate family, extended family, friends, employer, etc. However, it is Ward's immediate family who suffered the most serious harm as they were deprived of a daughter and sister for almost two decades. It is submitted that the indirect harms suffered by Ward's family were so serious that they constituted a setback to their welfare interests (thereby wronging them). We can derive support for this argument from the fact that our right to respect for our private and family life is so important that it has been enshrined as a human right and fundamental freedom.³¹⁷ Thus we can see that Ward's family were indirectly harmed by the corrupt conduct of the forensic scientists.

Let us now consider the remote harm arising from the misconduct of the forensic scientists. As to this, we can borrow from the general literature on corruption the likely effects of pervasive corruption on the legal system. It is easy to imagine how pervasive corruption might undermine the integrity of the legal system (both criminal and civil). If witnesses (including expert witnesses such as forensic scientists) were allowed to manipulate the trial process, the

³¹⁷ The Human Rights Act 1998 gives effect to article 8 (right to respect for private and family life) of the Convention for the Protection of Human Rights and Fundamental Freedoms (signed by the UK on 4 November 1950, ratified on 8 March 1951, entered into force 3 September 1953).

integrity of the legal system would be undermined. A legal system which lacks integrity is unlikely to command the respect of the general public. When the legal system cannot be relied upon by the public to resolve legal disputes (both criminal and civil), there is likely to be a spillover in terms of civil disorder and unrest.

The harm principle tells us that a properly functioning legal system is a public interest. It is something which we all have an interest in by virtue of our membership of society. A setback to the proper operation of the legal system (a governmental interest) therefore results in remote harms to individual members of society.

We must now consider the wrongdoing resulting from our example. To this end, we must recall the serious setback suffered by Ward as a result of the forensic scientists' misconduct. It is submitted that the forensic scientists' actions constituted an unjustified and inexcusable interference with Ward's moral right to liberty. When this important fundamental right was set back, Ward was simultaneously wronged. This is not difficult to understand given that she was wrongfully deprived of her right to liberty for almost 18 years. This deprivation of liberty constituted an unlawful interference with her autonomy and her ability to make self-regarding decisions about her life. We can support this proposition by reference to the fact that Ward's unlawful detention meant that she was denied the opportunity of pursuing and advancing most of her interests (e.g. obtaining employment, starting a family, etc.). In short, it is fairly obvious that the wrong suffered by Ward was of a particularly egregious nature.

Let us consider another example of noble cause corruption.

THE BIRMINGHAM SIX

In 1974, IRA bombs exploded in two public houses in Birmingham killing 21 people and injuring 162 others. Shortly afterwards, six men were arrested in connection with the matter. Following extensive interrogation, four of the six signed written confessions and, according to the evidence of police officers, the other two made oral admissions. In 1975, the six men were each convicted of 21 counts of murder and sentenced to life imprisonment.

In 1990, the Home Secretary referred their cases to the Court of Appeal following the emergence of fresh evidence (a previous appeal against conviction by the defendants and a previous referral by the Home Secretary had both been dismissed). In 1991, after serving

almost 16 years in prison, the Court of Appeal allowed the defendants' appeals and quashed their convictions.³¹⁸

Although the case against the defendants at trial was convincing, it depended heavily on scientific evidence and the testimony of police officers about their interviews with the six defendants. Before the Court of Appeal, the scientific evidence was shown to be erroneous. However, of more concern was the evidence given by the police officers at the trial. The Court of Appeal found that they had deceived the court when giving evidence. At best, they had lied. At worst, they had fabricated parts (if not the whole) of the defendants' interviews. The Court of Appeal also found that the police officers had altered statements and notes after they were first made.³¹⁹

We can see from the facts of this example that it involves the quintessential form of noble cause corruption. It is clear that the police officers in the present case resorted to the use of improper means in order to help convict the six defendants. Let us see how this example fares against our analytical framework.

Part 1: The 2010 Act

Given that it was the police officers who resorted to improper means to help convict the defendants, it is submitted that section 1 (offences of bribing another person) is applicable rather than section 2 (offences relating to being bribed).

It will be recalled from our summary of section 1 that a person (P) is guilty of bribing another person if he offers, promises, or gives an advantage to another person (R) with the intention of either inducing R to perform a relevant function or activity improperly (case 1) or in the knowledge or belief that the acceptance of the advantage would itself constitute the improper performance of a relevant function or activity by R (case 2).

³¹⁸ Ian Dennis, 'Miscarriages of Justice and the Law of Confessions: Evidentiary Issues and Solutions' [1993] Public Law 291, 295-297.

³¹⁹ *R v McKelvey, Hill, Power, Walker, Hunter, and Callaghan* [1991] 93 Cr App R 287.

There is no difficulty in establishing the first part of section 1 (the actus reus). As with our previous example, it is submitted that the police officers gave an intangible advantage to prosecution counsel. This was confirmed by the Court of Appeal which held that the police officers had tampered with the evidence and given false testimony. Of course, there is no suggestion that prosecution counsel was even aware of this. However, as we have already established, it is not a necessary ingredient of section 1 that R (i.e. prosecution counsel) need be aware that he has been furnished with an advantage.

The crucial question is whether the police officers intended by their misconduct to induce prosecution counsel into performing a relevant function or activity improperly (case 1) or in the knowledge or belief that the acceptance of the advantage by prosecution counsel would itself constitute the improper performance of a relevant function or activity (case 2).

Dealing with case 1, it is difficult to think of an innocent explanation as to why the police officers might have fabricated evidence and given false testimony. Rather, it is submitted that the only plausible explanation for their behaviour is that they must have formed a personal view that the defendants were guilty of the offences with which they had been charged. In order to ensure that the defendants were convicted (thereby promoting their personal view as to the defendants' guilt), the police officers fabricated evidence and gave false testimony. Since prosecution counsel was responsible for presenting the case for the Crown, it must be the case that the police officers intended by their misconduct to influence prosecution counsel's performance of this function or activity.

The next step is to consider whether prosecution counsel was performing a relevant function or activity. We can deal with this matter fairly swiftly since we have previously concluded that counsel acting on behalf of the Crown is engaged in a relevant function or activity for the purposes of the 2010 Act. In the context of the present case, it is submitted that prosecution counsel was performing a function of a public nature. In the alternative, he was acting in the course of his employment. Moreover, by virtue of his position as prosecution counsel and a minister of justice, he was under a duty to act impartially.

As to the question of whether prosecution counsel acted improperly, there can be no doubt that he failed to act impartially. Of course, there is no suggestion that prosecution counsel did this deliberately. Rather, it is quite clear that prosecution counsel failed to act impartially as a direct result of the police officers' misconduct. That being so, it is submitted that a reasonable

person would come to the same conclusion (i.e. that the police officers had induced prosecution counsel into performing his duties improperly). Let us therefore hold that the misconduct of the police officers satisfies section 1 (case 1) of the 2010 Act. In short, it is a core case of corruption.

As with our previous example (the case of Judith Ward), it is submitted that case 2 is also satisfied. This states that P's offering, promising, or giving of an advantage must have been provided in the knowledge or belief that the acceptance of the advantage by R would itself constitute the improper performance of a relevant function or activity by R. This point need not trouble us for long since it would have been obvious to the police officers that it was improper for prosecution counsel to place misleading evidence before the jury, whether knowingly or not. Thus, we can see that case 2 is also satisfied.

Part 2: The law in the USA

Let us now apply the second part of our analytical framework. According to the federal statute, 18 USC § 201(b)(1), a person is guilty of bribery if he corruptly gives or offers anything of value to a public official in order to influence the public official in his official capacity.

We have previously noted that the term "public official" includes any person acting on behalf of any branch of the government in any official function. We concluded that this description is broad enough to include prosecution counsel. In addition, we also argued that a "thing of value" is a reference to an inducement which may be either tangible or intangible. Lastly, we observed that the term "corruptly" refers to a specific intent to give or receive something of value in exchange for an official act (i.e. it imposes a quid pro quo requirement). Of course, the quid pro quo requirement does not require an actual exchange of benefits.

Returning to our example, it is submitted that the police officers gave prosecution counsel "a thing of value" by fabricating evidence and giving false testimony. It will be recalled that under section 201, a thing of value includes both tangible or intangible items. However, the key question is whether this intangible advantage was given corruptly. One immediate difficulty is the fact that prosecution counsel was not privy to the police officers' misconduct. In short, he did not know and had no reason to believe that evidence had been fabricated and that the police officers had given false evidence. However, this difficulty is more apparent than

real for the simple reason that there is no requirement that the recipient of the advantage (i.e. prosecution counsel) be aware that he is being offered an advantage.³²⁰ Section 201(b)(1) focuses on the intention of the bribe payer rather than the intention of the recipient. Thus, an advantage will have been conferred corruptly if the bribe payer intended to influence a public official in his official capacity.

In the present example, it must be the case that by conferring an advantage on prosecution counsel, the police officers intended to influence prosecution counsel in the performance of his duties. But section 201(b)(1) also requires a quid pro quo. It is submitted that this was satisfied when prosecution counsel relied upon the police officers' false evidence as part of the prosecution's case.

Let us therefore hold that that this example satisfies the requirements of section 201(b)(1) and is therefore an offence contrary to the federal law of the USA.

Part 3: Harm and wrongdoing

We are now ready to consider the third and final part of our analytical framework. That is, the harm and wrongdoing which resulted from the police officers' corrupt conduct.

As with the case of Judith Ward, it is submitted that the primary victims of the police officers' misconduct were the six defendants. The actions of the police officers resulted in a setback to the defendants' entire network of interests (both welfare and ulterior). However, there is no doubt that the most serious setback was to their right to liberty. As a direct result of the police officers' misconduct, the defendants were unlawfully deprived of their liberty for almost 16 years. This was a serious invasion which had the effect of setting back a whole raft of the defendants' welfare and ulterior interests. It adversely affected their ability to go about their daily lives and to do and enjoy the things that most people take for granted. Let us therefore hold that the primary harm was a setback to the defendants' right to liberty.

Turning to the question of indirect harm, it is possible to locate in the present example other actors whose interests were indirectly harmed by the corrupt conduct of the police officers.

³²⁰ *United States v Labovitz* 251 F.2d 393 (3d Cir. 1958).

The first group consists of the families of the six defendants. As we have previously discussed the impact on this group (in the context of the Judith Ward case), we can be brief in our discussion. It goes without saying that each family was deprived of a family member for a considerable period of time and that this constituted a clear invasion of their welfare interests (most people have a welfare interest in the well-being of their family). However, in addition to this, the defendants' wrongful incarceration may have set back the welfare interests of their respective families in others ways. For example, given that the defendants were men, it may be that they were the main breadwinners for their respective families. As a result of the police officers' misconduct, they were prevented from providing financial support for their families through gainful employment. However, without further information as to their domestic circumstances prior to arrest, it is difficult to assert this point in any real certainty.

The second group of actors who suffered indirect harm consists of the 162 individuals who were injured by the explosions and the families of the 21 people who were killed. It is submitted that the corrupt conduct of the police officers denied this group their right to justice. The former because they had been physically harmed and the latter because their relatives had lost their lives. As a result of the police officers' misconduct, the two explosions were not properly investigated and the perpetrators remain at large. This group of actors had a legitimate expectation that the matter would be properly investigated by the police and the perpetrators tried for their crimes. By acting in the way that they did, the police officers set back this right and denied the group their right to see the perpetrators brought to justice and punished for their wrongdoing.

Let us now consider the issue of remote harms. These are fairly easy to identify. The general scholarship tells us that if police officers routinely took to fabricating evidence and giving false testimony, there would be a complete breakdown in both policing and the criminal justice system. Not only would the public have no confidence in policing, they would also have no confidence in the administration of the criminal justice system. That being so, it easy to imagine how this could lead to a rise in lawlessness.

The public interest have a vested interest in a police force which is impartial. The job of a police officer is to investigate allegations of criminal wrongdoing, and to arrest and charge those who are suspected of having committed crimes. The public's confidence in policing is prefaced on this integrity. In the absence of such integrity, there would be little incentive for

the public to abide by the law. Let us therefore hold that the remote harm stemming from the present example is a setback to the public's interest in a fair and impartial police force.

We must now consider the wrongdoing in our example. It is trite that the defendants were wronged insofar as their right to liberty was set back. We discussed this in some detail when looking at the case of Judith Ward. But the six defendants were also wronged in another way. They were deprived of a very important right when they were denied a fair trial by virtue of the police officers' misconduct. The right to a fair trial is widely recognised as an important right. The fact that it is enshrined in English law as a human right and fundamental freedom lends considerable weight to this claim.³²¹ Both of these setbacks were so serious that they simultaneously wronged the six defendants. The net effect of these breaches was an unlawful interference with the six defendants' autonomy and personhood.

In sum, it is apparent from this example that the corrupt conduct of the police officers gave rise not just to remote harms but a number of different harms (i.e. primary harms and indirect harms). Moreover, we have seen how the police officers' misconduct adversely affected the interests of different groups of actors.

3. NEPOTISM

Nepotism is a type of favouritism towards one's kin.³²² Bellow argues that nepotism is more expansive than this insofar as it also includes favouritism towards close friends.³²³ This view is not shared by all. For example, Transparency International refer to favouritism towards close friends as a type of cronyism.³²⁴ However, despite this minor disagreement over labelling, both Bellow and Transparency International agree that nepotism and cronyism are to be regarded as core cases of corruption. In this section, Bellow's broader description is preferred simply as

³²¹ The Human Rights Act 1998 gives effect to article 6 (right to a fair trial) of the Convention for the Protection of Human Rights and Fundamental Freedoms (signed by the UK on 4 November 1950, ratified on 8 March 1951, entered into force 3 September 1953).

³²² Jeremy Pope, *TI Source Book 2000* (2nd edn, Transparency International, 2000) 197.

³²³ Adam Bellow, *In Praise of Nepotism* (Doubleday, 2003) 11.

³²⁴ Chandrashekhar Krishnan and Robert Barrington, *Corruption in the UK: Overview and Policy Recommendations* (Transparency International UK, 2011) 6.

a matter of convenience. In other words, we shall proceed on the basis that nepotism is a type of favouritism towards both one's kin and close friends.

Bellow argues that there are two types of nepotism: old nepotism and new nepotism.³²⁵ He argues that old nepotism describes a situation where a person takes active steps to secure a benefit for a family member or a friend. This can be contrasted with new nepotism which operates from the bottom up. That is, where a person exploits their family name, connections, or wealth in order to further their interests. Whilst this may seem like a neat distinction, it is submitted that it is not as clear cut as Bellow suggests. That is because there is an obvious overlap between old nepotism and new nepotism. For example, if a person takes active steps to secure a benefit for a family member, they will have engaged in old nepotism. However, if we shift our standpoint and focus instead on the conduct of the family member, we can see that the family member has engaged in an act of new nepotism by exploiting their connections. The distinction made by Bellow is therefore not as helpful as might seem at first sight and is entirely dependent on one's standpoint.

However, for the purposes of this section, there is no need to dwell on this distinction as it does not impact upon our analysis. Our concern in this section is with analysing some examples of nepotistic conduct in order to explore how such conduct fares against our analytical framework. Let us turn to this task now.

THE UNIVERSITY OF QUEENSLAND SCANDAL

In 2011, the University of Queensland became the centre of a high profile nepotism scandal. According to newspaper reports, a meeting had taken place between the scholarships office, the Dean of Medicine, and the Vice-Chancellor, Paul Greenfield. Following this meeting, Greenfield's daughter was offered a place on a highly competitive medical degree course.

However, although Greenfield's daughter had obtained the required overall position ranking, it transpired that she had not achieved the required score in the undergraduate medicines and health sciences admission test (UMAT). Notwithstanding this, she had not only been offered a

³²⁵ Adam Bellow, *In Praise of Nepotism* (Doubleday, 2003) 14.

place on the degree course but had actually commenced her studies by the time the matter came to light.³²⁶

The matter was referred by the Chancellor of the University to the Crime and Misconduct Commission³²⁷ (CMC) for investigation. Initially, the CMC indicated that it would not commence proceedings against the University as both Greenfield and the Dean of Medicine had resigned from their positions after the matter had come to light.³²⁸ However, in May 2012, the CMC reversed this decision and stated that it would begin an investigation into the affair after the Queensland Police Service referred a complaint by a member of the public regarding the commission of possible criminal offences.³²⁹ Let us apply our analytical framework to Greenfield's conduct.

Part 1: The 2010 Act

Perhaps the first thing to note about the scandal is that there is no direct evidence as to what transpired at the meeting between the scholarships office, the Dean of Medicine, and Greenfield. However, what is clear is that in the ordinary course of events, Greenfield's daughter would not have been offered a place on the degree course. There is no dispute that the degree course was highly competitive and there was no shortage of appropriately qualified students. The inference is that Greenfield used his position and influence to ensure that his

³²⁶ Bernard Lane, 'All clear' for UQ after nepotism scandal' *The Australian* (Sydney, 14 May 2012) <<http://www.theaustralian.com.au/higher-education/all-clear-for-uq-after-nepotism-scandal/story-e6frgcjx-1226354925933>> accessed 30 May 2012; Des Houghton, 'University of Queensland nepotism furore prompts changes to accountability rules' *The Courier Mail* (Brisbane, 18 May 2012) <<http://www.couriermail.com.au/news/queensland/university-of-queensland-nepotism-furore-prompts-changes-to-accountability-rules/story-e6freoof-1226359356447>> accessed 30 May 2012.

³²⁷ The Crime and Misconduct Commission is an independent law enforcement agency which was created by the Crime and Misconduct Act 2001 (Australia).

³²⁸ Crime and Misconduct Commission (Queensland), 'University of Queensland matter' (Press Release, 9 December 2011) <<http://www.cmc.qld.gov.au/news-and-media/media-releases/cmc-media-statement-university-of-queensland-matter>> accessed 30 May 2012.

³²⁹ Daniel Hurst, 'UQ nepotism scandal report to go public' *Brisbane Times* (Brisbane, 28 May 2012) <<http://www.brisbanetimes.com.au/queensland/uq-nepotism-scandal-report-to-go-public-20120528-1zenm.html>> accessed 2 June 2012.

daughter was offered a place notwithstanding the fact that she had not obtained the required UMAT score.

Another slight difficulty with our example is that it is not immediately apparent whether Greenfield engaged in active bribery (bribing another person contrary to section 1) or whether he is guilty of passive bribery (being bribed contrary to section 2). Let us analyse both and see how they fare against our example.

Recall section 1 of the 2010 Act. This makes it an offence for a person (P) to bribe another person (R). In order to satisfy section 1, P must offer, promise, or give an advantage to R with the intention of inducing R (or another person) to perform a relevant function or activity improperly (case 1) or in the knowledge or belief that the acceptance of the advantage would itself constitute the improper performance of a relevant function or activity by R (case 2).

It is immediately apparent that section 1 does not seem to fit the facts of our example. The primary difficulty is that there is no evidence whatsoever to suggest that Greenfield either offered, promised, or gave any advantage to any member of staff so as to cause them to perform a relevant function or activity improperly. Although it is arguable that the offer of a place to Greenfield's daughter constituted the improper performance of a relevant function or activity, there is no evidence to suggest that the offer was prompted by the provision of an advantage. Rather, our example taken at its highest shows that there was some collusion between the scholarships office, the Dean of Medicine, and Greenfield which led to Greenfield's daughter being offered a place on the degree course. Thus, in the absence of further evidence, it would appear that section 1 of the 2010 Act is not engaged by the facts of this particular example.

Let us consider whether section 2 (offences relating to being bribed) takes us any further. It will be recalled that section 2 states that a person (R) is guilty of being bribed if he requests, agrees to receive, or accepts an advantage in one of the circumstances set out in cases 3 to 6. In the context of the present case, it is submitted that only cases 3 and 4 are applicable. In order to satisfy case 3, it must be shown that R requested, agreed to receive, or accepted an advantage with the intention of performing a relevant function or activity improperly (whether by R or another person). By contrast, to satisfy case 4, it must be shown that R requested, agreed to receive, or accepted an advantage in circumstances where the request or

receipt of the advantage itself constituted an improper performance of a relevant function or activity by R.

If we recall the facts of our example, it is arguable that Greenfield either requested or accepted an advantage. Nothing particularly turns on which of these methods he may have relied upon. What is important is the fact that Greenfield must have colluded with the scholarships office and the Dean of Medicine in order to secure a place for his daughter on the medical degree course. As to the question of whether this should be regarded as an advantage, section 2(6)(b) of the 2010 Act makes it clear that it does not matter whether the advantage is for the benefit of R or another person. In other words, it is possible for R to request an advantage for the benefit of another person. In the present case, it is arguable that the offer of a place on the degree course constituted an advantage for both Greenfield and his daughter. As to Greenfield, it is submitted that something which promotes the well-being of one's family must be an intangible benefit especially as it also promotes one's self-interest. As for his daughter, there can be little doubt that she would have regarded as an advantage the offer of a place on a highly competitive degree course.

The next question is whether Greenfield's conduct also satisfies the requirements of cases 3 and 4. Let us begin by considering case 3. In order to prove this, we must show that by requesting and accepting an advantage, Greenfield intended to perform a relevant function or activity improperly (whether by himself or through another person). It is helpful to pause and consider this carefully as there is no evidence of what occurred at the meeting between the scholarships office, the Dean of Medicine, and Greenfield. It is submitted that after requesting an advantage for his daughter, Greenfield must have conspired with his colleagues in order to ensure that she was formally offered a place. As we have previously noted, there is no way that she would, in the ordinary course of events, have been offered a place on the medical degree course.

However, that is not the end of the matter. In order to bring our example within the ambit of case 3 we must show that either Greenfield or his colleagues performed a relevant function or activity improperly. Before we consider this, it is important to note that it is immaterial that we cannot state with certainty exactly who acted improperly. It is sufficient that we can draw an inference from the fact that one, some, or all of the conspirators must have acted improperly.

There is little difficulty with establishing that all of the conspirators were engaged in a relevant function or activity. It will be recalled that a relevant function or activity is one which is of a public nature, connected with a business, performed in the course of employment, or performed on behalf of a body of persons (corporate or unincorporate), and the person performing it is expected to act in good faith, impartially, or in accordance with a position of trust. It is submitted that in the present case, the conspirators were all acting in the course of their employment. Moreover, it is submitted that a reasonable person would expect them to discharge their duties impartially. That is, because a reasonable person would expect a university, in making offers, to do so on the basis of academic ability rather than nepotistic reasons. In short, the improper performance was the award of a place to a student who did not satisfy the entry requirements for the course. Thus, we can see that Greenfield's conduct is caught by section 2 (case 3).

However, even if we are wrong about case 3, it is submitted that case 4 is also satisfied. It will be recalled that unlike case 3, case 4 imposes strict liability. As to case 4, it is submitted that Greenfield's request (let alone the acceptance by his daughter of the advantage) to the scholarships office and the Dean of Medicine constituted the improper performance of a relevant function or activity by these actors. Moreover, given that Greenfield was the Vice-Chancellor, this would have been obvious to him. Let us therefore hold that case 4 is also satisfied.

Part 2: The law in the USA

Let us now compare our example against the law in the USA. The first of our four federal statutes, 18 USC § 201, is concerned with the bribery of public officials, jurors, and witnesses in the domestic context. However, although the phrase "public official" includes any person acting on behalf of any branch of the government in any official function or a non-government employee occupying a position of trust with federal responsibilities, it is submitted that neither Greenfield nor his colleagues at the University of Queensland fit this description. The second of the federal statutes, the FCPA, can also be excluded because it is concerned with the bribery of foreign public officials. We can also exclude the Sherman Act 1890 and the Securities Exchange Act 1934 because the present example is not concerned with restraints of trade or insider dealing.

We are therefore left with the California Penal Code § 641.3. This proscribes both active and passive bribery in the private sector. As to the former, active bribery, a person (P) commits an offence if he corruptly gives or offers to an employee (R) (who is not his own) anything of value (other than in trust for R's employer) without the consent of R's employer in return for R using his position for the benefit of P.

It is immediately apparent that this does not fit the facts of the present example. There is no evidence to suggest that Greenfield gave anything of value to his colleagues in the scholarships office or the Dean of Medicine. As an aside, the fact that the conspirators in our example all worked for the same employer (the University of Queensland) does not cause any problems in terms of the application of section 641.3 as the staff in the scholarships office and the Dean of Medicine were not Greenfield's employees.

Let us see whether Greenfield's conduct is caught by the passive bribery provisions of section 641.3. This states that an employee (R) is guilty of being bribed if he corruptly solicits or accepts from a person (P) who is not his employer anything of value (other than in trust for his employer) without the consent of his employer and in return for using his position for the benefit of P.

There is little difficulty with satisfying the majority of section 641.3. We know that Greenfield was an employee of the University of Queensland and that he solicited from his colleagues an advantage for his daughter. There is also no problem in showing that this solicitation was corrupt given that Greenfield must have realised that he was setting back his employer's interest in offering places only to the most academically able students. We are also able to satisfy the next requirement of section 641.3 which makes it clear that P cannot be R's employer. This is easily done since Greenfield's colleagues were obviously not his employer. It is also clear from the evidence that Greenfield's employer, the University of Queensland, did not consent to Greenfield's daughter being offered a place on the degree course. The difficulty comes when we try to establish the last limb of section 641.3. That is, that Greenfield used his position for the benefit of P (i.e. his colleagues). Put simply, there is no evidence that Greenfield used his position for the benefit of his colleagues. Obviously, if such evidence emerged, we would have no hesitation in holding that Greenfield's misconduct is caught by section 641.3. However, in the absence of such evidence it is clear that we are unable to satisfy the passive bribery provisions of section 641.3.

However, there is an alternative argument which might be made. Section 641.3 stipulates that in order to be guilty of being bribed, R must corruptly solicit or accept from P a thing of value without the consent of his employer, and in return for using his position for the benefit of P. It is arguable that first requirement may be satisfied by the fact that Greenfield corruptly accepted a thing of value from his daughter. That is, his daughter's acceptance of a place on the medical degree course. Given that this would have promoted Greenfield's welfare interests (he obviously had a stake in the well-being of his own family), it is arguable that his daughter's acceptance of the offer constituted an intangible benefit to Greenfield. The next requirement is easily satisfied as there is no doubt that the transaction was corrupt given that Greenfield intended to defraud the University of Queensland (by securing a place for his daughter over a better qualified student). In addition, we know that the University of Queensland did not consent to this course of conduct. Turning to the last requirement, it is arguable that this too is satisfied. Greenfield must have known that his daughter would accept the offer of a place on the degree course (she herself must have been aware that she did not have the appropriate UMAT score). That being so, it is arguable that in return for his daughter agreeing to accept the offer of a place on the degree course, Greenfield used his position for her benefit.

Although this analysis may seem a little strained, there is no reason why the facts of the present case should not be caught by section 641.3. Our hesitation stems from the fact that an intangible benefit is involved. But this hesitation is misplaced for the simple reason that we would have no difficulty if there was evidence that Greenfield's daughter had provided him with a tangible benefit (i.e. a bribe).

On the basis of this analysis, we can see that Greenfield's misconduct is caught by the passive bribery provisions of section 641.1 of the California Penal Code.

Part 3: Harm and wrongdoing

It is arguable that there are two primary victims whose interests were set back by Greenfield. On the one hand, it is clear that Greenfield's misconduct must have set back the interests of the University of Queensland. In particular, its legitimate interest in attracting the most academically able students. But it is submitted that there is another innocent actor whose interests were more seriously harmed by Greenfield's misconduct and who is arguably the primary victim in this scandal.

In short, it is submitted that the primary victim is the innocent student who was not offered a place on the medical degree course because his place was corruptly offered to Greenfield's daughter instead. Of course, it is highly unlikely that the innocent student would have been aware that his interests had been set back in this way. We can support this argument by reference to a press release from the University of Queensland.³³⁰ According to this, 11 manual offers were made to students on the medical degree course. Of these 11 students, 7 were the recipients of prestigious scholarships which marked them as amongst the "best and brightest" students. Accordingly, they were made offers despite the fact that they had not obtained the appropriate UMAT score. Another 3 places were offered to students of aboriginal or Torres Strait descent under the University of Queensland's alternative entry scheme. The remaining place was offered to Greenfield's daughter who was neither the recipient of a scholarship nor of aboriginal or Torres Strait descent. As a result of Greenfield's nepotism, an innocent student's interests were set back when his offer of a place on the degree course was made to Greenfield's daughter instead. Of course, it is possible than an extra place may have been created and therefore no other student was affected. However, this argument is misconceived since any extra place could and should have been offered in a transparent manner to the best qualified student.

It is difficult to articulate with precision the harm suffered by the innocent student. The main reason for this is that we have no information as to his personal circumstances. All things being equal, it is possible that he may have accepted an offer at another university and therefore there was no material setback to his interests. However, this does not alter the fact that he was denied the offer of a place at the University of Queensland (which obviously constitutes a setback). Of course, it is equally possible that our innocent student was unable to secure an offer elsewhere. The point is that we do not know. However, if our project is to have any utility, we must assume the worst case scenario. Let us therefore assess the harm and wrongdoing to this innocent student on the basis that as a result of Greenfield's misconduct he was unable to secure a place elsewhere.

³³⁰ University of Queensland, 'Memorandum on the making of offers into the 2011 undergraduate-entry MBBS program' (Press Release, 9 December 2011) <<http://www.uq.edu.au/about/planning-docs/2011-mbbs-program-admissions/>> accessed 2 June 2012.

It is submitted that our innocent student had a right to the offer of a place on the medical degree course. It represented the culmination of much hard work and study. Greenfield's misconduct deprived the innocent student of this opportunity and thereby breached his rights. But that is not the end of the matter. It is arguable that there were further harms which resulted from Greenfield's misconduct. A degree is usually a means to obtaining gainful employment. In the present example, the course in question was a medical degree. This meant that our innocent student's ability to practise in the medical sciences was set back when he was denied the offer of a place on the degree course. Of course, this in turn would have limited his employment opportunities (at least temporarily if not permanently) and thereby affected his financial circumstances. The harm principle tells us that a person's employment and their ability to earn remuneration are both welfare interests. Any setback to these interests constitutes a serious setback to interests. This is the primary harm resulting from Greenfield's misconduct.

Let us now consider the indirect harm which resulted from Greenfield's misconduct. We have already mentioned the setback to the interests of the University of Queensland. It is submitted that as a direct consequence of Greenfield's nepotism, the University of Queensland's interests were set back in two ways. First, it was deprived of the benefit of a better qualified student. All universities take a keen interest in their position in league tables. They can determine the funding that a university is able to attract. One way in which a university can promote this interest is by making offers of places to the brightest students. In the present case, it is clear that Greenfield's conduct set back this interest. Second, the university also suffered damage to its reputation as the matter was widely reported in the press. It is an obvious point, but no academic institution would want the kind of adverse publicity generated by this scandal.

As to the remote harms arising from Greenfield's misconduct, the general scholarship suggests that if such conduct were to become commonplace, there would be a setback to the integrity of the education system. It will be recalled from our analysis of the Pembroke College scandal (bribery in the private sector) that pervasive corruption in the education system can have a number of undesirable consequences. The general literature suggests that the education system as whole would become devalued with the result that employers would be reluctant to employ graduates as there would be no guarantee as to quality. In addition, students themselves would be deterred from applying to university as there would be no guarantee that their applications would be assessed fairly. Given the importance to the economy of an

educated workforce, it is easy to foresee the long-term harm to the economy from such corruption.

Let us now consider the wrongdoing stemming from our example. Perhaps the first thing to note is that our innocent student had a moral right to be treated on equal terms with the other students who applied for a place on the medical degree course. In the ordinary course of events, he would have been offered a place on the basis of his academic ability alone. Greenfield's misconduct indefensibly breached our innocent student's moral right to this offer. Greenfield had no legitimate basis for denying our innocent student of the offer of a place on the degree course. In short, Greenfield's misconduct wronged our innocent student insofar as it deprived him of the opportunity of accepting (or rejecting) a place on the degree course. In other words, it constituted an unlawful interference with his ability to make a self-regarding decision. It is also arguable that Greenfield set back our innocent student's welfare interests since the possession of a degree is usually a valuable commodity in the context of employment. The harm principle tells us that the invasion of a welfare interest simultaneously constitutes a wrong because of their importance to a person's ulterior interests.

A HYPOTHETICAL EXAMPLE

Our previous example was concerned with the steps taken by a father to secure the offer of a place on a medical degree course for his daughter. It is not difficult to understand the motivation for such conduct. Familial bonds are strong and people are more likely to put their family ahead of other interests and obligations. This lends support to our earlier conclusion that Greenfield benefitted from his conduct insofar as his familial interests were advanced by his nepotism.

But would our conclusion be the same if, instead of securing a benefit for a family member, Greenfield had secured a benefit for a friend? We have already established that such conduct is regarded as a core case corruption (Bellow calls it nepotism whereas Transparency International refer to it as cronyism). Let us explore this question with a hypothetical set of facts.

Let us assume that a university admissions tutor (P) is asked by a close friend to offer a place on a degree course to the latter's daughter (R). P receives no benefit (either tangible or intangible) from her friend. P obliges and offers R a place on the degree course despite the fact

that R does not possess the requisite grades. R accepts the offer of a place on the degree course. Additionally, let us assume that there are only a limited number of places available on the degree course. Let us see how this example fares against our analytical framework.

Part 1: The 2010 Act

As with our previous example, it is submitted that section 1 (offences of bribing another person) is not engaged. It is clear from the facts that P has not sought to induce another person. Let us therefore turn our attention to section 2 of the 2010 Act which is concerned with offences relating to being bribed.

In order to establish guilt under section 2, we must show that P either requested, agreed to receive, or accepted an advantage in one of the circumstances set out in cases 3 to 6. Before we consider these, we must first establish whether P requested, agreed to receive, or accepted an advantage.

As to this, it is clear from the facts that P did not request an advantage from her friend. The question therefore arises as to whether she agreed to receive or accepted an advantage from her friend. It is here that we encounter difficulties. Put simply, whilst it is relatively easy to argue that promoting the interests of one's own family is an advantage because it simultaneously promotes one's self-interest, it is much more difficult to make the same argument in respect of one's friends and their family members. It will be recalled that the harm principle tells us that there are two main types of interests: welfare interests and ulterior interests. Whilst the well-being of one's own family may properly be categorised as a welfare interest, it is difficult to argue that the well-being of one's friends is also a welfare interest. At best, it might be said that we have an ulterior interest in the well-being of our friends. Looking at the matter another way, if P were unable to offer a place to R, there would be no setback to P's welfare interests. By contrast, if P were unable to offer a place to her own daughter, there might be a setback to her welfare interests. It is submitted that this difference reflects the strength of the bond between the parties (i.e. familial bonds being stronger than the bonds of friendship).

Thus, on the basis that P only has an ulterior interest in the well-being of her friend (and R), it is difficult to see how, for the purposes of section 2, it could be argued that P either received or accepted an advantage when R accepted the offer of a place on the degree course. Whilst P

may have received some satisfaction from being able to assist her friend, it would be stretching matters to describe this as an intangible benefit to P.

Of course, it does not follow from this conclusion that nepotistic conduct which favours one's friends is not a form of corruption. This thesis does not argue that the 2010 Act is determinative of the range of conduct which may properly be regarded as corrupt. It may be the case that nepotism which favours one's friends falls under the broad umbrella of corruption whereas nepotism which favours one's family falls within the smaller subset of bribery. However, whatever the merits of this view, it is an exercise in labelling and is therefore beyond the scope of this thesis (which is concerned with the harm and wrongdoing in core cases of corruption).

Part 2: The law in the USA

Let us see whether the position in the USA is any different in terms of coverage. Once again, it is clear that the four federal statutes are not applicable. The simple reason for this is that our example does not concern the bribery of a public official (domestic or foreign), juror, witnesses, a restraint of trade, or insider dealing.

If we recall the California Penal Code § 641.3, it is evident that the active bribery provisions do not apply either. That is, because P did not corruptly give or offer to an employee (who is not her own) anything of value in return for the latter using their position for the benefit of P. Rather, as can be seen from our example, P was approached by her close friend.

The prohibition on passive bribery contained in section 641.3 states that an employee is guilty of being bribed if he corruptly solicits or accepts from a person who is not his employer anything of value (other than in trust for his employer) without the consent of his employer and in return for using his position for the benefit of that other person.

The immediate problem from our point of view is that P neither solicited nor accepted from her close friend anything of value. In addition, as we argued earlier, the acceptance by R of the offer of a place on the degree course did not constitute a thing of value for P (because it did not promote her interests). That being so, it is submitted that the passive bribery provisions of section 641.3 are not engaged either.

In short, we can see that in terms of coverage, the position is largely the same as that in England and Wales. That is, whereas nepotism involving family members is caught as a core case of corruption, nepotism involving friends is not.

Part 3: Harm and wrongdoing

We argued earlier that the fact that our hypothetical example does not satisfy the first and second parts of our analytical framework suggests that such conduct is not a core form of corruption. However, this does not preclude us from looking at the harm and wrongdoing arising from our hypothetical example. In fact, any similarities with our first example (the University of Queensland scandal) would lend analogical support to the idea that nepotistic conduct which favours one's friends is a form of corruption (in the wider sense) as opposed to a core case of corruption (bribery).

Let us begin by looking at the primary harm resulting from P's offer to R of a place on the degree course. As with our previous example, it is submitted that there are two potential victims whose interests were set back: the university and the innocent student who was deprived of the offer of a place. However, it is arguable that the harm to the innocent student is more serious than the harm to the university. Our innocent student was denied the offer of a place on the degree course which was rightfully his and which represented the culmination of much hard work on his part. Assuming the worst case scenario, it is arguable that given the importance of a degree to one's employment prospects, P's nepotism set back our innocent student's interests in this regard. We have previously argued that a person's employment and their ability to earn remuneration are both welfare interests. Any setback to these interests constitutes a serious harm. Thus, we can see that the primary harm in our hypothetical example is very similar to the primary harm in the University of Queensland case.

Turning to the indirect harm, it is arguable that the university's interests were set back by P's misconduct. That is, because P deprived the university of a better qualified student. The ability of a university to attract the brightest students has a direct bearing on two important interests. First, any dilution in the quality of students has a direct impact on a university's position in league tables. Second, if a university slides down the league tables, it may find that there is a reduction in the funding that it is able to attract. Thus, we can see that the university's interests were also set back by the corruption of P. It will be recalled that this is similar to the harm in our previous example involving the University of Queensland.

As to the remote harms arising from P's conduct, the general literature tells us that if nepotism (involving friends) were to become pervasive, it would devalue the education system with the result that employers would be reluctant to employ graduates as there would be no guarantee as to quality. In addition, students themselves may be deterred from applying to university if they know that their applications will not be considered on merit. Given the importance to the economy of an educated workforce, it is submitted that this would result in a set back to the economy. These remote harms are identical to those identified in our previous example.

Finally, let us consider the wrongdoing arising from our hypothetical example. Our innocent student had a right to be considered equally with other students for a place on the degree course. P's misconduct constituted an indefensible violation of that right.

In addition to this, it is submitted that our innocent student's welfare interests were also set back. Assuming the worst case scenario, P's misconduct set back our innocent student's ability to compete in a competitive employment market. It is generally accepted that a degree is a useful qualification when pursuing employment opportunities, especially those of a professional nature. The harm principle tells us that a person's employment is a welfare interest. It is easy to understand this since most people require remunerative employment in order to live their day-to-day lives. Without remuneration, the opportunities for most people are significantly reduced. P's invasion of this welfare interest constituted a wrong because of its importance to our innocent student's general network of interests. Thus, we can see that the wrongdoing in our hypothetical example is very similar to the University of Queensland case.

* * *

It is clear from this analysis, that the harm and wrongdoing stemming from nepotism involving family and nepotism involving friends is largely the same. The difference lies in the fact that in the former P receives an inducement whereas in the latter P does not. This is an important distinction because the presence of an inducement is a key feature in core cases of corruption (i.e. bribery). It is the central feature which distinguishes bribery from other similar activities. In the absence of an inducement, it is arguable that P's conduct is more akin to some form of misconduct. It may be well that this distinction is best reflected in terms of labelling or even sentencing.

In sum, we can see from this analysis that whilst both types of nepotism share similarities based on harm and wrongdoing, it is only nepotism involving family members which falls to be properly described as a core case of corruption.

4. MATCH-FIXING

Match-fixing describes a situation in which the outcome of a competitive sporting fixture is predetermined. A narrower form of match-fixing, called spot-fixing, involves the fixing of specific incidents (as opposed to the overall outcome) within a competitive sporting fixture. Match-fixing is regarded by many as a core type of corruption.³³¹ So for example, offering an inducement to a professional tennis player to throw a match, and placing a bet on the outcome would constitute match-fixing.³³²

There are a number of different actors who may be involved in match-fixing ranging from individuals betting on the outcome of matches to sportsmen, staff (both coaching and management), and match officials. The first and most obvious reason for engaging in match-fixing is financial gain. Gambling on the outcome of sporting events is a multimillion pound industry. In keeping with technological advances, it is now possible for gamblers to place bets not only in advance of a sporting fixture but also during the game itself. In fact, bookmakers will accept bets on almost any aspect of a game. Thus, the ability to fix even a small incident within a game, such as the time of the first corner kick in a football match, opens up the possibility of betting on that outcome and winning large dividend pay outs.

But financial gain is not the only motivator. Those involved in professional sports may also resort to match-fixing in order to ensure victory in a particular competition, secure promotion to a higher division, prevent relegation to a lower division, etc. In 2006, Juventus Football Club was stripped of two of its titles and demoted to Serie B after it was found guilty

³³¹ Ian Preston and Stefan Szymanski, 'Cheating in Contests' (2003) 19 (4) *Oxford Review of Economic Policy* 612; Michael Macaulay and Gary Hickey, *National Integrity System Assessment: United Kingdom* (Transparency International UK, 2011) 16.

³³² Thomas L. Carson, 'Bribery, Extortion, and the Foreign Corrupt Practices Act' (1985) 14 (1) *Philosophy and Public Affairs* 66, 70.

of match-fixing. Four other clubs, AC Milan, Lazio, Fiorentina, and Reggina, were deducted points and fined for their part in the scandal.³³³ The fact that these incidents were not purely driven by financial rewards shows that those involved in match-fixing may act for mixed reasons. That is, not only for financial gain but also to secure specific results (sometimes very prestigious results such as winning the league). Let us consider some examples.

THE PAKISTAN CRICKETERS' SPOT-FIXING SCANDAL

A recent and well-known case of match-fixing (or spot-fixing to be precise) occurred during the Pakistan cricket team's tour of England during the summer of 2010. The facts can be summarised shortly.³³⁴

In August 2010, an undercover reporter from the *News of the World* newspaper approached Mazhar Majeed (an agent of some Pakistani cricketers) posing as a wealthy businessman. A number of meetings took place between the pair during the course of which the subject of spot-fixing was discussed. Majeed boasted that he had been spot-fixing with the Pakistan team for some years.

In due course, it was agreed that in return for £150,000, Majeed would arrange for three no-balls to be bowled by Pakistani cricketers during the Fourth Test at Lords. Following payment, three no-balls were bowled at the precise moments identified by Majeed.

Three Pakistani cricketers were implicated in the affair: Salman Butt, the captain of the Pakistan Test side, Mohammad Asif, and Mohammad Amir. The trio were disciplined by the International Cricket Council (ICC) Disciplinary Tribunal and suspended (for differing periods) from playing all forms of professional cricket (international, first class, and club cricket).³³⁵

³³³ Gabriele Marcotti, 'Penalties Reduced in Italian Scandal' *The Times* (London, 26 July 2006) 68.

³³⁴ Summarised from *R v Mohammad Amir and Salman Butt* [2011] EWCA Crim 2914.

³³⁵ *International Cricket Council (ICC) v Salman Butt, Mohammad Asif and Mohammad Amir* (ICC Disciplinary Tribunal Determination, 5 February 2011).

In September 2011, Majeed, Butt, Asif, and Amir, appeared in the Crown Court at Southwark on criminal charges. Majeed and Amir pleaded guilty. The former to conspiracy to give corrupt payments (to Butt, Asif, and Amir) and conspiracy to cheat. The latter to conspiracy to accept corrupt payments (from Majeed) and conspiracy to cheat. Butt and Asif were charged with the same offences as Amir but pleaded not guilty. They were tried by a jury and convicted of both offences. On 3 November 2011, the defendants were all sentenced. Majeed received two years and eight months' imprisonment (concurrent), Butt received two years and six months' imprisonment (concurrent), Asif received one year's imprisonment (concurrent), whilst Amir received a concurrent sentence of six months' detention in a Young Offender Institution. Butt and Amir appealed their sentences but both appeals were dismissed.³³⁶

Part 1: The 2010 Act

Before we apply the first part of our analytical framework, it is important to point out that none of the defendants were prosecuted under the 2010 Act. The reason for this is that the spot-fixing occurred prior to the coming into force of the 2010 Act on 1 July 2011 (the 2010 Act does not have retrospective force).

Let us begin with an examination of Majeed's role in the scandal. It is clear from our summary that Majeed was the link between the briber payer (the undercover reporter) and the Pakistani cricketers. That is, because he negotiated the bribe and instructed the Pakistani cricketers to bowl no-balls at specific moments.

Section 1 of the 2010 Act states that a person (P) is guilty of bribing another person if he offers, promises, or gives an advantage (whether by P or through a third party) to another person with the intention of inducing that person (or another person) to perform a relevant function or activity improperly (case 1) or in the knowledge or belief that the acceptance of the advantage would itself constitute the improper performance of a relevant function or activity (case 2).

In the present case, it is clear from the evidence that Majeed received a bribe of £150,000 from the undercover reporter and then furnished the Pakistani cricketers with some of this

³³⁶ *R v Mohammad Amir and Salman Butt* [2011] EWCA Crim 2914.

money.³³⁷ Thus, we can see that, for the purposes of section 1, Majeed gave an advantage to the Pakistani cricketers. Let us begin by considering case 1. As to this, the first question which arises is what Majeed intended by his actions. That is, did he intend to induce them into performing a relevant function or activity improperly. There is little difficulty with the first part since the evidence at trial showed that Majeed paid the Pakistani cricketers in order to induce them into bowling three no-balls during the Fourth Test at Lords. The question for us is whether the Pakistani cricketers were performing a relevant function or activity.

Section 3 of the 2010 Act tells us that a relevant function or activity is one which is of a public nature, connected with a business, performed in the course of employment, or performed on behalf of a body of persons (corporate or unincorporate), and the person performing it is expected to act in good faith, impartially, or in accordance with a position of trust.

It is obvious that the Pakistani cricketers were not performing a function or activity of a public nature. Neither were they acting on behalf of a body of persons. So we can exclude both of these. However, it is arguable that they were simultaneously performing a function or activity connected with a business and acting in the course of their employment. As to the former, section 3(7) tells us that the word “business” includes a trade or profession. It is submitted that this is expansive enough to include a professional cricketer. After all, professional cricket (like most professional sports) is not a hobby. It is a professional and regulated sport for which professional cricketers are paid a salary. Let us therefore hold that the Pakistani cricketers were performing a relevant function or activity.

But that is not the end of the matter. In order to bring Majeed within section 1 (case 1), we must also show that the Pakistani cricketers acted improperly by accepting the money from Majeed. We can deal with this matter fairly quickly. By accepting an inducement from Majeed, the Pakistani cricketers not only breached the rules of the game, they also breached their contract with the Cricket Board of Pakistan. This imposed upon them a number of obligations including compliance with the Anti-Corruption Rules of the ICC.³³⁸ In those circumstances, a reasonable person would have little hesitation in holding that the Pakistani cricketers had

³³⁷ *ibid* at paras 19-20 (Lord Judge).

³³⁸ *ibid* at para 8 (Lord Judge).

been induced into performing a relevant function or activity improperly. Let us therefore hold that Majeed's conduct is caught by section 1 (case 1) of the 2010 Act.

However, even if we are wrong about case 1, it is submitted that case 2 is satisfied. That is because Majeed, as a professional agent, would have known that the mere acceptance of money (in the circumstances set out above) by the Pakistani cricketers would constitute the improper performance of a relevant function or activity.

Let us now consider the actions of the three Pakistani cricketers. To this end, we must recall section 2 of the 2010 Act which deals with offences relating to being bribed. Section 2 states that a person (R) is guilty of being bribed if he requests, agrees to receive, or accepts an advantage in one of the ways set out in cases 3 to 6. Although we cannot be sure that the Pakistani cricketers requested an advantage, there is no doubt that, at the very least, they agreed to receive and accepted an advantage (i.e. money) from Majeed. The question is whether in accepting the advantage, they acted in any of the ways proscribed by cases 3 to 6. It will be recalled that case 3 requires proof of mens rea (intention) whereas cases 4 to 6 are strict liability.

In order satisfy case 3, it must be shown that R agreed to receive or accepted an advantage with intention of performing a relevant function or activity improperly (whether by R or another person). It is clear from the evidence before the jury that the Pakistani cricketers intended, by their acceptance of the advantage, to perform a relevant function or activity improperly. In fact, the evidence showed that the Pakistani cricketers were not prepared to bowl no-balls unless the undercover reporter paid a large and substantial amount of money. According to the evidence, they were concerned when the undercover reporter initially indicated that he was only prepared to pay £10,000. It was only when this sum was increased to £150,000 that an agreement was reached that three no-balls would be bowled.³³⁹ When viewed in the context of this evidence, it is clear that the Pakistani cricketers must have intended to perform a relevant function or activity improperly when they accepted the money from Majeed. We have already established that the acceptance of a bribe by a professional cricketer and the bowling of no-balls constitutes the improper performance of a relevant

³³⁹ *ibid* at paras 14-17 (Lord Judge).

function or activity. Let us therefore hold that the Pakistani cricketers' conduct is caught section 2 (case 3).

But that is not the end of the matter because it is submitted that in this example, case 4 is also satisfied. Case 4 imposes strict liability and does not require proof of mens rea. It is submitted that case 4 is met because the Pakistani cricketers' very acceptance of an advantage constituted the improper performance of a relevant function or activity. They must have been aware of this since they were contractually prohibited from accepting bribes by the anti-corruption rules imposed by the ICC.

It may be that cases 5 and 6 are also satisfied but we cannot be certain without further evidence. In order satisfy case 5, we would have to show that the Pakistani cricketers received a reward (i.e. a payment after the event) for having behaved improperly (i.e. bowling no-balls). However, there is no evidence that they received any additional money after the Fourth Test at Lords. Rather, the evidence suggests that they were paid in advance. By contrast, case 6 states that R must perform a relevant function or activity in anticipation of receiving an advantage. Again, there is no evidence to suggest that the Pakistani cricketers bowled no-balls in anticipation of receiving a reward (or further reward). Rather, the evidence suggests that they were paid in advance.

In short, we can see from this analysis that the conduct of both Majeed and the three Pakistani cricketers is caught by the provisions of the 2010 Act.

Part 2: The law in the USA

Let us now consider the second part of our analytical framework. Our four federal statutes do not apply as we are not concerned with the bribery of a public official (domestic or international), a juror, a witness, a restraint of trade, or insider dealing. Let us therefore consider the California Penal Code § 641.3.

It is clear from our earlier discussion that Majeed was engaged in active bribery. That is, he was concerned with bribing the Pakistani cricketers. According to section 641.3, a person (P) is guilty of active bribery if he corruptly gives or offers an employee (R) (not his own) anything of value (other than in trust for R's employer) without the consent of R's employer in return for R using his position for the benefit of P.

In the context of the present case, there is little doubt that Majeed gave a thing of value to the Pakistani cricketers in return for them using their position for his benefit. He paid them to bowl three no-balls so that he could make a financial gain for himself. When he was interviewed by the police, Majeed admitted that he was in debt and explained that he had acted in order to extract money from the undercover reporter.³⁴⁰ The key question is whether Majeed acted corruptly. For the purposes of section 641.3, P acts corruptly if he intended to injure or defraud R's employer or any competitor of R's employer. Whilst it might be difficult to argue that Majeed's primary intention was to injure the Cricket Board of Pakistan, it must have been obvious to him that by bribing the Pakistani cricketers, he was in effect setting back the interests of the Cricket Board of Pakistan. Let us therefore hold that Majeed's actions are caught by section 641.3 of the California Penal Code.

As to the conduct of the Pakistani cricketers, we must recall the passive bribery provisions of section 641.3. This states that an employee (R) is guilty of being bribed if he corruptly solicits, accepts, or agrees to accept from a person (P) who is not his employer anything of value (other than in trust for his employer) without the consent of his employer in return for using his position for the benefit of P.

By accepting the money, the Pakistani cricketers obviously accepted a thing of value from Majeed in return for bowling no-balls. There is little doubt that this behaviour was corrupt given that it was received without the consent of the Cricket Board of Pakistan. It must have been obvious to the Pakistani cricketers that their actions would undermine the interests of the Cricket Board of Pakistan and thereby injure its interests.

Thus, we can see that the actions of Majeed and the three Pakistani cricketers are also caught by section 641.3 of the California Penal Code.

Part 3: Harm and wrongdoing

There are a number of potential primary victims whose interests were adversely affected by the misconduct of Majeed and the Pakistani cricketers. It is not easy to distinguish between them. It is arguable that by their misconduct, the conspirators harmed the interests of the

³⁴⁰ *ibid* at para 24 (Lord Judge).

Cricket Board of Pakistan, the interests of the ICC, and the game of cricket as a whole. However, upon reflection, it is submitted that the interests of the Cricket Board of Pakistan and the ICC are probably more pressing than the game of cricket as a whole (especially as the game of cricket is not a legal entity).

The harm suffered by the Cricket Board of Pakistan and the ICC are interwoven. In fact, the harm was alluded to by the ICC Disciplinary Committee when it commented that the scandal had substantially damaged the interest in ICC events and cast a pall over the game.³⁴¹ It is clear that, on any view, the scandal damaged the integrity of the game of cricket. This is of the utmost interest to both the Cricket Board of Pakistan and the ICC because it is the integrity of the game which ensures that sponsors invest in cricket and which attracts the paying public. By setting back this interest, the conspirators caused financial harm to both the Cricket Board of Pakistan and the ICC.

Let us now consider the indirect harm resulting from this scandal. It is submitted that there are two groups whose interests were indirectly harmed by the scandal. First, those innocent individuals who gambled on the outcome of the Fourth Test at Lords and who were adversely affected by the corruption of Majeed and the Pakistani cricketers. In particular, those who gambled on specific incidents within the game such as the number and timing of no-balls and who suffered economic harm as a result. This constitutes a setback to their welfare interests which, as we know, is a serious harm. Second, the bookmakers who paid out as a result of the spot-fixing scandal also suffered economic harm and therefore a setback to their welfare interests.

In terms of remote harms, these are easier to identify. If corruption within the game of cricket were to become rampant, the sport as a whole would suffer. Sponsors would be unwilling to fund the game and members of the public would be unwilling to pay to watch the game. If this happened, the professional game would most likely collapse due to a lack of funding. Proof for

³⁴¹ *International Cricket Council (ICC) v Salman Butt, Mohammad Asif and Mohammad Amir* (ICC Disciplinary Tribunal Determination, 5 February 2011) at para 227.

this proposition can be found in China where match-fixing in football is so widespread that sponsors and television broadcasters have turned their backs on the game.³⁴²

Thus far we have discussed harming. In terms of wrongdoing, it is submitted that what made Majeed's conduct wrong was that he induced the Pakistani cricketers into breaching their duty of loyalty to the Cricket Board of Pakistan by engaging in criminal offences. This is the same view that Green takes of such conduct.³⁴³ By contrast, the Pakistani cricketers not only breached their duty of loyalty to the Cricket Board of Pakistan, they also breached the rules of the game. As the Court of Appeal observed, their participation in a professional game obliged them to perform with honesty and to play the game to the best of their abilities.³⁴⁴ By breaching these obligations they not only violated the rights of the Cricket Board of Pakistan, they also violated the rights of their team mates, the opposition team, and the spectators, who had a legitimate right to expect that the three Pakistani cricketers would play with honesty and to the best of their abilities.

ROBERT HOYZER

Thus far, we have considered the corruption of both professional sportsmen and other outside actors. Let us now consider whether our conclusion would be any different if the wrongdoing were committed by a match official instead.

In January 2005, football minnows, SC Paderborn 07, pulled off a shock victory against former European Cup winners, Hamburger SV, in the German Cup. The lower league team came from 2-0 down to beat Hamburger 4-2. Suspicions were raised during the game when the match referee, Robert Hoyzer, awarded Paderborn two debatable penalties and controversially sent off Hamburger's star striker.

Hoyzer (along with a number of co-conspirators including a Paderborn player) was later charged with fixing a number of football matches in Germany. He subsequently admitted

³⁴² Hannah Gardner, 'Chinese football bosses jailed in match-fixing crackdown' *The Times* (London, 14 June 2012).

³⁴³ Stuart P. Green, *Lying, Cheating, and Stealing: A Moral Theory of White-Collar Crime* (Oxford University Press, 2006) 208-210.

³⁴⁴ *R v Mohammad Amir and Salman Butt* [2011] EWCA Crim 2914 at para 32 (Lord Judge).

accepting £46,000 and a flat screen television from a Croatian organised crime syndicate in return for influencing the outcome of the match. He was sentenced to two years and five months' imprisonment. The trial judge described the incident as serious and said that Hoyzer had violated his duty of neutrality.³⁴⁵

Part 1: The 2010 Act

Recall section 2 of the 2010 Act. This states that a person (R) is guilty of being bribed if he requests, agrees to receive, or accepts an advantage in the circumstances set out in cases 3 to 6.

The first part causes us no difficulties since Hoyzer admitted that he had received an advantage from the Croatian crime syndicate. The crucial question is whether his receipt was contrary to cases 3 to 6.

Let us deal with case 3 first. In order to satisfy this, it must be shown that Hoyzer received an advantage with the intention of performing a relevant function or activity improperly (whether by himself or another person). There is no difficulty with establishing mens rea since Hoyzer admitted that he had accepted an inducement from the Croatian crime syndicate in return for influencing the outcome of the game. The question for us is whether in doing so, Hoyzer performed a relevant function or activity improperly.

Before we can consider the question of improper performance, we must determine whether Hoyzer was performing a relevant function or activity. It will be recalled that a relevant function or activity is one which is of a public nature, connected with a business, performed in the course of employment, or performed on behalf of a body of persons (corporate or unincorporate), and the person performing it is expected to act in good faith, impartially, or in accordance with a position of trust. It is immediately clear that Hoyzer was not performing

³⁴⁵ Mark Landler, 'Germany Still Consumed by a Scandal' *The New York Times* (New York, 23 March 2005) <http://www.nytimes.com/2005/03/23/sports/soccer/23soccer.html?pagewanted=1&_r=1> accessed 25 October 2009; BBC News, 'Jail Sentence for German Referee' *BBC News* (London, 17 November 2005) <<http://news.bbc.co.uk/sport1/hi/football/europe/4445896.stm>> accessed 25 October 2009; Paul Newman, 'German Referee Jailed for Two Years' *The Independent on Sunday* (London, 18 November 2005) <<http://www.independent.co.uk/sport/football/european/german-referee-jailed-for-two-years-515756.html>> accessed 25 October 2009.

a function or activity of a public nature. Neither can it be said that he was acting on behalf of a body of persons (corporate or unincorporate). It might be thought that he was acting on behalf of the Croatian crime syndicate. However, this is a non-starter for the simple reason that the 2010 Act is only concerned with lawful organisations (corporate or unincorporate). The Croatian crime syndicate obviously does not fit this description. As with our previous example (the Pakistani cricketers' scandal), it is submitted that Hoyzer was performing a relevant function or activity connected with a business. It will be recalled that section 3(7) of the 2010 Act states that the term "business" includes both a trade and profession. We know that Hoyzer was a professional referee who was paid to officiate football matches. That being so, it is submitted that Hoyzer was performing a relevant function or activity.

Let us now turn to the question of improper performance. Section 5(1) of the 2010 Act tells us that the test of what is expected is a test of what a reasonable person in the UK would expect in relation to the performance of the type of function or activity concerned. It is submitted that a reasonable person would expect a paid referee (arguably even an unpaid referee) to officiate a match fairly. That is, to act impartially and to enforce the rules fairly. After all, there would not be much point in playing (or watching) a game if the rules are not interpreted and enforced fairly. As the trial judge observed, by virtue of his misconduct, Hoyzer violated this duty of neutrality. Let us therefore hold that Hoyzer's misconduct is caught by section 2 (case 3).

However, the facts of this example are such that it is arguable that case 4 is also satisfied. Case 4, which imposes strict liability, is satisfied because Hoyzer's very acceptance of the advantage constituted the improper performance of a relevant function or activity. As a referee, he was duty bound to remain neutral. It must have been obvious to him that the mere receipt of an advantage in his capacity as a referee constituted an improper performance of his duties. It may be possible that cases 5 to 6 are also satisfied but we cannot be sure without further evidence as to when the advantage was received by Hoyzer. But nothing turns on this given that Hoyzer is, at the very least, caught by cases 3 and 4.

Part 2: The law in the USA

The second part of our analytical framework requires us to apply the law in the USA to see whether there are any differences in coverage. We need not concern ourselves with the four federal statutes as these are not applicable.

In order to analyse the present example, we must recall the California Penal Code § 641.3. The passive bribery provisions of section 641.3 state that an employee (R) is guilty of being bribed if he corruptly solicits, accepts, or agrees to accept from a person other than his employer (P) anything of value (other than in trust for his employer) without the consent of his employer in return for using his position for the benefit of P.

Leaving aside the question of mens rea, we know that Hoyzer accepted an inducement from the Croatian crime syndicate and in return for that inducement, he used his position as a referee for their benefit (by influencing the outcome of the game). As to mens rea, section 641.3 states that R must have acted corruptly in accepting the inducement. In other words, by his actions he must have intended to injure or defraud either his employer or a competitor of his employer. Whilst it is difficult to assert that Hoyzer's primary intention was to set back the interests of his employer (the German Football Association), there is no doubt that he would have been alert to the damage that his misconduct would cause to the interests of his employer. When the integrity of the game is harmed, commercial sponsors are likely to be deterred and fans are unlikely to pay to watch matches. The result is a reduction in revenue for the German Football Association.

We can see from this short analysis that Hoyzer's conduct is also caught by section 641.3 of the California Penal Code.

Part 3: Harm and wrongdoing

Despite the fact that Hoyzer was a referee (as opposed to being a player or member of coaching staff), the harm and wrongdoing resulting from his misconduct is similar to that identified in our previous example (the Pakistani cricketers' scandal).

It is submitted that there are two primary victims in our example: the Hamburger team and the German Football Association. However, the primary harms to their respective interests are the same. When a referee (or player) violates the rules of a game, the very integrity of the game is undermined. The net result is that fans will be left wondering whether a particular outcome is genuine or the result of match-fixing. In order to survive as a professional sport, football needs to generate revenue from sponsorship and the paying public. Unless the integrity of the game is preserved, these sources of revenue are likely to dry up fast. In addition, the Hamburger team suffered an additional harm insofar as it was unfairly denied

the opportunity of earning prize money by competing in the German Cup. Thus, we can see that by virtue of his misconduct, Hoyzer set back the financial interests of both the Hamburger team and the German Football Association.

As to the indirect harm resulting from Hoyzer's conduct, it is arguable that there was a setback to those innocent individuals who gambled on the outcome of the match as well as the bookmakers who paid out on bets. Given that Hamburger were the superior team (and the favourites), it is likely that they would have attracted a large amount of wagers. Whilst we cannot say with certainty that Hamburger would have won the match (although the fact that they were leading by two goals is compelling), Hoyzer's interference dramatically altered the course of the game. He awarded two dubious penalties and sent off Hamburger's star striker thereby reducing the team to ten men.

As a direct result, it is likely that many innocent individuals lost money and thereby suffered a setback to their financial interests. The same is true of bookmakers who paid out when Paderborn won a match that they were expected to lose. Given the superiority of the Hamburger team, the odds on Paderborn winning would no doubt have been very generous.

In addition to the above, it is arguable that Hoyzer also indirectly harmed the interests of the innocent players and the paying public. Both groups had a right to expect that the rules of the game would be enforced fairly by the match referee. By virtue of his misconduct, Hoyzer violated the rights of the players and spectators to an impartial referee. Instead of officiating fairly, Hoyzer interfered with the match and its outcome.

MacCormick describes the harm in such scenarios in terms of a breach of trust. He argues that a willing participant (this includes both players and match officials) in a game such as football enters into a relationship of trust which includes in a wide sense the principle of fair play.³⁴⁶ By virtue of his misconduct, Hoyzer breached this relationship of trust. He indirectly harmed the interests of the innocent players in the game by denying them a fair game. He may also have set back the financial interests of the Hamburger players who may have missed out on lucrative financial bonuses for winning the game. Of course, this is in addition to being unfairly denied the opportunity of competing in (and perhaps winning) the German Cup.

³⁴⁶ Neil MacCormick, *Practical Reason in Law and Morality* (Oxford University Press, 2008) 80-82.

We have already touched upon the remote harm arising from Hoyzer's conduct. There is no doubt that the integrity of the game of football was set back by the incident. If such conduct were to become prevalent, there would be a drastic decline in revenue as commercial sponsors and fans alike would be unlikely to take an interest in the game. Recall the state of football in China where match-fixing in football has led to a drastic decline in sponsorship and television coverage.³⁴⁷

Lastly, we must consider the wrongdoing which resulted from Hoyzer's misconduct. It is submitted that the Hamburger team had a moral right to be treated equally by Hoyzer. As the match referee, Hoyzer wronged the Hamburger team when he failed to enforce the rules of the game in a fair manner. However, that was not the only wrong to the Hamburger team. We have previously argued that a set back to the financial interests of a corporation constitutes a wrong. In this example, the Hamburger team had a right to non-interference with this important welfare interest. By his misconduct, Hoyzer invaded this interest and thereby wronged the Hamburger team by depriving it of valuable revenue.

By contrast, the German Football Association was wronged in two ways. First, when Hoyzer breached his duty of loyalty to the German Football Association by violating his duty of neutrality. Second, by setting back the financial interests of the German Football Association. It will be recalled from earlier analyses that a setback to the revenue of an organisation constitutes a serious wrong because it can threaten the survival of an organisation. In short, the German Football Association cannot exist without the income it generates through commercial sponsorship and ticket sales to the public. Hoyzer's misconduct indefensibly violated this particular interest.

5. FACILITATION PAYMENTS

A facilitation payment can be described as a payment made to a public official (domestic or foreign) or an employee of a private company in order to obtain some favour such as

³⁴⁷ Hannah Gardner, 'Chinese football bosses jailed in match-fixing crackdown' *The Times* (London, 14 June 2012).

expediting an administrative process, obtaining a permit, licence or service, or avoiding an abuse of power.³⁴⁸ Some commentators refer to such payments as speed or grease payments.³⁴⁹

In England and Wales, facilitation payments have always been contrary to the criminal law. Under the old law, such payments were proscribed by the common law offence of bribery.³⁵⁰ The 2010 Act, which abolished the old law, does not depart from this position. It contains no specific exemption for facilitation payments unless they are permitted or required by the written law applicable to a foreign public official.³⁵¹ The Law Commission argues that, on broad social grounds, a culture in which facilitation payments are regular and accepted is undesirable and such payments should therefore be discouraged.³⁵²

By contrast, the position in the USA is somewhat different. The FCPA excludes facilitation payments which are provided for the purposes of expediting or securing the performance of routine governmental action by a foreign public official.³⁵³ Somewhat surprisingly, the Organisation for Economic Co-operation and Development (the OECD) makes the same concession in the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the OECD Convention).³⁵⁴ The guidance to the OECD Convention explains that the exemption is based on the premise that facilitation payments do not constitute payments made for the purposes of obtaining or retaining business.³⁵⁵ This is a somewhat strange view given that there is no credible explanation as to why an individual would make a facilitation payment if not for the purposes of obtaining or retaining business.

³⁴⁸ Antonio Argandoña, 'Corruption and Companies: The Use of Facilitating Payments' (2005) 60 (3) *Journal of Business Ethics* 251; Ministry of Justice, *The Bribery Act 2010: Guidance* (March 2011) 18.

³⁴⁹ Law Commission, *Reforming Bribery: A Consultation Paper* (2007, Law Com Paper No 185) 291.

³⁵⁰ Colin Nicholls and others, *Corruption and Misuse of Public Office* (Oxford University Press, 2006) 21.

³⁵¹ Section 5(2) of the 2010 Act.

³⁵² Law Commission, *Reforming Bribery* (2008, Law Com Report No 313) 86.

³⁵³ Sections 78dd -1(c)(1) and (2) of the FCPA.

³⁵⁴ Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (signed by the UK on 17 December 1997, ratified on 14 December 1998, entered into force on 15 February 1999, Cm 3994).

³⁵⁵ Organisation for Economic Co-operation and Development, *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and Related Documents* (2011) 15.

There are some critics who argue that such exemptions blur the distinction between legal and illegal payments. Their objection is based on the fact that facilitation payments can have a potentially negative impact on society because they may lead to the violation of local laws and can actually delay, impede and distort the proper functioning of government.³⁵⁶

Let us explore the harm and wrongdoing which results from the payment of facilitation payments.

THE HELMERICH & PAYNE CASE

In July 2009, Helmerich & Payne (H&P), a US company, agreed to pay a fine of \$1 million to the US Treasury after it voluntarily disclosed that its subsidiaries had made improper payments to customs officials in Argentina and Venezuela.³⁵⁷

Between 2003 and 2008, H&P's subsidiaries in Argentina and Venezuela had made a number of payments to Argentinian and Venezuelan customs officials in connection with the importation and exportation of goods and equipment. H&P's Argentinian subsidiary made a number of payments (most were for less than \$5,000) which totalled approximately \$166,000. In addition, its Venezuelan subsidiary also made a number of payments (less than \$2,000 each) totalling approximately \$7,000. H&P made a modest saving overall as a result of making these payments. The evidence showed that the primary reason for making these payments was to expedite the importation and exportation of goods and equipment.

Although the US Department of Justice treated these payments as improper so as to bring them within the scope of the FCPA (it could not treat them as facilitation payments otherwise they would have been excluded from the ambit of the FCPA), Krause and Wiygul argue that they were, on the face of it, facilitation payments.³⁵⁸ Of course, it does not follow from this that

³⁵⁶ Rebecca Koch, 'The Foreign Corrupt Practices Act: It's time to cut back the grease and add some guidance' (2005) 28 (2) Boston College International and Comparative Law Review 380, 395.

³⁵⁷ United States' Department of Justice, 'Helmerich & Payne Agrees to Pay \$1 Million Penalty to Resolve Allegations of Foreign Bribery in South America' (Press Release, 30 July 2009) <<http://www.justice.gov/opa/pr/2009/July/09-crm-741.html>> accessed 9 June 2012.

³⁵⁸ Cheryl A Krause and Elisa T Wiygul, 'FCPA Compliance: The Vanishing "Facilitating Payments" Exception?' (2010) 2 (8) Financial Fraud Law Report 730, 733.

a federal court would necessarily have agreed or arrived at the same conclusion as the US Department of Justice. Moreover, it is important to note that the US Department of Justice's stance was not challenged by H&P. This is not surprising, however, given that H&P voluntarily disclosed the making of the payments (no doubt to protect itself from a criminal prosecution). However, for the purposes of analysis, the payments made by H&P's subsidiaries will be treated as facilitation payments. Let us apply our analytical framework to this example.

Part 1: The 2010 Act

We must consider the liability of both H&P and the employees of its subsidiaries based in both Argentina and Venezuela. In terms of H&P's position, we know that it was the parent of both subsidiaries. That being so, we must consider whether H&P is liable under section 7 of the 2010 Act. It will be recalled that section 7 is concerned with the failure of commercial organisations to prevent bribery by persons associated with it. However, for the purposes of analysis, we will need to overlook the fact that H&P is not a UK registered company. This is because section 7(6) makes it clear that the 2010 Act only applies to relevant commercial organisations which are either incorporated in the UK or which carry on business in any part of the UK.

As for section 7, this states that a commercial organisation (C) is guilty of failing to prevent bribery if a person associated with it bribes another person (i.e. by acting in the ways set out in either section 1 or section 6) for the purposes of obtaining or retaining business or an advantage in the conduct of business for C. However, C has a defence to section 7 if it can show that it had in place adequate procedures designed to prevent such conduct.

In the instant case, there is no difficulty with establishing that the employees of both subsidiaries were associated with H&P. That is, because the latter is the parent of both the Argentinian and the Venezuelan subsidiaries. The real question is whether the employees bribed the customs officials by acting in the ways set out in section 1 (offences of bribing another person) or section 6 (bribery of foreign public officials) for the purposes of obtaining or retaining business. Let us begin by looking at the provisions of section 1.

The first part of this question need not trouble us for long as it will be recalled that section 1 states that a person is guilty of bribery if he offers, promises, or gives an advantage (whether

by himself or through a third party) to another person with the intention of inducing that person (or another person) to perform a relevant function or activity improperly (case 1) or in the knowledge or belief that the acceptance of the advantage would itself constitute the improper performance of a relevant function or activity (case 2).

The first part of section 1 is easily satisfied as it was common ground that the employees had given an advantage in the form of monetary payments to the customs officials in order to expedite matters. As to case 1, we know from the facts that the reason that the employees made these payments was to expedite the importation and exportation of goods and equipment. In the absence of such payments, the evidence suggests that there would have been significant delays to these activities. We can infer from this that the payments made by the employees were intended to induce the customs officials into expediting the importation and exportation of H&P's goods and equipment. To this end, it is submitted that the customs officials were performing a relevant function or activity for the purposes of the 2010 Act given that they were public officials who were expected to act in good faith (i.e. they were under a duty to perform their duties without any additional reward). Moreover, there is no doubt that a reasonable person looking at the transaction would hold that the customs officials had performed their duties improperly. It is important to note that section 5(2) of the 2010 Act tells us to disregard any local practice or custom which requires the making of a payment unless the same is permitted or required by the written law applicable to the country concerned. There is no evidence that the payments in the present case were permitted or required by the written law of either Argentina or Venezuela. Let us therefore hold that case 1 is satisfied.

Case 2 need not trouble us for long either as it must have been obvious to the employees that the mere acceptance of money by the customs officials would constitute the improper performance of a relevant function or activity. Thus, we can see that the employees' conduct also satisfies case 2.

However, that is not the end of the matter because section 7 states that a commercial organisation is guilty if a person associated with it bribes another person for the purposes of obtaining or retaining business or an advantage in the conduct of business for the commercial organisation. It is submitted that as a result of making improper payments, H&P both obtained business and secured an advantage in the conduct of business. As to the former, although H&P only made a modest overall saving, there is no doubt that the making of

improper payments allowed its subsidiaries to operate in Argentina and Venezuela and thereby obtain business. As to the latter, we know that as a direct result of making these payments, H&P was able to expedite the importation and exportation of goods and equipment. In other words, it avoided delay; which is always advantageous in a business context.

In short, we can see from this analysis that H&P, as a commercial organisation, would be caught by the provisions of section 7 (but for the jurisdictional bar which we have overlooked) for failing to prevent bribery by its employees. However, as we noted earlier, H&P may have a defence to this if it can show that it had in place adequate procedures designed to prevent such conduct. In the instant case, there is no evidence of any adequate procedures. In fact, the evidence suggests the contrary as H&P not only accepted a fine of \$1 million, it also agreed to strengthen its compliance procedures.³⁵⁹

Let us now consider the liability of the employees of the Argentinian and Venezuelan subsidiaries under section 6 of the 2010 Act. This states that a person who offers, promises or gives an advantage to a foreign public official (F) with the intention of influencing F in order to obtain or retain business or an advantage in the conduct of business, is guilty of bribery unless the payment of the advantage is permitted by the written law in F's jurisdiction.

In the context of the present case, there is no dispute that the employees had given an advantage in the form of monetary payments to foreign public officials in Argentina and Venezuela (i.e. the customs officials). Moreover, it is clear that by making these payments, the employees intended to influence the customs officials into expediting the importation and exportation of goods and equipment. We can infer from this that the improper payments were made in order to influence the customs officials in order to obtain business and avoid delays. These payments were contrary to the law in both Argentina and Venezuela; hence the fine by the US Department of Justice. Thus, we can see that the employees would be personally liable under section 6 of the 2010 Act.

³⁵⁹ United States' Department of Justice, 'Helmerich & Payne Agrees to Pay \$1 Million Penalty to Resolve Allegations of Foreign Bribery in South America' (Press Release, 30 July 2009) <<http://www.justice.gov/opa/pr/2009/July/09-crm-741.html>> accessed 9 June 2012.

Part 2: The law in the USA

The second part of our analytical framework presents us with a conundrum. The US Department of Justice was unable to treat the payments made by the employees as facilitation payments because the FCPA (which deals with the bribery of foreign public officials) excludes facilitation payments made for the purposes of expediting or securing the performance of routine governmental action by a foreign public official.

The US Department of Justice has overcome this difficulty by proceeding on the basis of a fiction. In order to bring facilitation payments within the remit of the FCPA, the US Department of Justice has adopted two approaches. The first approach is to treat facilitation payments as improper payments. This then allows the US Department of Justice to enter into non-prosecution agreements with potential defendants (as in the present case). The second approach is to bring prosecutions for violations of the FCPA's accounting requirements.³⁶⁰

If we maintain this fiction (i.e. that the payments were "improper"), it is easy to bring the payments made by H&P's employees in Argentina and Venezuela within the remit of the FCPA. Recall that the FCPA makes it an offence for a person or an organisation to bribe a foreign public official (F) by corruptly giving something of value to F for the purposes of, inter alia, influencing any decision of F, inducing F to act in violation of his lawful duty, or securing any improper advantage for the purpose of obtaining business. The term "corruptly" is not defined in the FCPA but has been interpreted as meaning any conduct which involves a consciousness of wrongdoing.³⁶¹

Looking at the facts, there is no dispute that the employees offered something of value to foreign public officials (i.e. the customs officials) in the form of monetary payments. We also know that they did this in order expedite the importation and exportation of goods and equipment. If the employees had not paid the customs officials, it is clear that there would have been significant delays to both the importation and exportation of H&P's goods and equipment. It is arguable that the payments were made in order to influence the decision

³⁶⁰ Joseph W Yockey, 'FCPA Settlement, Internal Strife, and the "Culture Of Compliance"' [2012] (2) Wisconsin Law Review 689, 712.

³⁶¹ *Arthur Andersen LLP v United States* 125 S Ct 2129 (2005).

making of the customs officials, or to induce them into acting in violation of their duties, or to secure an improper advantage for the purpose of obtaining business. As to the mens rea element, it would have been obvious to any reasonable person let alone the employees, that they should not have offered bribes to the customs officials. The fact that they did therefore suggests a consciousness of wrongdoing on their parts; especially when we consider what their motives were for making the payments.

We can see from this analysis that both H&P and the employees at its Argentinian and Venezuelan subsidiaries would be caught by the provisions of the FCPA (but for the bar discussed earlier).

Part 3: Harm and wrongdoing

Let us now look at the primary harm resulting from our example. It is submitted that the primary victim in our example is H&P. After all, there is no evidence to suggest that it was directly involved in the bribing of customs officials. Rather, it appears that a small number of rogue employees at its Argentinian and Venezuelan subsidiaries took matters into their hands by making corrupt payments to a number of customs officials. The fact that H&P is liable for the misconduct of these employees does not detract from the force of our argument. The \$1 million fine imposed upon H&P was intended to punish it for the fact that it did not have in place adequate procedures to prevent the making of corrupt payments rather than any direct wrongdoing on its part.

As to the harm suffered by H&P, there is no doubt that the employees were under a duty of loyalty. It is submitted that by their misconduct, the employees set back this duty notwithstanding the fact that they were trying to advance the interests of H&P. However, rather than benefitting H&P, it is clear that as a direct result of their misconduct, H&P was fined \$1 million. Of course, this is in addition to the damage suffered by H&P to its reputation (which may have impacted upon its business and therefore caused further financial loss).

Let us now turn to the indirect harm. It is arguable that the indirect harm was to H&P's competitors who were not able to expedite the importation and exportation of their goods and equipment. In other words, they were denied a level playing field. It is clear from the evidence that if proper procedures had been followed by the employees, not only would the importation and exportation have taken considerably longer, it would also have cost more. By

engaging in corrupt conduct, the employees were able to secure a competitive advantage over H&P's innocent competitors.

In terms of the remote harm stemming from our example, it is helpful to borrow from the general literature. This tells us that the bribery of public officials is harmful because it has an adverse effect on the proper functioning of government (i.e. the governments of Argentina and Venezuela). For example, if such conduct were to become pervasive, it would represent a rise in the price of administration which the public is forced to endure. But of more concern is the fact that such corruption, if left unchecked, has the potential to grow and spillover into other institutional structures until the entire machinery of the government becomes corrupt. This can lead to a reduction in the legitimacy of the government in the eyes of the public (which may in turn lead to civil unrest).

This view is supported by the Law Commission which argues that a culture in which facilitation payments are regular and accepted is undesirable. According to the Law Commission, if such conduct were to become pervasive, it would lead to a gradual decline in the proper functioning of government.³⁶² Thus, we can see that the misconduct of the employees constituted a setback to the Argentinian and Venezuelan peoples' right to a properly functioning government (a public interest).

Finally, let us consider the wrongdoing in our example. It will be recalled that the primary harm suffered by H&P was to its financial interests. This occurred as a direct result of the employees breaching their duty of loyalty (because of which H&P was fined \$1 million). As with any employer, H&P had a right to expect that its employees (whether its own or those of its subsidiaries) would promote its interests by acting in accordance with the law and not in a way which might render it liable to criminal sanctions. On any view, by breaching their duty of loyalty, the employees violated that right and thereby wronged H&P.

³⁶² Law Commission, *Reforming Bribery* (2008, Law Com Report No 313) 86.

THE DOW CHEMICAL COMPANY CASE

In our previous example (the Helmerich & Payne case), we proceeded on the basis that the payments made by the employees were improper rather than facilitation payments. Let us consider an example involving facilitation payments.

In 2007, the Dow Chemical Company (Dow USA), a US company with a subsidiary in India (Dow India), agreed to the imposition of a cease and desist order by the US Securities and Exchange Commission (the SEC).³⁶³ In order to market its products in India, Dow India was required by Indian law to register its products at both federal and state level. Employees at Dow India found it very difficult to secure the necessary registration without making facilitation payments. For example, at federal level, a public official refused to register Dow India's products and threatened to delay registration unless he was paid a financial inducement. At state level, low-level public officials made similar demands. In order to overcome these difficulties, employees at Dow India arranged for the payment of a number of facilitation payments totalling approximately \$200,000. As a direct result of making these facilitation payments, Dow India managed to expedite the registration of its products and generated \$435,000 from accelerated sales.

The matter came to light when Dow USA conducted an internal investigation. At the close of the investigation, Dow USA voluntarily reported the matter to the SEC (as well as taking remedial steps such as disciplining its employees at Dow India). The disclosure was made with a view to avoiding any criminal sanctions.

The SEC agreed that Dow India's employees had made facilitation payments. Of course, this meant that the payments fell outside the scope of the FCPA. However, in a sign of the intolerance shown towards facilitation payments, the SEC alleged that Dow USA had failed to keep proper records of the facilitation payments contrary to the FCPA's record keeping provisions. Dow USA made no admissions in respect of this alleged failure (or indeed any wrongdoing under the FCPA). Instead, it agreed to the imposition of a cease and desist order.

³⁶³ United States' Securities and Exchange Commission, 'SEC Files Settled Enforcement Action Against the Dow Chemical Company for Foreign Corrupt Practices Act Violations' (Press Release, 13 February 2007) <<http://www.sec.gov/litigation/litreleases/2007/lr20000.htm>> accessed 10 June 2012.

Part 1: The 2010 Act

In order to apply the first part of our analytical framework, we must overlook the fact that Dow USA is not a UK registered company (it will be recalled that section 7(6) of the 2010 Act makes it clear that the 2010 Act only applies to commercial organisations which are registered in the UK or which carry on business in the UK).

Let us begin by looking at Dow USA's liability. It will be recalled that section 7 of the 2010 Act, which is concerned with the failure of commercial organisations to prevent bribery, states that a commercial organisation (C) is guilty of failing to prevent bribery if a person associated with it bribes another person (in the ways set out in sections 1 and 6) in order to obtain or retain business or an advantage in the conduct of business for C. The only exception is if C can show that it had in place adequate procedures to prevent such conduct.

There is no difficulty with showing that Dow India's employees are associated with Dow USA for the purposes of section 7 given that the latter is the former's parent company. That being so, the next step is to consider whether Dow India's employees bribed the public officials by acting in the ways set out in section 1 (offences of bribing another person) or section 6 (bribery of foreign public officials) for the purposes of obtaining or retaining business.

Let us begin by looking at the provisions of section 1. It will be recalled that section 1 states that a person (P) is guilty of bribery if he offers, promises, or gives an advantage (whether by himself or through a third party) to another person (R) with the intention of inducing that person (or another person) to perform a relevant function or activity improperly (case 1) or in the knowledge or belief that the acceptance of the advantage would itself constitute the improper performance of a relevant function or activity by R (case 2).

There is no problem with satisfying the first part of section 1 as it is clear from the facts that Dow India's employees gave an advantage in the form of monetary payments to public officials in order to expedite the registration of Dow India's products. The question is whether they did so with the intention of inducing the public officials to perform a relevant function or activity improperly (case 1) or in the knowledge or belief that the acceptance of the advantage would itself constitute the improper performance of a relevant function or activity (case 2).

Dealing with case 1, there is little doubt that the public officials were performing a relevant function or activity. They were performing a function of a public nature and were therefore expected to act in good faith. It is clear from the facts that by paying bribes, Dow India's employees intended to induce the public officials into expediting the registration of Dow India's products. That is, they intended for the public officials to act improperly. It is submitted that a reasonable person looking at the matter would hold that by accepting these bribes, the public officials had performed their functions improperly. Thus, we can see that the misconduct of Dow India's employees is caught by section 1 (case 1). Of course, it might be argued that Dow India's employees had no choice and that they only paid the public officials to do that which they ought to have done without any additional reward. But this argument is too simplistic because it fails to acknowledge the fact that Dow India's employees should not have succumbed to the public officials' demands. It may be that this aspect of the case is better regarded as mitigation (especially in any sentencing exercise before a court of law).

However, even if we are wrong about case 1, it is submitted case 2 is also satisfied. In order to satisfy this, we must show that Dow India's employees knew or believed that the acceptance of bribes by the public officials would itself constitute the improper performance of a relevant activity. This need not trouble us for long since it would have been obvious to any reasonable person that one should not offer a bribe to a public official. The fact that Dow USA disciplined Dow India's employees for doing so lends support to this proposition. Let us therefore hold that case 2 is also satisfied.

Finally, we must consider whether Dow India's employees acted in the ways described above for the purposes of obtaining or retaining business or an advantage in the conduct of Dow India's business. We need not dwell on this since it is clear from the facts that Dow India's employees paid the bribes in order to register Dow India's products and thereby obtain business. We can support this argument by reference to the fact that as a direct result of their corrupt conduct, Dow India generated \$435,000 from accelerated sales.

We can see from this analysis that, but for the jurisdictional bar discussed earlier, Dow USA would be caught by the provisions of section 7 of the 2010 Act. As to the adequate procedures defence under section 7, there is no evidence to suggest that either Dow USA or Dow India had in place adequate procedures to prevent their employees from engaging in corrupt conduct. Instead, there is evidence to the contrary given that Dow USA took remedial action

including giving Dow India's employees compliance training. Let us therefore hold that Dow USA is caught by the prohibition in section 7.

We must now consider the liability of Dow India's employees under section 6 of the 2010 Act. It will be recalled that section 6 states that a person who offers, promises or gives an advantage to a foreign public official (F) with the intention of influencing F in order to obtain or retain business or an advantage in the conduct of business, is guilty of bribery unless the payment of the advantage is permitted by the written law in F's jurisdiction.

In the present example, we have seen that Dow India's employees arranged for the payment of facilitation payments to a number of public officials. It is also clear that by their actions, they intended to influence these public officials into expediting the registration of Dow India's products. In view of the fact that facilitation payments are not permitted by the written law of India, it follows that the conduct of Dow India's employees would be caught by section 6.

Part 2: The law in the USA

The second part of our analytical framework need not detain us for long. The reason for the brevity is because the FCPA excludes facilitation payments which are made for the purposes of expediting or securing the performance of routine governmental action by a foreign public official. The phrase "routine governmental action" includes the obtaining of permits, licenses, or other official documents which are required for the purposes of conducting business in a foreign country. On the face of it, this would appear to cover the payments made by Dow India's employees.

However, it does not follow from this exclusion that facilitation payments are not regarded as a core case of corruption in the USA. Rather, it is submitted that the exclusion of facilitation payments is best regarded as a historical hangover. When the FCPA was enacted in 1977, the US Congress was concerned that facilitation payments were a routine part of doing business in other parts of the world and that prohibiting US companies from making such payments, on top of the restrictions already imposed by the FCPA, would put them at a competitive

disadvantage in the global marketplace.³⁶⁴ It was this concern which gave rise to the facilitation payments exception in the FCPA.

The position today is very different. Most countries have some sort of anti-corruption legislation with no exception for facilitation payments. This is true even in the USA where facilitation payments paid to domestic public officials are proscribed at both federal and state level. The lacuna exists only in respect of payments made to foreign public officials. However, the fact that the US Department of Justice and the SEC have adopted a tougher stance against such payments supports our argument that facilitation payments are regarded as being a core case of corruption even in the USA.

Part 3: Harm and wrongdoing

Let us now analyse the harm and wrongdoing stemming from our example. As with our previous example (the Helmerich & Payne case), it is submitted that the primary harm is to the interests of Dow USA. By arranging for the payment of facilitation payments, Dow India's employees must have been alert to the potential harm to Dow USA's financial interests (and the adverse effect on Dow USA's reputation if the matter came to light). Of course, it is arguable that they may not have considered this risk in view of the fact that facilitation payments are permitted by the FCPA. However, notwithstanding this, it is submitted that they must have been aware that such payments are, at the very least, not permitted under Indian law. Thus, by arranging for the payment of facilitation payments, Dow India's employees risked exposing Dow India and Dow USA to criminal sanctions in India. In this way, they breached their duty to act in accordance with the law and not jeopardise Dow USA's financial interests. It is obvious that a commercial organisation cannot function (legitimately) unless it can trust its employees to promote its interests in a lawful manner.

Turning to the indirect harm, this too is similar to our previous example. It is submitted that the indirect harm resulting from the misconduct of Dow India's employees was to Dow India's competitors in India. In particular, those innocent commercial organisations which

³⁶⁴ Jon Jordan, 'The OECD's Call For an End to "Corrosive" Facilitation Payments and the International Focus on the Facilitation Payments Exception Under the Foreign Corrupt Practices Act' (2011) 13 (4) University of Pennsylvania Journal of Business Law 881, 891.

did not resort to making corrupt facilitation payments in the way that Dow India's employees did. The net result is that these innocent competitors would have been subjected to delays when they sought to register their products. By contrast, not only did Dow India expedite the registration process, it also generated a substantial sum in income (approximately \$435,000) through accelerated sales. It is clear that, but for the making of facilitation payments, Dow India would not have been able to generate these sums through accelerated sales. In short, the harm suffered by these innocent competitors was economic in nature. For a commercial organisation, any setback to its financial interests constitutes a setback to its welfare interests.

The remote harm arising from our example is also similar to our previous example. The general literature on corruption suggests that the payment of facilitation payments can lead to a gradual decline in the proper functioning of government. In India, where there is already a deep-rooted problem with bureaucratic corruption, the payment of facilitation payments by Dow India's employees would simply have added to this unwanted problem. We can derive support for this argument from the fact that the facilitation payments were made over a period of five years (between 1996 and 2001).³⁶⁵ This suggests that, far from being one-off payments, the corrupt public officials were emboldened by the payment of facilitation payments and made repeated demands.

Finally, let us consider the wrongdoing in our example. We have already observed that by arranging for the payment of facilitation payments, Dow India's employees breached their duty of loyalty to Dow USA. By acting in this way, they wronged Dow USA insofar as they violated its right to expect that its employees would act in accordance with the law and not jeopardise its financial interests. Thus, notwithstanding the fact that the payment of the facilitation payments resulted in a substantial number of accelerated sales, the employees' conduct was nonetheless both harmful and wrongful.

³⁶⁵ United States' Securities and Exchange Commission, 'SEC Files Settled Enforcement Action Against the Dow Chemical Company for Foreign Corrupt Practices Act Violations' (Press Release, 13 February 2007) <<http://www.sec.gov/litigation/litreleases/2007/lr20000.htm>> accessed 10 June 2012.

6. EXTORTION

Extortion is the practice of obtaining property (usually money) from a person through the use of coercion. There are two distinct forms of extortion which are connected by the presence of coercion: blackmail and extortion under the colour of official right.³⁶⁶

The first of these, blackmail,³⁶⁷ refers to a situation where a person obtains property from another, with his consent, through the use of threats. It is important to qualify this statement by explaining that we are talking here about an invalid consent. That is, because it is not uncoerced, informed, and competent. The paradigm example consists of a blackmailer threatening to reveal an adulterous affair unless the victim pays the blackmailer a sum of money.³⁶⁸

The second type of extortion is less egregious and describes a situation where a public official obtains property from a person under the colour of official right through the use of compulsion. This form of misconduct used to be an offence under the English common law until it was abolished.³⁶⁹ Extortion under the colour of official right usually manifests itself as a demand by a public official for performing (or not performing) a function which he is required to perform without any additional reward. For example, a public official may decline to process an application promptly unless he is paid a bribe. In the USA, it has been held that the difference between bribery and extortion under the colour of official right lies in the fact that the essence of the former is voluntariness whereas the essence of the latter is duress.³⁷⁰

³⁶⁶ James Lindgren, 'The Theory, History, and Practice of the Bribery-Extortion Distinction' (1993) 141 (5) *University of Pennsylvania Law Review* 1695; Stuart P. Green, *Lying, Cheating, and Stealing: A Moral Theory of White-Collar Crime* (Oxford University Press, 2006) 37.

³⁶⁷ Section 21 of the Theft Act 1968 makes blackmail a criminal offence.

³⁶⁸ James Lindgren, 'Unraveling the Paradox of Blackmail' (1984) 84 (3) *Columbia Law Review* 670; Grant Lamond, 'Coercion, Threats, and the Puzzle of Blackmail' in AP Simester and ATH Smith (eds), *Harm and Culpability* (Clarendon Press, 1996) 215, 215.

³⁶⁹ The common law offence of extortion was abolished by section 32(1)(a) of the Theft Act 1968.

³⁷⁰ *United States v Addonizio* 451 F.2d 49 (3rd Cir. 1972).

The dividing line between what constitutes blackmail and what constitutes extortion under the colour of official right is sometimes blurred, and there may be occasions when a given type of conduct crosses the threshold of both.

Some dictionaries suggest that extortion (in the broader sense) also includes the obtaining of property from another through the use of force.³⁷¹ However, it is submitted that this is technically incorrect as the use of force has the effect of transforming extortive conduct into robbery. Extortion differs from robbery in that the former involves the obtaining of another's property with their (invalid) consent through the use of coercion. By contrast, robbery involves the taking (i.e. theft) of another's property through the threat or actual use of force before or at the time of the theft.

Our concern in this section is with extortion under the colour of official right. Such conduct is regarded by many as being a core type of corruption.³⁷² There is no consideration of blackmail or robbery as these do not generally feature in the scholarship as being core cases of corruption. Robbery, as defined above, is easy to distinguish since it requires the threat or actual use of force which is not a feature of any type of corruption. Blackmail is rather more difficult to distinguish. It may be that in some cases, such conduct may also fall within the wider definition of corruption.

Let us consider some examples of extortion under the colour of official right.

SANTIAGO VALLE

In 2006, Santiago Valle was tried and convicted by a jury of bribery and extortion.³⁷³ Valle was employed as an immigration and customs enforcement agent at an immigration holding and

³⁷¹ Catherine Soanes and Angus Stevenson (eds), *The Oxford Dictionary of English* (Oxford University Press, 2005).

³⁷² Thomas L. Carson, 'Bribery, Extortion, and the Foreign Corrupt Practices Act' (1985) 14 (1) *Philosophy and Public Affairs* 66; James Lindgren, 'The Theory, History, and Practice of the Bribery-Extortion Distinction' (1993) 141 (5) *University of Pennsylvania Law Review* 1695; Jeremy Pope, *TI Source Book 2000* (2nd edn, Transparency International, 2000) 17.

³⁷³ Summarised from *United States v Valle* 538 F 3d 341 (2008).

processing detention facility in El Paso, Texas, USA. His duties included, inter alia, reviewing detainees' detention files and gathering intelligence.

During the course of his employment, Valle came into contact with Francisco Gutierrez-Avila, a Mexican national who had been detained at the facility. In a meeting between the pair, Valle informed Gutierrez-Avila that he had removed criminal charges against him and demanded that Gutierrez-Avila pay him \$20,000 for this action. Gutierrez-Avila reported the matter to his attorney who in turn contacted the Federal Bureau of Investigation (the FBI). In a subsequent meeting, an undercover agent from the FBI, posing as Gutierrez-Avila's brother-in-law, paid Valle \$20,000 and covertly recorded Valle's admission that the money was for removing criminal charges against Gutierrez-Avila. Let us apply our analytical framework to this example.

Part 1: The 2010 Act

Recall section 2 of the 2010 Act which is concerned with the receipt of bribes. This states that a person (R) is guilty of being bribed if he requests, agrees to receive, or accepts an advantage in the circumstances set out in cases 3 to 6.

There is no issue with the first part of section 2 since Valle both requested and accepted \$20,000. The key question is whether Valle acted in one of the ways prohibited by cases 3 to 6. Case 3, which requires proof of intention, states that R is guilty of being bribed if he accepts an advantage with the intention of performing a relevant function or activity improperly. On a literal interpretation, it might be argued that case 3 is not satisfied because Valle did not request or accept an advantage (i.e. the \$20,000) in advance of committing an improper act (i.e. removing the criminal charges against Gutierrez-Avila). Rather, as can be seen from the facts, Valle demanded an advantage after he had committed the improper act. It is therefore arguable that he did not accept the advantage with the intention of performing a relevant function improperly. Let us therefore hold that case 3 is not satisfied.

However, the same objection cannot be taken in respect of cases 4 to 6. It will be recalled that these are strict liability and therefore, unlike case 3, there is no need to prove mens rea. Case 4 states that R is guilty of being bribed if his request or receipt of an advantage itself constitutes the improper performance of a relevant function or activity.

There is no difficulty with establishing that Valle was performing a relevant function or activity. We know from section 3 that a relevant function or activity is one which is of a public nature, connected with a business, performed in the course of employment, or performed on behalf of a body of persons (corporate or unincorporate), and the person performing it is expected to act in good faith, impartially, or in accordance with a position of trust. As a public official, it is obvious that Valle was performing a function of a public nature and that this necessarily imposed upon him a duty to act in good faith. That being so, it is submitted that it would have been obvious to Valle that he should neither have requested nor accepted any kind of advantage. He was required to perform his duties in good faith. Thus, we can see that the facts of our current example are caught by case 4.

However, the circumstances of our example are such that it is arguable that cases 5 and 6 are also satisfied. Case 5 states that R is guilty of being bribed where the advantage is a reward for having improperly performed a relevant function or activity. By contrast, case 6 states R is guilty if, in anticipation of receiving an advantage, he performs a relevant function or activity improperly. We know from the facts that Valle removed the criminal charges before demanding payment from Gutierrez-Avila. That being so, it is arguable that Valle's request and acceptance of an advantage constituted a reward (case 5). In the alternative, it might be argued that in anticipation of receiving an advantage, he removed the charges against Gutierrez-Avila (case 6). In sum, we can see that Valle's misconduct is also caught by cases 5 and 6.

Part 2: The law in the USA

Let us now turn to the second part of our analytical framework. The bribery of domestic public officials is dealt with by 18 USC § 201. According to section 201(b)(2), a public official is guilty of bribery if he corruptly seeks or accepts anything of value in return for being influenced in his capacity as a public official.

In the present example, Valle was charged and convicted of two separate offences: bribery under section 201(b)(2) and extortion under section 18 USC § 872. The reason for this is that unlike the law in England and Wales, extortion remains a distinct offence under US federal law. However, notwithstanding this, it is submitted that the extortive parts of Valle's conduct would, in any event, have been caught by the federal anti-bribery provisions set out in section 201(b)(2). Let us put this idea to the test.

First, it is obvious that Valle was a public official for the purposes of section 201(b)(2). That is, because he was performing an official function on behalf of the government. Second, he corruptly sought a financial advantage from Gutierrez-Avila for having acted improperly in his capacity as a public official. It is clear from the facts that Valle's sole reason for removing the criminal charges against Gutierrez-Avila was to seek a financial reward. It was the prospect of such a reward which influenced Valle's conduct as a public official. Third, it also will be recalled that the term "corruptly" in section 201(b)(2) requires a quid pro quo. This is easily satisfied because Valle not only removed the criminal charges, he also received \$20,000 from an undercover FBI agent. It might be thought that there was no quid pro quo because the money received by Valle from the undercover FBI agent was most likely recovered following his arrest. However, it is submitted that this argument is illusory because, on any view, Valle had already committed the mischief before his arrest. The fact that the money may have been recovered is therefore immaterial. The quid pro quo in section 201(b)(2) does not require that the offender retain any advantage received.

In short, we can see from this analysis that extortion is not only proscribed as a distinct offence in the USA. It is conduct which is also likely to be caught by the USA's anti-corruption statutes; thereby lending further support to our argument that extortion is a core case of corruption.

Part 3: Harm and wrongdoing

Let us now consider the harm and wrongdoing arising from Valle's misconduct. Starting with the primary harm, it might be thought that there are two potential victims: Gutierrez-Avila and the US government. However, it is submitted that whilst Gutierrez-Avila was no doubt inconvenienced, it is stretching matters somewhat to describe him as the primary victim of Valle's misconduct. Rather, it is submitted that the more obvious candidate is the US government. As an employee of the US government, Valle was under a duty to act in its best interests. There is no doubt that he breached this duty when he removed Gutierrez-Avila's criminal charges and demanded a payment in return. The US government was entitled to expect that Valle would observe his duties as an immigration and customs enforcement agent.

The indirect harm arising from Valle's conduct is of a different nature. It is submitted that the innocent victim of Valle's misconduct was Gutierrez-Avila. The latter was no doubt inconvenienced and his application was most likely delayed as a result of Valle's misconduct.

However, without further information it is difficult to state with precision which of his interests were set back (i.e. his welfare interests or his ulterior interests). Obviously a setback to a person's welfare interests is more serious than a setback to his ulterior interests. Nonetheless, we can be fairly sure that Valle's misconduct must have resulted in some form of indirect harm to Gutierrez-Avila's interests.

The remote harm stemming from Valle's misconduct is easier to identify. The general scholarship on corruption tells us that if immigration controls were to be regularly breached by public officials, there would be a number of unwanted consequences. The most obvious and serious remote harm is the threat to national security. It is trite that the implementation and enforcement of immigration controls are of paramount importance to all states. The threat to national security demands that public officials do not erase criminal charges since these are an important indicator of whether an individual poses a security risk. If the charges are sufficiently serious, an individual may even be refused entry. It is therefore arguable that Valle's misconduct resulted in a setback to the public's interest in the maintenance of proper and effective immigration controls. Of course, this is not the only remote harm. Other remote harms include the strain on public services which would result if there were an unauthorised relaxation of immigration controls.

Finally, we must consider the question of wrongdoing. It is submitted Valle wronged the US government through his disloyalty. When Valle engaged in corruption, he set aside his duty to act in good faith in favour of his own self-interest. The US government, like all employers, has an interest in a loyal workforce which acts in its best interests. This is an important welfare interest in that an employer cannot hope to flourish without a loyal and law abiding workforce. By engaging in corruption, Valle set back this important welfare interest and thereby wronged the US government.

Let us consider another example.

THE SOCHI 2014 SCANDAL

In 2006, Sergei Evdokimenko, a public official with responsibility for federal property in Sochi, Russia, was approached by a local businessman, Viktor Babii. The city of Sochi was bidding to host the 2014 Olympic Winter Games and Babii wanted to tender for construction contracts in the event that Sochi was selected (which it subsequently was). Despite the fact that

Sochi had not yet been confirmed as the host city, Evdokimenko demanded a payment of approximately US \$500,000 before he would consider Babii's proposed tender. Babii declined to pay and instead reported the matter to the Russian Interior Ministry. Officials from the Interior Ministry devised a sting whereby they covertly filmed Evdokimenko receiving the money from Babii. Evdokimenko was subsequently arrested and charged with extortion.³⁷⁴

Part 1: The 2010 Act

Section 2 of the 2010 Act states that a person (R) is guilty of being bribed if he requests, agrees to receive, or accepts an advantage in the ways set out in cases 3 to 6. It will be recalled that whereas case 3 requires proof of mens rea (intention), cases 4 to 6 impose strict liability. It is submitted that only cases 3 and 4 are applicable to the facts of the present example.

Let us begin by looking at case 3. This states that R is guilty of being bribed if he requests, agrees to receive, or accepts an advantage with the intention of performing a relevant function or activity improperly. Evdokimenko, as a public official, was obviously under a duty to act in good faith (i.e. because he was performing a relevant function). By requesting an advantage of US \$500,000 it is clear that he breached this duty and that a reasonable person would hold that he had acted improperly. The only logical explanation as to why Evdokimenko made this demand is that he intended in return to perform his duties improperly. That is, upon receipt of US \$500,000, he would have looked favourably upon Babii's proposed tender for construction contracts. We can therefore see that case 3 is satisfied.

Turning to case 4, it will be recalled that this states that R is guilty of being bribed if the request or receipt of the advantage itself constitutes an improper performance of a relevant function or activity. In the context of the present case, there is no doubt that Evdokimenko was not permitted to request an advantage before considering Babii's proposed tender. We can support this by reference to the fact that the Russian Interior Ministry arrested and charged him after he was covertly taped accepting US \$500,000 from Babii. If Evdokimenko had been entitled to make such a demand, he would not have been arrested and charged. In

³⁷⁴ Alexandra Addison Wrage, *Bribery and Extortion: Undermining Business, Governments, and Security* (Praeger Security International, 2007) 91.

short, we can see that Evdokimenko's demand constituted the improper performance of his duties.

We can see from this analysis that Evdokimenko's extortive conduct is caught by section 2 of the 2010 Act insofar as it satisfies the requirements of both cases 3 and 4. Let us therefore hold that this is an example of a core case of corruption.

Part 2: The law in the USA

We must now consider whether our example is regarded as a core case of corruption by the anti-corruption provisions in the USA. In determining this, we can immediately discount the FCPA on the basis that it is concerned with the bribery of foreign public officials whereas our example concerns the extortive conduct of a domestic public official. Likewise, we can also exclude from analysis the California Penal Code § 641.3 on the basis that this is concerned exclusively with private sector bribery whereas our example concerns an extortive demand made in the public sector.

Rather, it is submitted that the appropriate statute under US law is 18 USC § 201. It will be recalled that section 201 proscribes the corruption (both active and passive) of public officials, jurors, and witnesses in the domestic context. In particular, section 201(b)(2) makes it an offence for a public official to corruptly seek or accept anything of value in return for being influenced in his capacity as a public official. In other words, it is an offence for a public official to engage in both active (seeking an inducement) and passive (accepting an inducement) bribery.

Let us apply section 201(b)(2) to the facts of our example. We can deal with the non-contentious matters fairly swiftly. There is no doubt that Evdokimenko was a public official. For the purposes of section 201(b)(2), a public official is defined as someone who acts on behalf of any branch of the government in any official function. This broad definition includes a person who occupies a position of trust with official federal responsibilities. Given that Evdokimenko had responsibility for making decisions about federal property in Sochi, it is clear that he falls within the definition of a public official for the purposes of section 201(b)(2).

The next step is to consider whether Evdokimenko engaged in active or passive extortion. To this end, it will be recalled that Evdokimenko instigated the transaction by demanding a

payment of US \$500,000 from Babii before he was prepared to discuss the latter's proposed tender. Let us therefore hold that Evdokimenko was engaged in active extortion.

That being so, the key question is whether by demanding US \$500,000, Evdokimenko acted corruptly for the purposes of section 201(b)(2). In simple terms, was his demand for US \$500,000 made in return for him acting improperly in the course of his duties as a public official? The facts, as set out, leave little room for manoeuvre. Evdokimenko was not entitled to demand an inducement for performing his duties. The fact that he did demand an inducement (and a sizeable one at that) can only lead to one inference. That is, if Babii had made the payment as requested, Evdokimenko would have looked favourably upon Babii's proposed tender. Thus, we can see that the quid pro quo requirement in section 201(b)(2) is satisfied. Let us therefore hold that Evdokimenko's extortion is caught by section 201(b)(2), and is therefore a core case of corruption in the USA.

Part 3: Harm and wrongdoing

Let us now consider the harm and wrongdoing resulting from Evdokimenko's misconduct. As with our previous example, it is submitted that the primary harm in this example was not to Babii but to the Russian government. Evdokimenko was employed by the Russian government as a public official and he was therefore bound by a duty of loyalty. As an employee and public official, he was required to act in the interests of his employer and promote the public interest rather than acting in self-interest. By acting for his own benefit, Evdokimenko behaved in a manner which was diametrically opposed to the duty of loyalty which he owed to his employer. By demanding an inducement in circumstances when he should not have, Evdokimenko compromised not only his own integrity but also that of the Russian government.

Turning to the indirect harm which resulted from Evdokimenko's misconduct, it might be thought that the victim was Babii. However, it is submitted that this is incorrect. There is no doubt that Babii was inconvenienced by Evdokimenko's demand. Having approached Evdokimenko in order to express an interest in tendering for constructions contracts, he was met with an extortive demand. But as we have seen, Babii did not give in to this demand and instead reported the matter to the Russian Interior Ministry with the result that Evdokimenko was arrested and charged for extortion. Had Babii not reported the matter, he may have been more than inconvenienced. The amount of the inducement demanded by Evdokimenko was

such that it may well have precluded Babii from participating in the tendering process. However, it is clear from the facts that Babii did not suffer any economic harm as the US \$500,000 was provided by the Russian Interior Ministry as part of the sting. Moreover, Sochi had not yet been confirmed as the host city and Babii was simply expressing an interest in tendering for construction projects in the event that Sochi's bid was successful. Following Evdokimenko's arrest and charge, Babii was free to contact Evdokimenko's successor in order to express his interest in tendering for construction projects.

Of course, we would not be as sympathetic towards Babii if he had paid the inducement and not reported the matter. In this scenario, notwithstanding Evdokimenko's extortion, we would regard Babii as someone who had engaged in an act of criminality by bribing a public official.

In the context of the present example, it is submitted that the indirect harm was to the residents of the city of Sochi. Hosting a prestigious event like the 2014 Olympic Winter Games (or any other major sporting event) usually brings with it many benefits for the residents of the host city. For example, there may be an economic benefit in the form of increased business driven by the visiting spectators and athletes, there may be lasting improvements made to the infrastructure of the city, and the worldwide media coverage may result in increased tourism. By engaging in an act of corruption, Evdokimenko jeopardised Sochi's chances of hosting the 2014 Olympic Winter Games.

A sceptical reader might argue that there was no indirect harm as, notwithstanding Evdokimenko's misconduct, Sochi was nonetheless selected as the host city. However, this does not detract from the fact that Evdokimenko unlawfully interfered with the residents' interest in hosting the 2014 Olympic Winter Games. The fact that his misconduct did not ultimately derail Sochi's bid is immaterial, and may have been down to luck. It does not take a great leap to see that Evdokimenko's conduct could have been fatal to Sochi's bid. In any event, there is no denying that Evdokimenko's misconduct indirectly resulted in adverse publicity which tarnished the image of both the city of Sochi and its public officials.

The remote harm resulting from Evdokimenko's misconduct is easier to identify. The general literature tells us that when public officials routinely engage in extortion, they set back the public interest in the proper and efficient administration of government. This results in additional harms insofar as the public are required to pay bribes in order to access goods and

services from the government. Given that the public will already have been taxed once, the requirement to pay a bribe in order to transact business constitutes a second tax, and therefore a setback to financial interests. When such corruption becomes endemic, the government loses legitimacy in the eyes of the public; thereby paving the way for civil unrest.

Finally, let us consider the wrongdoing in Evdokimenko's conduct. We have already established that Evdokimenko acted in self-interest in circumstances when he was not permitted to do so. That is, because he owed a duty of loyalty to his employer (either the government or some manifestation of the public at large) to promote the public interest rather than his own self-interest. Evdokimenko wronged his employer when he set aside his duty of loyalty and sought to make an unlawful profit for himself.

7. BID RIGGING

Bid rigging is a form of collusive price-fixing whereby individuals or firms conspire to coordinate their bids in order to secure procurement contracts.³⁷⁵ This may occur in at least four different ways. The first, cover bidding, occurs when the conspirators agree that one of them will be the lowest bidder and that the rest of them will submit inflated or unsuitable bids. The second, bid suppression, involves an agreement between the conspirators that one or more of them will refrain from bidding or withdraw a previously submitted bid so that another of them will be awarded the contract. The third, bid-rotation, describes a situation in which all the conspirators continue to submit bids for different procurement contracts but take it in turns to be the winning bidder (i.e. the one submitting the lowest tender). The fourth, market allocation, occurs when the conspirators carve up the market and agree not to compete for certain customers or certain geographic areas.³⁷⁶

³⁷⁵ R. S. Khemani and D. M. Shapiro, 'Glossary of Industrial Organisation Economics and Competition Law' (OECD, 1993) <<http://www.oecd.org/dataoecd/8/61/2376087.pdf>> accessed 8 July 2012.

³⁷⁶ Organisation for Economic Co-operation and Development, *Guidelines for Fighting Bid Rigging in Public Procurement: Helping Governments to Obtain Best Value for Money* (2009) 1-2.

Bid-rigging (in all its guises) is regarded by many as a core type of corruption.³⁷⁷ For example, the Joint Committee on the Draft Corruption Bill criticised the draft Corruption Bill³⁷⁸ (not presented to Parliament) on the basis that it failed to proscribe the payment of an inducement by the principal of one firm to the principal of another firm in order to ensure that the latter does not tender for a particular contract (i.e. bid suppression).³⁷⁹ The Home Office did not take issue with the fact that such conduct is a core case of corruption. Instead, it sought to defend the draft Corruption Bill's failure to capture bid rigging by suggesting that it was sufficient that such conduct is criminalised as a competition offence by section 188(2)(f) of the Enterprise Act 2002.³⁸⁰

For our purposes, it is immaterial that bid rigging is also regarded as a competition offence. This does not alter the fact that such conduct is also a core type of corruption. One reason for classifying bid rigging as a competition offence may be to bring such offending within the remit of the Office of Fair Trading (the OFT) which has both the resources and the expertise to enforce and prosecute instances of bid rigging. There is no doubt that the OFT takes a dim view of such conduct. For example, in September 2009, it imposed fines totalling £129.2 million on more than 100 construction companies for bid rigging after it emerged that almost 200 procurement contracts worth in excess of £200 million had been rigged over a six-year period.³⁸¹

Let us consider some examples of bid rigging.

³⁷⁷ Joint Committee on the Draft Corruption Bill, *Draft Corruption Bill: Report and Evidence* (2002-03, HL Paper 157, HC Paper 705) 31; William P Olsen, *The Anti-Corruption Handbook* (John Wiley & Sons, 2010); Yvan Lengwiler and Elmar Wolfstetter, 'Auctions and Corruption: An Analysis of Bid Rigging by a Corrupt Auctioneer' (2010) 34 (10) *Journal of Economic Dynamics and Control* 1872.

³⁷⁸ Home Office, *Corruption: Draft Legislation* (2003, Cm 5777).

³⁷⁹ Joint Committee on the Draft Corruption Bill, *Draft Corruption Bill: Report and Evidence* (2002-03, HL Paper 157, HC Paper 705) 31.

³⁸⁰ Home Office, *Draft Corruption Bill: The Government Reply to the Report from the Joint Committee on the Draft Corruption Bill* (2003, Cm 6086) 6.

³⁸¹ Office of Fair Trading, 'Construction Firms Fined for Illegal Bid-Rigging' (Press Release, 22 September 2009) <<http://www.of.gov.uk/news/press/2009/114-09>> accessed 31 October 2009; BBC News, 'Building Companies Fined £129.5m' *BBC News* (London, 22 September 2009) <<http://news.bbc.co.uk/1/hi/business/8268116.stm>> accessed 31 October 2009.

THE NEW YORK PRESBYTERIAN HOSPITAL CASE

In July 2012, David Porath, the owner of an insulation company, pleaded guilty to rigging bids in order to secure contracts for re-insulation services with the New York Presbyterian Hospital (the hospital).

The hospital operated a competitive bidding policy in respect of high value and complex contracts (such as those for re-insulation services). Porath and a co-conspirator (C), an officer of two other companies that also provided re-insulation services, agreed to rig the bidding process. In order to do this, they entered into an agreement whereby C's two companies would submit artificially inflated, non-competitive bids for re-insulation contracts with the hospital. At the same time, Porath would submit a lower bid from his own company. The submission of the artificially high bids created the illusion of a competitive bidding process and insured that the contract was awarded to Porath's company as the lowest bidder. In return, Porath would subcontract a substantial proportion of the re-insulation work to C's two companies.

Over a five year period, Porath and C successfully rigged a number of bids with the result that Porath's company was awarded numerous contracts for the provision of re-insulation services with the hospital.³⁸²

Let us apply our analytical framework to this example.

Part 1: The 2010 Act

According to section 1 of the 2010 Act, a person (P) is guilty of bribing another person if he offers, promises, or gives an advantage to another person (R) with the intention of inducing that person to perform a relevant function or activity improperly (case 1) or in the knowledge or belief that the acceptance of the advantage would itself constitute the improper performance of a relevant function or activity by R (case 2).

³⁸² United States' Department of Justice, 'Owner of Insulation Service Company Pleads Guilty to Million Dollar Bid-Rigging and Fraud Conspiracies at New York City Hospital' (Press Release, 11 July 2012) <http://www.justice.gov/atr/public/press_releases/2012/285024.htm> accessed 14 July 2012.

In the present example, Porath offered to provide an advantage to C by subcontracting some of the re-insulation work to C's two companies. It is clear from the facts that Porath not only adhered to this agreement, he actually provided a substantial proportion of the re-insulation work to C's two companies. Equally, we know that Porath intended this to be an inducement in return for C's two companies submitting artificially high bids to the hospital. There is little doubt about this given that both Porath and C had conspired to rig the bidding process. The central question is whether C performed a relevant function or activity improperly (case 1) or whether the acceptance by C of the advantage constituted an improper performance of a relevant function or activity (case 2).

It will be recalled that a relevant function or activity is one which is of a public nature, connected with a business, performed in the course of employment, or performed on behalf of a body of persons (corporate or unincorporate), and the person performing it is expected to act in good faith, impartially, or in accordance with a position of trust. In deciding whether a relevant function or activity has been performed improperly, the test is what a reasonable person in the UK would expect in relation to the performance of the function or activity concerned.

In the present case, it is clear from the facts that C was performing a function or activity which was either connected with a business (i.e. C's two companies) or performed in the course of employment (C was an officer of both companies). Moreover, as an officer of both companies, it is submitted that C was required to act in good faith. That is, he was required to act in the best interests of both companies. This obviously included an obligation to act within with the bounds of the law and not to put the companies at risk of prosecution. It is therefore arguable that a reasonable person would hold that C had not acted in good faith by accepting bribes from Porath. If C had acted in good faith, he would have submitted competitive bids on behalf of one or both of his companies. Such a course of action may have resulted in the companies being awarded the re-insulation contracts with the hospital.

In short, we can see that Porath's misconduct is caught by the provisions of case 1. However, even if we are wrong about this, it is submitted that case 2 is also satisfied. That is, because it is arguable that C, as an officer and employee, should not have accepted a bribe from anyone. By accepting the bribes offered by Porath, C failed to act in the best interests of the companies. It might be argued that he promoted the interests of both companies insofar as they benefitted financially. However, this argument fails to recognise two important points. First, both

companies may have suffered financial loss for the simple reason that they may have secured the re-insulation contracts outright had they submitted competitive bids. Second, by engaging in criminality, C exposed both companies to the very real risk of prosecution and, if found guilty, the imposition of criminal sanctions (in the form of fines). It is therefore arguable that C's very acceptance of the bribes constituted an improper performance for the purposes of case 2.

It might be thought that C has escaped personal liability. Although no prosecution seems to have been brought against him (it may be that he entered into some form of agreement with the US Department of Justice), it is worth noting that C's conduct would be caught by section 2 (offences relating to being bribed) of the 2010 Act. For the sake of clarity, it is also worth mentioning that both Porath's company and C's two companies could also be prosecuted under section 7 of the 2010 Act for failing to prevent bribery. However, without further information as to the size and structure of these companies, and whether they had in place adequate procedures to prevent such conduct, it is not possible to perform any meaningful analysis.

Part 2: The law in the USA

Let us now consider the law in the USA. This discussion need not detain us for long. Recall the Sherman Act 1890. Section 1 states that any person who enters into a conspiracy in restraint of trade is guilty of an offence. Moreover, the per se approach (akin to strict liability in English law) tells us that anyone who enters into a bid rigging arrangement is automatically guilty of an offence.

In the present case, there is no doubt that Porath and C entered into a bid rigging arrangement with one another. It is clear from the facts that they conspired to fix the outcome of the hospital's tendering process. As a result of this conspiracy, the hospital awarded re-insulation contracts to Porath's company. Thus, we can see that our example is caught by section 1 of the Sherman Act 1890 as a core case of corruption.

Part 3: Harm and wrongdoing

The Sherman Act 1890 proscribes bid rigging on the basis that such conduct is inherently harmful to competition. However, it is submitted that this statement is too general. In order to

fully understand the harm and wrongdoing which results from bid rigging, we must consider both elements systematically.

In terms of the primary harm resulting from our example, the most obvious victim of Porath's misconduct was the hospital. By fixing the bidding process, Porath and C benefitted financially whilst simultaneously denying the hospital the benefits of a competitive tendering process. One does not need to be an economist to appreciate that genuine competition helps to drive down prices. By rigging the bidding process, Porath and C ensured that the price paid by the hospital was one which benefitted them rather than the hospital. This necessarily resulted in funds being improperly diverted from the hospital to Porath and C. Thus, we can see that the bid rigging in our example constituted a setback to the financial interests of the hospital. Such setbacks are very serious because they also amount to an invasion of the hospital's welfare interests.

As to the indirect harm resulting from our example, there are two potential victims: the hospital and other innocent competitors. Dealing with the hospital first, it might be argued that Porath and C's misconduct indirectly set back the hospital's interests in being well-equipped and properly staffed. By denying the hospital the benefits of a competitive tendering process, it is highly likely that the hospital paid more for the re-insulation works than it would otherwise have done. The additional money spent on paying Porath's company to complete the re-insulation work might have been put to better use (e.g. in purchasing new equipment or recruiting additional staff). But the hospital was not the only victim. We know that the bidding process was open to any commercial organisation with expertise in re-insulation services. By rigging the bidding process, Porath and C indirectly harmed the interests of these innocent competitors by denying them the opportunity of competing fairly for the contracts. Of course, that is not to say that a given competitor would necessarily have secured a contract with the hospital. Rather, the harm lies in the fact that these innocent competitors were denied a fair opportunity to compete. For any business, the ability to compete fairly is of paramount importance. Without a level playing field, no legitimate business can hope to thrive.

The remote harm resulting from our example follows on from the primary harm identified above. Competitive tendering is used by both public and private organisations to achieve best value for money. This results in organisations saving money which can then be used to fund other projects. But such benefits are only derived when the bidding process is genuinely competitive. If bid rigging were to become endemic, the benefits of competitive tendering

would be lost and purchasers and the public alike would be required to pay more for goods and services. Moreover, any losses borne by public organisations would inevitably have to be made up by the government (leaving less to spend on other public projects).

Let us now consider the wrongdoing in bid rigging. Our examination of the primary harm showed the main victim to be the hospital. We argued that Porath and C's misconduct set back the hospital's financial interests. The harm principle tells us that financial interests are welfare interests. In other words, they are so important that any invasion of a financial interest simultaneously constitutes a wrong. It is therefore arguable that insofar as the hospital is concerned, it was wronged because it was required to pay over the odds for re-insulation services.

Let us consider another example of bid rigging.

THE VIRGINIA REAL ESTATE SCAM

In January 1997, Mija Romer and Khem Batra were convicted of, inter alia, conspiracy to rig bids at real estate foreclosure auctions in Fairfax County, Virginia, USA, contrary to the Sherman Act 1890.³⁸³

Romer and Batra were real estate speculators who had conspired with a number of co-conspirators to suppress the price of properties at public foreclosure auctions. The properties sold at these auctions were repossessed properties. The conspirators fixed the auction by agreeing not to bid against one another. During the auction, most of the conspirators would refrain from bidding thereby allowing a designated member of the conspiracy to make a low bid and secure the property at a significant undervalue. Following the auction, the conspirators would then hold a second private auction amongst themselves. At this second auction, they would write down and submit the maximum bid that they would each have made for the property. The conspirator with the highest bid would then be awarded the title to the property. The difference between the price paid at the foreclosure auction and the price paid at the private auction was then divided amongst the remaining conspirators. According

³⁸³ Summarised from *United States v Romer and Batra* 148 F 3d 359 (1998).

to the evidence, the conspirators were well aware that their conduct was illegal. In order to avoid detection, they agreed to make payments in cash so as to avoid leaving a paper trail.

Let us apply our analytical framework to this example.

Part 1: The 2010 Act

It might be thought that this example falls to be considered in exactly the same way as our previous example (the New York Presbyterian Hospital case). That is, because both Romer and Batra offered bribes in the form of financial inducements (i.e. a share of the proceeds). In the alternative, it might be thought that they are guilty of being bribed because they shared in the profits derived from the scam.

However, it is submitted that our present example is not so straightforward. Recall section 1 of the 2010 Act. This states that a person is guilty of bribing another person if he offers, promises, or gives an advantage (whether by himself or through a third party) to another person with the intention of inducing that person (or another person) to perform a relevant function or activity improperly (case 1) or in the knowledge or belief that the acceptance of the advantage would itself constitute the improper performance of a relevant function or activity (case 2).

The first part of section 1 causes us little difficulty. There is no denying that both Romer and Batra offered a financial advantage to their co-conspirators. The facts show that the conspirators all agreed to share in the profits of the scam. There is also no doubt that it was this agreement to share the profits which induced the co-conspirators to participate in the scam. After all, there would be little point in any of them participating otherwise.

Let us consider case 1. This causes us some difficulty because it states that the advantage must have been provided for the purpose of inducing another to perform a relevant function or activity improperly. The interpretation provisions of the 2010 Act explain that a relevant function or activity is one which is of a public nature, connected with a business, performed in the course of employment, or performed on behalf of a body of persons (corporate or unincorporate), and the person performing it is expected to act in good faith, impartially, or in accordance with a position of trust. Dealing with the first part only, we can immediately exclude some of these categories. There is no evidence to support the contention that any of the co-conspirators were performing relevant function or activity of a public nature, in the

course of employment, or on behalf of a body of persons (so as to place them in a position of trust). Rather, the evidence suggests that the co-conspirators were all private individuals.

We are therefore left with the question of whether the co-conspirators were performing a function or activity in connection with a business. It might be thought that the co-conspirators were not acting in this way. After all, they were all private individuals acting in a private capacity. However, it is submitted that this view is too narrow. Although the 2010 Act does not tell us what is meant by an “activity connected with a business”, section 3(7) does tell us that the term “business” includes a trade or profession.

The sceptical reader might argue that there is no evidence that any of the co-conspirators were exclusively involved in the business of real estate. There is some force in this argument. It is apparent from the evidence that some of the co-conspirators may have had alternative employment. However, this counter-argument takes an unnecessarily restrictive view of what is meant by the term “business”. In the present case, it is worth pausing to consider why the co-conspirators attended public foreclosure auctions if not to derive some profit. There is no evidence to suggest that they attended in order to purchase a property for themselves. Rather, it is clear that the properties were purchased with a view to reselling at a profit. In other words, it is clear that the co-conspirators regarded this as a business enterprise (albeit part-time). That being so, it is submitted that case 1 is satisfied because the co-conspirators received a financial advantage from Romer and Batra in the course of a business.

The next question is whether the co-conspirators were expected to act in good faith, impartially, or in accordance with a position of trust. It might be argued that there was no such obligation on them. After all, they were private individuals who were also part-time real estate speculators. However, it is submitted that this view is faulty because it ignores the fact the co-conspirators were bound by the rules applicable to foreclosure auctions. In short, it is arguable that by virtue of their attendance and participation in foreclosure auctions, they impliedly agreed to abide by the rules of such auctions. This necessarily imposed on them a duty to act in good faith.

We can derive support for this proposition from an example. Let us suppose that an individual bids on an item at an auction. Let us further suppose that the individual wins the auction but then changes his mind. In this scenario, it is well established that the individual is contractually bound to purchase the item. Likewise, the auction house is reciprocally bound to

provide the individual with that item (and if it is unable to do so, it would be liable for damages). In short, this contractual relationship arises because of the rules which apply to auctions. Given the competitive nature of auctions, it is submitted that bidders are under an implied duty to act in good faith. This means placing genuine bids as opposed to colluding with others to rig the bidding process. Let us therefore hold that the co-conspirators were performing a relevant function or activity when they attended the foreclosure auctions.

Finally, we must consider whether Romer and Batra intended to induce the co-conspirators into improperly performing a relevant function or activity for the purposes of case 1. This need not trouble us for long since it is clear from the facts that Romer and Batra intended by their actions to rig the auctions. They could not have achieved this without the assistance of their co-conspirators. It is submitted that a reasonable person looking at the matter would expect a person attending an auction to abide by the rules of the auction. That is to say, that they would expect them to act in good faith by placing bids up to their maximum bid. This not only creates competition but it also ensures that the seller receives the best possible price as opposed to a lower price.

We can see from this analysis that Romer and Batra's misconduct is caught by case 1. However, even if we are wrong about this, it is submitted that case 2 is also satisfied. We can deal with this analysis fairly swiftly. Case 2 states that a person is guilty of bribery if he offers, promises, or gives an advantage (whether by himself or through a third party) to another person in the knowledge or belief that the acceptance of the advantage would itself constitute the improper performance of a relevant function or activity.

We have already established that Romer and Batra offered a financial advantage to their co-conspirators. In addition, we have also established that the co-conspirators were engaged in a relevant function or activity. That being so, we need only consider whether Romer and Batra knew or believed that the acceptance of the advantage would itself constitute the improper performance of a relevant function or activity by the co-conspirators. As to this, there is ample evidence to suggest that they both possessed the requisite mens rea. The evidence shows that both Romer and Batra (indeed all the conspirators) were aware that what they were doing was wrong. In order to avoid detection, they agreed to conduct their transactions in cash so as to avoid leaving a paper trail. It is also submitted that a reasonable person looking at the transaction would conclude the same. That is, the mere receipt of an advantage by the co-

conspirators constituted the improper performance of a relevant activity because it violated the rules of the auction.

Let us therefore hold that Romer and Batra's misconduct is also caught by case 2. Of course, our conclusion may not have been the same if the co-conspirators had attended a one-off auction in order to purchase a property for themselves. In this scenario, it would be more difficult to argue that they were acting in the course of a business.

Part 2: The law in the USA

Let us now consider the second part of our analytical framework. This need not concern us for long for the simple reason that Romer and Batra were both charged and convicted of bid rigging contrary to the Sherman Act 1890. Section 1 states that any person who enters into a conspiracy in restraint of trade is guilty of an offence (this includes bid rigging). Moreover, it will be recalled that the US courts have held that bid rigging is an offence per se (similar to strict liability in English law). In short, some commercial agreements such as bid rigging are deemed to be so harmful to competition that they are prohibited outright.

Part 3: Harm and wrongdoing

It might be thought that the primary harm resulting from Romer and Batra's misconduct was either to the innocent bidders who lost out as a result of the bid rigging, the mortgagee banks which may have been unable to redeem mortgages because the properties were sold at an undervalue, or the auction house insofar as it received reduced commissions due to the suppressed sale prices. However, whilst these groups have arguable claims, it is submitted that the primary harm must have been to the interests of the mortgagor homeowners for whom a sale at the best possible price was of paramount interest. For this reason, it is the mortgagor homeowners rather than the other groups who are the primary victims.

Properties sold at real estate foreclosure auctions are repossessed properties. Repossessions occur when a mortgagor homeowner defaults on a mortgage because he is unable to service the mortgage (usually due to financial hardship). In these circumstances, the mortgagee (usually a bank) will repossess the property and sell it at an auction. The proceeds of the sale are used by the mortgagee bank to redeem the mortgage (and any other liens). Any remaining proceeds are then returned to the mortgagor homeowner. It follows from this that the

mortgagor homeowners had an obvious and legitimate interest in the best possible sale prices being achieved at the foreclosure auctions.

By rigging the auction process and deliberately suppressing the price at which properties were sold, Romer and Batra invaded and set back the financial interests of these innocent mortgagor homeowners. In short, their misconduct meant that these mortgagor homeowners' properties were not sold at the best possible price. By suppressing the purchase price, Romer and Batra diverted funds from the mortgagor homeowners to themselves. If the mortgagor homeowners' properties had been sold at the best possible price, it may have resulted in their debts being settled in full and, in certain circumstances, may have resulted in some proceeds being returned to them. Given the precarious financial predicament of these mortgagor homeowners, it is clear that the violation of their financial interests constituted a violation of their welfare interests. Let us therefore hold that the primary harm resulting from the present example is to the welfare interests of the mortgagor homeowners.

Let us now consider the indirect harm which resulted from Romer and Batra's misconduct. We have already identified some of the likely candidates of such harm. One of the indirect consequences of Romer and Batra's bid rigging was the effect on those innocent bidders who unsuccessfully participated in the foreclosure auctions. Their financial interests were set back insofar as they were unable to promote this interest because the auctions were rigged. Of course, the setback to their financial interests is considerably less pronounced than that suffered by the mortgagor homeowners.

But the innocent bidders were not the only group to have suffered indirectly. We have already mentioned the possible setback to the financial interests of the mortgagee banks. It is well known that repossessed properties tend to fetch less on the market (both open and at auction) than non-repossessed properties. By suppressing the bidding process, Romer and Batra ensured that the prices at which these repossessed properties sold were even lower than they would otherwise have been. The net result may have been that some of the mortgagee banks were unable to redeem mortgages in full (thereby incurring a financial loss). Of course, it might be argued that there was no loss to the mortgagee banks for the simple reason that the mortgagor homeowners remained liable for any shortfall. Whilst this is correct in principle, it is unlikely that the mortgagee banks' would have been able to recover any shortfall given the mortgagor homeowners' financial difficulties. The net result may therefore have been that some mortgagee banks were forced to write-off shortfalls (thereby incurring a financial loss).

Lastly, we also noted the potential financial harm to the auction house. This is relatively straightforward to deal with. Most auction houses tend to charge a commission on sales. This is usually a percentage of the sale price. The lower the sale price, the less the auction house will receive. By depressing the sale price, Romer and Batra invaded the auction house's financial interests as it received less in commission than it might otherwise have done.

We must now consider the remote harm which resulted from Romer and Batra's misconduct. This is fairly easy to identify. Auctions provide a means by which a seller can ensure that interested parties compete with one another thereby ensuring that the best possible sale price is achieved. But this can only occur when the interested parties are genuine bidders who are prepared to abide by the rules of the auction. However, if bid rigging became pervasive, there would be no incentive for private individuals and commercial organisations to use auctions. It might be thought that there is no further harm. However, staying with our example, it is submitted that property sales (repossessed or otherwise) would be adversely affected as the pool of competitors would be reduced. Although auctions are not the primary method of sale for properties, they are fairly common. Given the importance of property sales to the economy generally, it submitted that any significant reduction in the number of property sales may result in a setback to the public's interest in the economy (and more specifically in a fluid and buoyant property market).

Of course, we have concentrated simply on property auctions. But auctions are used to sell a wide array of goods ranging from low value items (e.g. on eBay) to cars and fine art (which often sell for vast sums of money). These activities would also be adversely set back if bid rigging became pervasive; thereby causing further damage to the economy.

Lastly, let us consider the wrongdoing in our present example. Our discussion of primary harm pointed to the mortgagor homeowners as the principal victims of Romer and Batra's bid rigging. The primary harm suffered by these mortgagor homeowners was financial. Their right to expect that any auction would be conducted fairly so as to achieve the best possible sale price was set back by Romer and Batra's misconduct. The importance of this right is not to be underestimated. If a mortgagee bank had negligently or fraudulently sold a property at an undervalue, the mortgagor homeowner would be able to bring a claim for damages in order to recover any shortfall. The reason for this is that the mortgagee bank has a duty to ensure that it achieves the best possible price when selling the repossessed property. Thus, we can see that by rigging the auction, Romer and Batra wronged the mortgagor homeowners by

setting back their financial interests. We can be certain that their financial interests were set back because the conspirators held private auctions amongst themselves at which prices higher than those achieved at the public foreclosure auction were agreed upon. In the ordinary course of events, these higher prices would have been achieved at the public foreclosure auctions. Thus, we can see that Romer and Batra wronged the rights of the innocent mortgagor homeowners.

8. INSIDER DEALING

Insider dealing (also known as insider trading) is a type of market abuse. It can be defined as the misuse of non-public information (i.e. confidential information which is not in the public domain) in order to make a personal gain or avoid a personal loss.

Strictly speaking, insider dealing is concerned with the conduct of insiders such as directors, officers, and shareholders. However, in both England and Wales and the USA, the law relating to insider dealing has sensibly been extended so as to include third parties who receive information from insiders (except where such information is furnished and received in good faith e.g. by accountants, lawyers, etc.).

In England and Wales, insider dealing is proscribed by section 52 of the Criminal Justice Act 1993 (the 1993 Act). This creates two different offences. The first makes it an offence for a person to deal in securities or to encourage another person to deal in securities. The second criminalises the passing of insider information to another (it is irrelevant whether the passing of information actually resulted in any insider dealing).

In the USA, insider dealing is dealt with by a combination of 15 USC § 78 (the Securities Exchange Act 1934) and the common law. Under the powers conferred by section 10(b) of the Securities Exchange Act 1934, the US Securities and Exchange Commission has promulgated a number of rules which regulate insider dealing. The most important of these is to be found in 17 C.F.R. § 240.10b-5.

It is clear from both section 52 of the 1993 Act and the Securities and Exchange Act 1934 that insider dealing is regarded as a competition offence. One reason for this may be the fact that such conduct is generally regarded as having adverse consequences for the proper and

efficient operation of markets. However, labelling aside, insider dealing is also regarded by many scholars as a core case of corruption.³⁸⁴ Let us test this idea by reference to some examples.

THE BLUE INDEX CASE

In May 2012, James Sanders (the director of a brokerage firm called Blue Index), his wife Miranda Sanders, and James Swallow (a co-director of Blue Index), pleaded guilty to a number of counts of insider dealing contrary to section 52 of the 1993 Act. James Sanders was subsequently sentenced to four years' imprisonment and disqualified as a director for five years. Miranda Sanders and Swallow were both sentenced to 10 months' imprisonment.

Miranda Sanders's brother in law, Arnold McClellan, was a senior partner at an accounting firm in the USA. According to the prosecution, both Arnold McClellan and his wife Annabel McClellan (Miranda Sanders's sister) furnished James and Miranda Sanders with insider information on a number of mergers and acquisitions. James Sanders had, in turn, disclosed this insider information to Swallow.

The trio used this insider information to enter into a number of trades. As a direct result of their misconduct, they generated profits totalling approximately £1.9 million. In addition, both James Sanders and Swallow had used the insider information to generate profits for clients of Blue Index which totalled approximately £10.2 million.³⁸⁵ The trio used the profits to fund a luxury lifestyle including the purchase of multi-million pound houses and expensive sports cars.³⁸⁶

³⁸⁴ Nancy Reichman, 'Insider Trading' (1993) 18 *Crime and Justice* 55; Leo V Ryan, 'Combating Corruption: The 21st-Century Ethical Challenge' (2000) 10 (1) *Business Ethics Quarterly* 331, 334; Antonio Argandoña, 'Private-to-Private Corruption' (2003) 47 (3) *Journal of Business Ethics* 253, 256.

³⁸⁵ Financial Services Authority, 'Three Sentenced for Insider Dealing' (Press Release, 20 June 2012) <<http://www.fsa.gov.uk/library/communication/pr/2012/067.shtml>> accessed 21 July 2012.

³⁸⁶ Jonathan Russell, 'Insider Dealing Trio Sentenced to Over Five Years' *The Telegraph* (London, 20 Jun 2012) <<http://www.telegraph.co.uk/finance/financial-crime/9344446/Insider-dealing-trio-sentenced-to-over-five-years.html#>> accessed 21 July 2012.

Let us apply our analytical framework to this example. For simplicity's sake, we shall only consider the actions of James Sanders.

Part 1: The 2010 Act

As noted above, cases of insider dealing, such as the Blue Index case, are criminalised by section 52 of the 1993 Act. In this section, we are concerned with the question of whether such conduct is also caught by the 2010 Act. The purpose of this enquiry is to provide support for the proposition that insider dealing, despite being labelled as a competition offence, is also a core case of corruption.

In the context of our present example, it might be thought that section 1 is not engaged because James Sanders did not actively engage in an act of bribery. Rather, as is apparent from the facts, he received an advantage from his brother in law, Arnold McClellan. However, it is submitted that this analysis is incorrect. As will be seen, James Sanders not only engaged in active bribery contrary to section 1 but he also allowed himself to be bribed contrary to section 2 of the 2010 Act.

Recall section 1 of the 2010 Act. This states that a person (P) is guilty of bribing another if he offers, promises, or gives an advantage (whether by P or through a third party) to another person (R) with the intention of inducing that person (or another person) to perform a relevant function or activity improperly (case 1) or in the knowledge or belief that the acceptance of the advantage would itself constitute the improper performance of a relevant function or activity by R (case 2).

There is little difficulty with satisfying the first part of section 1. It is clear from the facts of the case that James Sanders passed insider information to his colleague, Swallow. In other words, he gave an advantage to Swallow. However, in order to satisfy case 1, we must also show that James Sanders provided that advantage with the intention of inducing Swallow to perform a relevant function or activity improperly. Before we consider James Sanders's intention, it is helpful to first establish whether Swallow was performing a relevant function or activity.

As to this, it will be recalled that a relevant function or activity is one which is of a public nature, connected with a business, performed in the course of employment, or performed on behalf of a body of persons (corporate or unincorporate), and which imposes on the person

performing it a duty to act in good faith, impartially, or in accordance with a position of trust. It is clear from the facts of our example that Swallow was performing an activity connected with a business or performing an activity in the course of his employment. The next question is whether this imposed upon him a duty to act in good faith or impartially (as he was not acting on trust, we can exclude this expectation). It is submitted that Swallow was under a duty to act in good faith in at least three ways. First, as a co-director of Blue Index he was required by section 172 of the Companies Act 2006 to act in a way which he considered, in good faith, was likely to promote the success of the company. It is difficult to see how engaging in criminality could qualify as acting in good faith. Second, he was under a duty to promote the interests of the Blue Index's clients in a lawful manner. Third, as a market trader, he was under a duty to comply with the rules of the market (which necessarily meant that he should not have acted upon the insider information). Let us therefore hold that Swallow was performing a relevant function or activity which imposed upon him a duty to act in good faith.

The final aspect of case 1 is to consider whether James Sanders intended to induce Swallow into performing a relevant function or activity improperly. This discussion need not concern us for long. We know from the facts that James Sanders, Miranda Sanders, and Swallow were all complicit in the scam. It is clear from the evidence that James Sanders's furnished Swallow with insider information because he wanted the latter to act improperly. Moreover, we know that Swallow misused this information not only for his own benefit but also for the benefit of Blue Index's clients. Let us therefore hold that case 1 is satisfied.

In the alternative, it is submitted that case 2 is also satisfied. It will be recalled that case 2 states that P is guilty of bribery if he offers, promises, or gives an advantage to another person in the knowledge or belief that the acceptance of the advantage would itself constitute the improper performance of a relevant function or activity. In the present case, the evidence showed that James Sanders was the head of compliance at Blue Index. That being so, it would have been obvious to him that the acceptance by Swallow of insider information (irrespective of whether he intended to act upon it) would itself constitute an improper performance of a relevant function or activity. James Sanders would have known this because it was his responsibility to ensure that Blue Index's employees did not engage in any illegal conduct such as insider dealing. Let us therefore hold that case 2 is also satisfied.

We can now turn our attention to section 2 of the 2010. This is concerned with offences relating to being bribed. In order for a person (R) to be guilty of being bribed, he must request,

agree to receive, or accept an advantage and act in the ways set out in cases 3 to 6. In the context of the present example, it can be seen from the facts that James Sanders accepted an advantage in the form of insider information from either Arnold or Annabel McClellan. The question is whether James Sanders acted in the ways set out in cases 3 to 6. As to this, it is submitted that only cases 3 and 4 are applicable. The former, which requires proof of mens rea, is considered first. It will be remembered that the latter, case 4, is a strict liability offence.

In order to satisfy case 3, R must have accepted the advantage with the intention of performing a relevant function or activity improperly (whether by R or another person). If we recall the facts of our example, we know that James Sanders, having been furnished with insider information, acted upon that information thereby making a substantial gain for himself. We know that he was performing a relevant function or activity because, like Swallow, he was performing an activity connected with a business or performing an activity in the course of his employment. Like Swallow, this imposed upon him a duty to act in good faith or impartially. By acting upon the insider information, James Sanders acted improperly insofar as his conduct breached the rules of the market. Thus, it is arguable that James Sanders is also guilty of being bribed contrary to case 3 of section 2 of the 2010 Act.

In order to satisfy case 4, R's receipt of an advantage must itself constitute an improper performance of a relevant function or activity. In the present case, we are not told whether James Sanders solicited the insider information or whether his receipt of the same was unsolicited. However, it is submitted that it is unlikely to have been unsolicited given that James Sanders's wrongdoing encompassed a number of illegal trades spanning a period of years. In the present case, we know that James Sanders was not only furnished with insider information, he also acted upon this information and made a significant profit for himself. Given his position as a director of Blue Index, it is arguable that the mere receipt of insider information constituted an improper performance of a relevant function or activity for the purposes of case 4.

Of course, if James Sanders had neither solicited the insider information nor acted upon it, there would be no suggestion of his having acted improperly for the purposes of the 2010 Act. In the specific context of case 4, which imposes strict liability, it would be absurd if a person who is furnished with unsolicited insider information and who does not act upon such information was nonetheless deemed to be acting improperly. Rather, it is submitted that to act improperly, Sanders must either have solicited the insider information or acted upon it.

We can see from this analysis that so far as James Sanders is concerned, his conduct is caught by both sections 1 and 2 of the 2010 Act. This lends support to the idea that insider dealing, notwithstanding its classification as a competition offence, is also a core case of corruption.

Part 2: The law in the USA

Let us now consider the position in the USA. Recall rule 17 C.F.R. § 240.10b-5 which was promulgated under the powers contained in section 10(b) of the Securities Exchange Act 1934. This makes it unlawful for a person (P) to engage in any act or omission which operates as a fraud upon any person in connection with the purchase or sale of any security. In addition, it is also unlawful for a third party to receive insider information when he knows or has reason to believe that P is in breach of a fiduciary duty by disclosing the insider information.

In the present example, it is clear from the facts that James Sanders was not an insider. That is, because he was not employed by any of the companies in which he invested. Rather, it is clear that he was a third party who received insider information either from his brother in law, Arnold McClellan or from his sister in law, Annabel McClellan. For the purposes of rule 10b-5, Arnold McClellan would fall to be classified as an insider given his position as a senior partner at the accounting firm which dealt with the mergers and acquisitions which formed the basis of the insider information in this case.

However, in order to bring a successful prosecution against James Sanders under rule 10b-5, it must be established that as a third party, he knew or had reason to believe that Arnold McClellan was in breach of a fiduciary duty by disclosing the insider information (directly or indirectly via his wife Annabel McClellan). In addition, it must be established that Arnold McClellan received some personal benefit (either tangible or intangible).

This discussion need not detain us for long. We know that James Sanders was Blue Index's compliance officer. It is therefore highly likely that he knew that he was being improperly furnished with insider information and that this was illegal. We can derive support for this conclusion by reference to a telephone conversation which took place between James Sanders and his father, Tim Sanders. During the call, Tim Sanders asked "is this not insider dealing?".

James Sanders replied “No, not really. Well...” At this point his father laughed and said “try proving it” to which James Sanders responded “yes, exactly!”³⁸⁷

We can infer from this conversation that James Sanders knew that he was engaging in insider dealing. In short, he must therefore have been aware that Arnold McClellan was acting in breach of a fiduciary duty by disclosing such information to him.

The final question is whether Arnold McClellan derived any benefit from this (whether tangible or intangible). Again, this discussion need not detain us for long either. Rule 10b-5 has been held to include both tangible and intangible benefits. This description is so wide that it even captures insider information which is disclosed to a third party as a gift.³⁸⁸ In the present example, Arnold and Annabel McClelland divulged insider information to James and Miranda Sanders because they were family. The harm principle tells us that we all have an interest in our families (whether immediate or extended) and that this is therefore an important interest. By their actions, it could be argued that by disclosing insider information, the McClellands had promoted their own interests. However, even if we are wrong about that, it is arguable that, at the very least, the McClellands must have disclosed the insider information to James Sanders as a gift. That being so, it is submitted that James Sanders’s misconduct is caught by rule 10b-5.

Part 3: Harm and wrongdoing

Let us now turn to the final part of our analytical framework. It might be thought that there are no victims in our example and therefore no resultant harm. After all, there is nothing to suggest that any of the mergers and acquisitions were adversely affected by the misconduct of James Sanders. That being so, a sceptical reader might ask what is objectionable about James Sanders’s conduct?

³⁸⁷ Paul Cheston and Jonathan Brown, ‘James Sanders: The Trader Who Thought He Was Untouchable’ *The Independent* (London, 21 June 2012).

³⁸⁸ *Dirks v Securities and Exchange Commission* 463 US 646 (1983).

We must begin by acknowledging that insider dealing has the potential to affect a range of different actors: insiders, market professionals, traders, and investors.³⁸⁹ In the context of the Blue Index case, there is no doubt that Arnold McClellan's behaviour constituted a breach of his fiduciary duty to his employer. In short, by disclosing insider information, he breached his duty of loyalty. However, as against James Sanders, it is not possible to make the same argument. After all, he did not owe any duty to Arnold McClellan's employer.

It might be argued that the primary harm resulting from James Sanders's misconduct was to the interests of Blue Index and its shareholders. Assuming that Blue Index was owned by other innocent shareholders, it is fairly easy to make a case that James Sanders's conduct set back their welfare interests. We can derive support for this proposition from the fact that Blue Index subsequently went out of business. However, the evidence seems to suggest that Blue Index was wholly owned by James Sanders (his co-defendant, Swallow, was a co-director but not a shareholder). That being so, our argument falls away. That is, because James Sanders set back his own interests by his misconduct (which is no different to any person who intentionally commits a crime).

Rather, it is submitted that the primary harm resulting from our example was to those innocent shareholders (i.e. traders and investors) who sold their shares at a reduced price to James Sanders before the insider information (i.e. news of the upcoming acquisition or merger) became public knowledge. By his possession of insider information, James Sanders had an unfair advantage over these innocent shareholders. Had the latter been in possession of the same information, it is highly unlikely that they would have entered into any trades at reduced prices. By purchasing their shares in advance of a public announcement, James Sanders deprived them of the opportunity of making a substantial return on their shares. In short, James Sanders's misconduct set back the financial interests (a welfare interest) of these innocent shareholders.

The indirect harm resulting from our example was to other innocent actors. It might be argued that as a result of James Sanders's misconduct, there was an adverse impact on the share prices of the companies involved in the scandal. However, without further information, we cannot be sure about this. A more certain indirect consequence of James Sanders's

³⁸⁹ Jie Hu and Thomas H. Noe, 'The Insider Trading Debate' (1997) 82 (4) *Economic Review* 34, 37.

misconduct is the harm to Arnold McClellan's employer (Deloitte). There is no doubt that a scandal such as this must have resulted in damage to the reputation of the firm. Although James Sanders did not owe any duty to Deloitte, this does not detract from the fact that he must have known that his misconduct, if discovered, would be likely to cause such harm.

The remote harm arising from the Blue Index case is fairly easy to identify. The general literature tells us that if insider dealing were to become prevalent, it would have an adverse impact on investors' confidence in the integrity of the market. A setback to the integrity of a financial market is likely to undermine the proper and efficient operation of that market. This may, in turn, lead to a slowdown in that market which is likely to be detrimental to the economy as a whole.³⁹⁰

Turning to the wrongdoing in our example, we know from our discussion of primary harm that James Sanders set back the financial interests (a welfare interest) of those innocent shareholders who sold their stock at reduced values. The harm principle tells us that a setback to a welfare interest is so serious that it simultaneously constitutes a wrong. In this example, it is submitted that James Sanders's conduct was wrong because it involved the use of deception to obtain stock at reduced values. In other words, he was under a duty (imposed by the rules of the market) not to enter into transactions when in possession of insider information. The simple reason for this is that a person who is unlawfully in possession of insider information has an unfair competitive advantage over those who are not privy to such information. By breaching this duty, James Sanders set back the innocent shareholders' right to transact on a level playing field.

The Blue Index case concerned an outsider who had been furnished with insider information. Let us now consider an example involving an insider.

THE UBEROIS

In November 2009, Matthew Uberoi and his father, Neel Uberoi, were convicted by jury of 12 counts of insider dealing contrary to 52 of the 1993 Act. Following an adjournment for pre-

³⁹⁰ Michael Manove, 'The Harm from Insider Trading and Informed Speculation' (1989) 104 (4) *Quarterly Journal of Economics* 823.

sentence reports, Matthew Uberoi was sentenced to 12 months' imprisonment whilst his father was sentenced to two years' imprisonment.³⁹¹

According to the evidence, during the summer of 2006, Matthew Uberoi undertook a six-month internship with Hoare Govett, the corporate broking arm of ABN-AMRO Bank. During his internship, Matthew Uberoi worked on a number of takeovers and other price sensitive deals. The prosecution alleged that he had communicated insider information on these transactions to his father, Neel Uberoi, before the information had been made public.³⁹²

As a result of being furnished with this insider information, Neel Uberoi bought shares in three different companies just before favourable announcements were made to the market. His first and most lucrative trade concerned a small pharmaceutical company called Neutec Pharma. Neel Uberoi bought 18,000 shares valued at approximately £90,000. A few days later, Neutec Pharma announced it was to be taken over by the Swiss pharmaceutical giant Novartis which sent its share price soaring. Thereafter, Neel Uberoi sold his shares for almost £200,000 which made him a profit of approximately £110,000. The same method was used in respect of two other companies although the investments and returns were smaller.³⁹³

Let us apply our analytical framework to this example. As we are concerned with insiders, our analysis will focus on the conduct of Matthew Uberoi only.

Part 1: The 2010 Act

Section 1 of the 2010 makes it an offence for a person to offer, promise, or give an advantage to another person with the intention of inducing that person to perform a relevant function or activity improperly (case 1) or in the knowledge or belief that the acceptance of the advantage would itself constitute the improper performance of a relevant function or activity (case 2).

³⁹¹ Alex Spence, 'Two-year jail sentence for insider trader' *The Times* (London, 11 December 2009).

³⁹² Summarised from *R (Matthew Uberoi and Neel Uberoi) v City of Westminster Magistrates' Court* [2008] EWHC 3191 (Admin).

³⁹³ Michael Herman, 'Dentist Neel Uberoi 'made £150,000 through insider trading with intern son'' *The Times* (London, 16 October 2009); Aislinn Laing, 'Dentist and son jailed for three years for insider trading' *The Telegraph* (London, 11 December 2009).

There is no difficulty with satisfying the first part of section 1. We know from the facts of our example that Matthew Uberoi gave an advantage to his father, Neel Uberoi, in the form of valuable insider information. However, before we can consider Matthew Uberoi's intention, we must first establish whether his father was engaged in a relevant function or activity.

As to this, it will be recalled that a relevant function or activity is one which is of a public nature, connected with a business, performed in the course of employment, or performed on behalf of a body of persons (corporate or unincorporate), and the person performing it is expected to act in good faith, impartially, or in accordance with a position of trust.

It is immediately apparent that Neel Uberoi was not performing a function or activity of a public nature or acting in the course of his employment (he was, by occupation, a dentist). We also know from the evidence that he was not employed by Hoare Govett or any of the companies in which he invested. Neither is there any evidence to suggest that he was acting on behalf of a body of persons.

The only remaining category is therefore a function or activity which is connected with a business. It might be thought that this category is not engaged given our observation about Neel Uberoi being a dentist by profession. The 2010 Act does not tell us what is meant by a function or activity connected with a business. Instead, section 3(7) tells us that the term "business" includes (but is not limited to) a trade or profession. Beyond this, there is no guidance. It is arguable that Neel Uberoi's conduct falls within the scope of the term "business". The evidence showed that he frequently traded in shares (in his spare time). Although this was not his primary occupation, there is no doubt that he traded in shares for the purposes of financial reward (i.e. as a part-time business). Even if we are wrong about that, it is submitted that a person who trades on the stock market impliedly agrees to act in good faith (i.e. by complying with the rules of the market). That being so, it is arguable that Neel Uberoi was acting in the course of business when he received insider information from his son, Matthew Uberoi.

We must now return to the question of Matthew Uberoi's intention in furnishing his father with insider information. Having established that his father, Neel Uberoi, was acting in the course of a business, the obvious inference is that Matthew Uberoi disclosed insider information to his father in order to induce him into acting improperly. That is, to use the insider information to buy shares contrary to the rules of the market. It is submitted that a

reasonable person looking at Neel Uberoi's conduct would hold that he had failed to act in good faith by virtue of his misuse of confidential insider information. On any view, he should not have used or relied upon this information when conducting trades.

In short, we can see from this analysis that Matthew Uberoi's misconduct is caught by case 1. In the alternative, it is submitted that case 2 is also satisfied. Given Matthew Uberoi's background as an intern at Hoare Govett and the knowledge that his father also engaged in trading, it must have been obvious to him that the mere acceptance by his father of insider information was improper (case 2). Let us therefore hold that Matthew Uberoi's actions are also caught by case 2.

Part 2: The law in the USA

For the second part of our analytical framework let us recall 17 C.F.R. § 240.10b-5. This makes it unlawful for a person (P) to engage in any act or omission which operates as a fraud upon any person in connection with the purchase or sale of any security. In short, this requires proof that P engaged in a fraudulent act (or omission) in connection with the purchase or sale of securities.

In the context of our present example, there is little difficulty in satisfying the requirements of rule 10b-5. From an analytical perspective, it is clear that Matthew Uberoi was an insider. That is, because he was employed by Hoare Govett and worked on a number of takeovers and price sensitive deals. There is also no difficulty with establishing that he engaged in a positive act by furnishing his father with insider information. The sole issue is whether this disclosure operated as a fraud upon any person in connection with the purchase or sale of any security. We can deal with this point shortly.

The US Supreme Court has held that a fiduciary's undisclosed use of information belonging to his principal, without disclosure of such use to the principal, for personal gain constitutes fraud in connection with the purchase or sale of a security and thus violates rule 10b-5. This misappropriation theory has been approved as a valid basis for insider trading liability.³⁹⁴

³⁹⁴ *United States v O'Hagan* 521 US 642 (1997).

In the instant case, it is clear from the facts that Matthew Uberoi disclosed confidential insider information belonging to his employer without its consent. Moreover, we know that the reason for making this disclosure was financial gain (it is immaterial that the financial gain was obtained by his father, Neel Uberoi). Let us therefore hold that our example is caught by rule 10b-5.

It is also worth mentioning that Neel Uberoi, despite being an outsider, would also be caught by rule 10b-5. In order to establish liability on his part, we would need to show that he knew or had reason to believe that his son, Matthew Uberoi, was in breach of a fiduciary duty by disclosing insider information. Of course, this is largely a question of fact. However, in the context of the present case we can draw an adverse inference from the fact that the Uberois discussed the insider information using coded messages about Chinese food. This suggests that they were both aware that their conduct was illegal. Of course, we would also need to establish that Matthew Uberoi received some personal benefit from his misconduct. As to this, we know from the facts that Matthew Uberoi's father benefitted financially as a result of the illegal trading. It is submitted that this is sufficient to satisfy the requirement of personal benefit for two reasons. First, because Matthew Uberoi was a dependant at the time of the wrongdoing, the financial benefit to his father essentially subsidised the financial support which his father no doubt provided to him. Second, something which promotes the well-being of one's family obviously constitutes an intangible benefit because it also promotes one's self-interest.

Part 3: Harm and wrongdoing

Unlike our previous example (the Blue Index case), the primary harm in our current example is far more obvious and therefore easier to identify. We know that Matthew Uberoi was undertaking an internship with Hoare Govett. We also know that during the course of this internship, he worked on a number of takeovers which meant that he became privy to confidential price sensitive information. This imposed upon him both a duty of loyalty and a duty of confidentiality. In other words, he owed a duty of loyalty to his employer not to disclose or misuse the insider information that he had acquired through his employment.

By disclosing this information to his father, Matthew Uberoi not only breached his duty of confidentiality, he also breached his duty of loyalty to his employer and thereby set back its interests in a loyal workforce. His employer, Hoare Govett, had a right to expect that Matthew

Uberoi would not put his own self-interest first. In addition, no brokerage firm would want to be associated with insider dealing. It may be that the adverse publicity surrounding Matthew Uberoi's misconduct resulted in a setback to Hoare Govett's financial interests as some investors may have been deterred by the scandal. However, without further information, we can only speculate about this particular setback.

As to the indirect harm flowing from our example, it is submitted that this was to those innocent shareholders who sold their shares at a reduced price to Neel Uberoi. As with the Blue Index case, it is submitted that this information gave Neel Uberoi an unfair advantage over these innocent shareholders. Had they been in possession of the same information, it is highly unlikely that they would have sold their shares at a reduced price. In view of the profits made by Neel Uberoi, we know that the financial loss was sizeable. Thus, we can see that Matthew Uberoi's misconduct set back the financial interests (i.e. welfare interests) of these innocent shareholders.

In terms of remote harm, the general literature on corruption tells us that if insider dealing were to become prevalent, there would be an adverse impact on the proper and efficient operation of markets. In order for investors to operate freely in the marketplace, they must be satisfied that there is a level playing field. If insider dealing became routine, there would be an inherent distrust amongst investors with the result that there may be a slowdown in the market and a knock-on effect for the economy. If the economy were to slow down, there would be a rise in unemployment. This would necessarily mean a reduction in revenue for the government which in turn would negatively impact upon public spending. Thus, we can see that there are a number of different remote harms which might arise if insider dealing were to become prevalent.

Finally, let us consider the wrongdoing arising from Matthew Uberoi's misconduct. We have previously argued that the primary victim of his misconduct was his employer, Hoare Govett. The classical explanation of the wrongdoing in agency relationships is based upon the idea of disloyalty. That is, Matthew Uberoi wronged Hoare Govett by breaching his duty of loyalty. However, it is submitted that this is a bit vague. Let us therefore try to be a bit more specific about what this entails.

As an employer, Hoare Govett employed and paid Matthew Uberoi's salary (albeit he was only retained on a six-month internship). In return, Matthew Uberoi was under a duty to promote

not his own interest but that of his employer. Similarly, Hoare Govett had a right to expect that Matthew Uberoi would act in this way.

In the context of the present case, we know that Matthew Uberoi violated this duty by putting his own self-interest first and misusing the confidential insider information. All employers depend upon the hard work and honesty of their employees. It is a right that they are entitled to enforce given that they pay their salaries. It is arguable that this right is so important that it also constitutes a welfare interest because without a loyal workforce, most employers would be unable to function. Thus we can see that the loyalty of an employee is of paramount interest to employers. When Matthew Uberoi set this aside for his own benefit, he violated Hoare Govett's rights and thereby wronged them.

9. VOTE BUYING

Vote buying is a very specific type of electoral fraud. It can be described as the payment of an advantage in order to induce a voter to vote or refrain from voting. By contrast, electoral fraud is far wider and encompasses any conduct which interferes with the proper administration of an election such as vote buying, personation, treating, and undue influence.³⁹⁵

In England and Wales, these different types of electoral fraud are criminalised by the Representation of the People Act 1983 (the 1983 Act). In addition, the Electoral Administration Act 2006 contains offences of supplying false information and stealing another person's postal vote. The 1983 Act consolidated a number of different election offences left over from the Victorian era and recast them as offences of corruption. Section 113 deals specifically with the bribery of voters.³⁹⁶

³⁹⁵ Electoral Commission, 'Summary of Electoral Offences' (Factsheet, July 2012) <http://www.electoralcommission.org.uk/__data/assets/pdf_file/0005/149729/List-of-electoral-offences.pdf> accessed 1 August 2012.

³⁹⁶ Isobel White and Charley Coleman, 'Postal Voting and Electoral Fraud' (22 June 2011) House of Commons Library Note No. SN/PC/3667 <<http://www.parliament.uk/documents/commons/lib/research/briefings/snpc-03667.pdf>> accessed 1 August 2012.

In the USA, electoral fraud is illegal at federal level and in every state.³⁹⁷ At federal level, the law consists of a complex mix of overlapping statutes.³⁹⁸ For our purposes, we need only refer to 42 USC § 1973i(c). We have not previously referred to this statute but, in short, it makes it an offence for a person to knowingly pay or offer to pay (or accept payment) for voting.

The general scholarship in this area suggests that vote buying is a core case of corruption.³⁹⁹ Let us consider some examples and see how they fare against our analytical framework.

THE BREATHITT COUNTY VOTE BUYING SCANDAL

In May 2010, a primary election was held in Breathitt County, Kentucky, USA. One of the candidates standing for election was Michael Salyers. During the early stages of the election, an abnormally large number of absentee votes were entered. In an attempt to uncover any illegal voting practices, the police interviewed and offered immunity to every voter who had voted in the election. As a result of the investigation, Salyers and his co-defendants, Naomi Johnson, Earl Young and Jackie Jennings, were charged with, inter alia, vote buying contrary to 42 USC § 1973i(c) (they were prosecuted under federal law because the election was held in part to select a candidate for the US Senate).

The epicentre of the vote buying scam was a grocery store owned by Salyers and run by Johnson. The scam worked in one of two ways. In the first instance, voters came into the grocery store and offered to sell their votes. In other instances, the defendants solicited votes for Salyers in exchange for money. Once the amount of the bribe had been agreed, Salyers would instruct one of his co-defendants to escort the voter to the polling station so as to ensure that they voted for him. Afterwards, they would return to the grocery store where Salyers would pay the voter for having voted for him.

³⁹⁷ Richard L. Hasen, 'Vote Buying' (2000) 88 (5) *California Law Review* 1323.

³⁹⁸ Craig C. Donsanto and Nancy L. Simmons, *Federal Prosecution of Election Offenses* (7th edn, US Government Printing, 2007).

³⁹⁹ Mark E. Warren, 'What Does Corruption Mean in a Democracy?' (2004) 48 (2) *American Journal of Political Science* 328; Gokhan R. Karahan, R. Morris Coats and William F. Shughart II, 'Corrupt Political Jurisdictions and Voter Participation' (2006) 126 (1) *Public Choice* 87; Ben Holzer, 'Political Vote Buying Statutes: Textual Limits, Enforcement Challenges, and the Need for Reform' (2008) 12 (1) *Journal of Legislation and Public Policy* 211.

Salyers and Jennings pleaded guilty and were given reduced sentences of 2 months' imprisonment. Young and Johnson were convicted after trial and were sentenced to 4 months' imprisonment.⁴⁰⁰

Let us apply our analytical framework to this example. For the sake of clarity, we shall only consider the conduct of Salyers.

Part 1: The 2010 Act

It is clear from our example that we are dealing with two types of bribery: active and passive. Salyers offered a financial reward to some voters in order to induce them to vote for him (active bribery) whereas other voters approached him and offered to sell their votes in exchange for a financial reward (passive bribery). Let us consider these in turn.

Section 1 of the 2010 Act is concerned with active bribery (i.e. offences of bribing another person). According to section 1, a person is guilty of bribery if he offers, promises, or gives an advantage (whether by himself or through a third party) to another person with the intention of inducing that person to perform a relevant function or activity improperly (case 1) or in the knowledge or belief that the acceptance of the advantage would itself constitute the improper performance of a relevant function or activity by that person (case 2).

There is little difficulty with satisfying the first part of section 1. We know from the facts that Salyers gave an advantage in the form of money to voters who had voted for him in the election. In order to satisfy case 1, it is necessary to show that these payments were made by Salyers with the intention of inducing the voters to vote for him. This is easily satisfied on the facts. We know from the evidence that Salyers and his co-defendants solicited the voters and went to great lengths to ensure that they voted for Salyers. So far, so good.

However, it is when we turn to last part of case 1 that we encounter difficulties. In short, this requires us to establish that Salyers induced the voters to perform a relevant function or activity improperly. According to section 3 of the 2010 Act, a relevant function or activity is one which is of a public nature, connected with a business, performed in the course of

⁴⁰⁰ Summarised from *United States v Naomi Johnson and Earl Young* 5:11-CR-143 (ED Ky, 1 June 2012).

employment, or performed on behalf of a body of persons (corporate or unincorporate) in circumstances where the person performing it is expected to act in good faith, impartially, or in accordance with a position of trust.

It is immediately apparent from this list that voters who vote in an election are not performing a function or activity of a public nature (i.e. connected with a public office), acting in the course of a business, employment, or on behalf of a body of persons. In short, such voters act in a manner which falls outside the ambit of section 3. On the basis of this analysis, we can see that case 1 is not satisfied.

We are presented with the same problem when we turn to case 2. This requires us to establish that Salyers knew or believed that the acceptance of the advantage by the voters would itself constitute the improper performance of a relevant function or activity. However, as with case 1, it is not possible to sustain any such argument as the voters were not engaged in a relevant function or activity pursuant to section 3.

Let us now consider section 2 of the 2010 Act. This is concerned with passive bribery. According to section 2, a person is guilty of being bribed if he requests, agrees to receive, or accepts an advantage in one of four scenarios. First, with the intention of performing a relevant function or activity improperly (case 3). Second, where the request or receipt of the advantage itself constitutes the improper performance of a relevant function or activity (case 4). Third, as a reward for having improperly performed a relevant function or activity (case 5). Fourth, in anticipation of receiving an advantage performs a relevant function or activity improperly (case 6).

A relevant function or activity is defined by section 3 as one which is of a public nature, connected with a business, performed in the course of employment, or performed on behalf of a body of persons (corporate or unincorporate), and which imposes upon the person performing it a duty to act in good faith, impartially, or in accordance with a position of trust.

In the context of the present case, it is submitted that Salyers was performing a function or activity of a public nature by virtue of the fact that he was running for public office. It might be said that this argument is premature because Salyers had not been elected at the time of the wrongdoing. However, it is submitted that this counter-argument is incorrect for the simple reason that it would result in a lacuna in the law. It would essentially mean that candidates

campaigning for election would not need to act in good faith or abide by the rules of an election. This cannot be correct as a matter of common sense. Rather, it is submitted that candidates campaigning for election, though not elected, are engaging in conduct which is itself an activity of a public nature. Let us therefore hold that Salyers was engaged in a relevant function or activity for the purposes of section 3. That being so, the question arises as to whether he requested, agreed to receive, or accepted an advantage in the circumstances set out in cases 3 to 6.

To this end, it is submitted that cases 3 and 4 are applicable. Salyers is caught by case 3 because he allowed himself to be bribed by the voters when he accepted the offer to buy their votes. We know that he had an improper intention when he purchased the votes because his co-defendants escorted the voters to the polling station in order to ensure that they voted for Salyers. It is submitted that this constituted the improper performance of a relevant function or activity because a candidate standing for election is required to abide by the rules of the election. This obviously means that they should refrain from certain types of conduct such as the buying of votes.

However, even if we are wrong about this, it is submitted that case 4, which imposes strict liability, is also satisfied. In short, Salyers's acceptance of the voters' offer to buy their votes constituted the improper performance of a relevant function or activity (for the reasons set out above). We can see from this analysis that Salyers's misconduct is caught by section 2 of the 2010 Act. It is submitted that this supports our assertion that vote buying is a core case of corruption.

Before we move on, it is useful to contrast our analysis by considering the offence of vote buying under section 113 of the 1983 Act. It will be recalled that section 113 creates a number of different offences. Let us look take a look at section 113(2) which deals specifically with the bribery of voters.

According to section 113(2), a person is guilty of bribery if he directly or indirectly offers, promises, or gives any money or office to any voter (or another on his behalf) in order to induce the voter to vote or refrain from voting. In the instant case, there is ample evidence to satisfy section 113(2). We know that Salyers gave money to the voters. Moreover, we know that his reason for doing so was to reward them for having voted for him. In fact, he was so keen to secure their votes that he sent his co-defendants along with them to the polling station

in order to ensure that they kept their end of the bargain. Thus, we can see that Salyers's misconduct is also caught by section 113(2) of the 1983 Act.

It is worth noting that under section 113(5) of the 1983 Act, the voters would also be guilty of a reciprocal offence by virtue of their either having solicited or accepted a bribe in exchange for voting. We can see from this discussion that vote buying is caught by both the 2010 Act as well as the 1983 Act.

Part 2: The law in the USA

In the USA, the approach is very similar to that in England and Wales in that vote buying is dealt with as an offence in its own right. It will be recalled that Salyers and his co-defendants were convicted of vote buying contrary to 42 USC § 1973i(c). This makes it an offence for a person to knowingly pay or offer to pay (or accept payment) for voting.

In the present case, we can be certain that section 1973i(c) is satisfied because both Salyers and his co-defendants were convicted of vote buying contrary to section 1973i(c). The evidence shows that Salyers paid the voters in order to secure their votes at the election.

Another similarity with the law in England and Wales is the fact that section 1973i(c) contains a mirror offence which makes it an offence for a voter to knowingly accept a payment in return for voting. In the context of the present case, this would capture the misconduct of the voters who either solicited or accepted a payment in exchange for voting.

Part 3: Harm and wrongdoing

The purpose of an election is twofold. First, it allows suitably qualified candidates to contest an election. Second, it allows the electorate to exercise their right to vote for the candidate who most appeals to them. That is, the candidate who best promotes their interests.

By engaging in vote buying, Salyers and his co-defendants invaded the rights and interests of both these groups. It might be argued that both of these groups are the primary victims of Salyers's wrongdoing. However, it is submitted that the interests of the electorate are best described as a community interest. That is because most, if not all people, have an interest in the proper administration of elections. But such interests do not belong to any one person in

particular. Rather, they belong to everyone. The harm is therefore not to a welfare interest but is more general in nature.

By contrast, the candidates in an election have a very different interest in the outcome of an election. By standing for election, each candidate hopes that they will be elected. Each candidate therefore has a personal interest in the proper and fair administration of the election. By engaging in vote buying Salyers invaded the interests of these innocent candidates. It is for this reason that they are best regarded as the primary victims of Salyers's misconduct.

In terms of primary harm, it might be thought that these innocent candidates only suffered setbacks to their ulterior interests. After all, public office is usually an aspiration for those who choose to contest elections. However, it is submitted that this view is faulty and that all the innocent candidates suffered setbacks to their welfare interests.

The innocent candidates were standing for election in the hope of being elected and securing a permanent position. Such an appointment would have carried with it the usual benefits of being employed such as remuneration and other fringe benefits. On any view, remunerative employment must be a welfare interest. It impacts directly on a person's ability to provide both for themselves and their family. Of course, not all of the innocent candidates contesting the election would have been elected. However, this does not detract from the fact that they had an interest in the outcome of the election. In short, by denying the innocent candidates a fair opportunity of being elected, Salyers set back their welfare interests.

Let us now consider the indirect harm arising from Salyers's vote buying. We have already mentioned the setback to the interests of the electorate. It is submitted that this is the indirect consequence of Salyers's misconduct. By engaging in vote buying, Salyers distorted the outcome of the election and set back the rights of the electorate to a democratic election. That is, an election in which the outcome is not manipulated through corruption.

The remote harm resulting from our example is something that we have previously touched upon as part our literature review in chapter II. The dominant view amongst the political scientists is that corruption in the proper functioning of government (which also includes the electoral process) can result in a number of remote harms. In developing countries, such corruption can strengthen the dominance of the ruling elite, weaken the economy, and foster national disintegration.

Of course, given that our example is set in the USA (which is a developed country), the remote harm is likely to be different to that in developing countries. Nonetheless, it is arguable that if election fraud (such as vote buying) were to become pervasive, the general public would lose confidence in the integrity of elections, public officials, and the government. This in turn may lead to more serious consequences such as civil unrest.

As for the wrongdoing stemming from Salyers's misconduct, let us recall the primary victims from our example: the innocent candidates. We have already referred to the fact that their welfare rights were set back by Salyers's vote buying. But what makes Salyers's conduct wrong is the setback to the innocent candidates' right to a fair election. That is, an election in which the result is not manipulated and in which all the candidates have an equal opportunity of being elected. Salyers set back this right when he paid the voters to vote for him.

The fact that the innocent candidates were most likely unaware that their rights had been set back in this way is immaterial and does not change the fact that they were wronged. This is true even though the results of the election were most likely declared void after the scandal came to light and a fresh election called. In short, it does not alter the fact that these innocent candidates were wronged by Salyers's misconduct.

Let us consider another example of vote buying.

THE NEWTON COUNTY VOTE BUYING CASE

In November 1986, a general election was held in Newton County, Arkansas, USA. The election was held to elect candidates for both state and federal offices (including that of US Senator). The defendant, Alton Campbell, was a county judge who stood in the election in order to seek re-election as a judge.

The prosecution alleged that shortly before the election, Campbell had approached a number of voters and offered to purchase their votes. As a result of this, he was charged with, *inter alia*, two counts of vote buying contrary to 42 USC § 1973i(c). The evidence in respect of the two counts of vote buying came from two voters called by the prosecution. According to these witnesses, Campbell had personally paid \$30 to one and \$50 to the other in exchange for their blank absentee ballots.

At his trial, Campbell raised a technical defence. He accepted that the voters had given him their absentee ballots in exchange for money. However, he argued that there was no evidence to show that he had made these payments in exchange for votes as neither voter had actually completed their absentee ballot before handing them to him. The prosecution alleged that Campbell had completed the absentee ballots himself.

The jury found the prosecution's case compelling and convicted Campbell of both counts of vote buying. He was sentenced to three years' imprisonment and fined \$5,000.⁴⁰¹ Let us apply our analytical framework to this example.

Part 1: The 2010 Act

In this example, there are two instances of misconduct. First, there is Campbell's misconduct in approaching the voters and offering to purchase their votes. It might be thought that this is a case of active bribery because Campbell approached the voters and offered to buy their absentee ballots. However, the fact that Campbell instigated the transaction does not absolve the voters of liability. The second instance of misconduct is the voters' behaviour in selling their absentee ballots to Campbell. It might be thought that this is an example of passive bribery because the voters accepted Campbell's offer of money in exchange for their absentee ballots.

This analysis might lead the reader to conclude that there is some significance in which of the parties instigated the corrupt transaction. From a moral perspective, it might be argued that the voters are slightly less culpable than Campbell. However, it is submitted that this is a factor for a judge to consider when passing sentence. Of more interest to us is the fact that the 2010 Act makes no distinction between which of the parties instigated the corrupt transaction. Instead, it treats them both equally.

In fact, there is nothing in section 1 of the 2010 Act which limits its application to the person who instigated the corrupt transaction. We can derive some support for this proposition from the fact that section 2, which is concerned with offences relating to being bribed, also applies to those who request an advantage (i.e. instigate a corrupt transaction). Thus, it is clear that

⁴⁰¹ Summarised from *United States v Alton Campbell* 845 F 2d 782 (1988).

section 2 is not exclusively concerned with cases of passive bribery. That being so, it is submitted that, in appropriate cases, section 1 may also fall to be considered in the same way.

In any event, any discussion about the identity of the bribe payer may be illusory. In the present case, it is arguable that both Campbell and the voters could be the bribe payer. It will be recalled that Campbell approached the voters and offered to purchase their absentee ballots. However, on the other hand, the voters agreed to this and offered to sell their absentee ballots to Campbell in exchange for money.

This is significant because if we proceed on the basis that the bribe payer was Campbell, we run into the same problems that we experienced with our previous example (the Breathitt County voting scandal). That is, section 1 does not apply because the voters were not performing a relevant function or activity for the purposes of section 3 of the 2010 Act. However, if we proceed on the basis that it was the voters who instigated the transaction when they offered to sell their absentee ballots to Campbell in exchange for money, we arrive at an entirely different conclusion.

It will be recalled that section 1 of the 2010 Act states that a person is guilty of bribing another if he offers, promises, or gives an advantage (whether by himself or through a third party) to another with the intention of inducing that person to perform a relevant function or activity improperly (case 1) or in the knowledge or belief that the acceptance of the advantage would itself constitute the improper performance of a relevant function or activity (case 2). Let us consider these in turn.

The first part of case 1 requires us to show that the voters gave an advantage to Campbell. This is easily satisfied on the facts as the voters furnished Campbell with their absentee ballots. The second part of case 1 states that the voters must have provided this advantage with the intention of inducing Campbell into performing a relevant function or activity improperly. This need not detain us for long because it is clear from the facts that the voters offered their votes to Campbell because they wanted him to act improperly by paying for their absentee ballots. The third and final part of case 1 requires us to establish that Campbell was performing a relevant function or activity improperly. Let us consider this carefully.

According to section 3, a relevant function or activity is one which is of a public nature, connected with a business, performed in the course of employment, or performed on behalf of

a body of persons (corporate or unincorporate), and which imposes upon the person performing it a duty to act in good faith, impartially, or in accordance with a position of trust. To this end, it will be recalled that Campbell was a judge who was seeking re-election. As an elected public official, Campbell was required to act in good faith not only when sitting in a judicial capacity but also when performing peripheral activities of a public nature such as seeking re-election in an election. It is submitted that a reasonable person looking at our example would hold that Campbell had acted improperly by succumbing to the voters' offer to sell their absentee ballots. Let us therefore hold that case 1 is satisfied, and that the voters are guilty of bribing Campbell contrary to section 1 of the 2010 Act.

Turning to case 2, it is submitted that the voters must have known or believed that the mere acceptance of a bribe by a judge would itself constitute the improper performance of a relevant function or activity. That being so, it is submitted that the case 2 is also satisfied.

Let us now consider Campbell's liability under section 2 of the 2010 Act. Recall section 2 which states that a person (R) is guilty of being bribed if he requests, agrees to receive, or accepts an advantage in the circumstances set out in cases 3 to 6. As to these, case 3, which requires proof of mens rea, states that R must have intentionally performed a relevant function or activity improperly. By contrast, case 4, which is strict liability, simply requires proof that the request or receipt of the advantage itself constituted the improper performance of a relevant function or activity. Similarly, case 5, which is also strict liability, is concerned with the situation where R is rewarded for having improperly performed a relevant function or activity. Case 6 also imposes strict liability and deals with the scenario where, in anticipation of receiving an advantage, R performs a relevant function or activity improperly.

There is no difficulty with establishing the first part of section 2. We know that Campbell requested (and accepted) an advantage from the voters when he approached them and offered to buy their absentee ballots. The next step is to determine whether Campbell's conduct was contrary to the circumstances set out in cases 3 to 6. To this end, it is submitted that only cases 3 and 4 are applicable to the facts of our example.

As to case 3, we can infer from the facts that Campbell's intention in requesting and accepting the absentee ballots must have been to manipulate the results of the election in his favour. There is no other logical reason for his actions. It would have been obvious to Campbell that such behaviour constituted the improper performance of his duties as a judge. As the holder

of a public office, he was required to act in good faith not only when sitting as a judge but also when he engaged in peripheral activities of a public nature such as standing in an election. It is submitted that a reasonable person looking at the facts of our example would have no hesitation in coming to the same conclusion. Let us hold therefore hold that case 3 is satisfied.

As to case 4, it is submitted that this too is satisfied on the facts. It will be recalled that case 4, which imposes strict liability, is satisfied when the request or receipt of the advantage itself constitutes the improper performance of a relevant function or activity. This is easily satisfied on the facts as Campbell's offer to buy the voters' absentee ballots constituted the improper performance of his duties as the holder of a public office. Campbell was, by virtue of his position, required to act in good faith not only when sitting as a judge but also when he engaged in peripheral activities of a public nature such as standing in an election. This would have been obvious to Campbell as well as any reasonable person looking at the matter. Thus, we can see that case 4 is also satisfied.

In summary, we can see from this analysis that the conduct of both the voters and Campbell is caught by the 2010 Act. This is in addition to their liability under the 1983 Act. It is submitted that the voters' conduct is caught by section 113(5) of the 1983 Act. This makes it an offence for a person to either solicit or accept a bribe in exchange for either voting or for refraining from voting. It is submitted that the voters, by selling their absentee ballots, essentially agreed to refrain from voting. By contrast, Campbell's conduct is caught by the reciprocal offence in section 113(2). This makes it an offence for a person to directly or indirectly offer, promise, or give any money or office to any voter in order to induce the voter to vote or refrain from voting. In the present case, it is clear that Campbell's misconduct is caught by section 113(2) given that he bought the voters' absentee ballots. In other words, Campbell induced the voters to refrain from voting.

Part 2: The law in the USA

The second part of our analytical framework need not detain us for long because the conduct of both the voters and Campbell is caught by 42 USC § 1973i(c). As to the voters, it is submitted that their conduct is caught section 1973(i)(c) because they accepted money from Campbell in return for their absentee ballots. By contrast, Campbell's guilt is easy to establish since he was charged and convicted of vote buying contrary to section 1973i(c).

Part 3: Harm and wrongdoing

Let us now consider the harm and wrongdoing resulting from our example. As we shall see, these are very similar to the harm and wrongdoing identified in our previous example (the Breathitt County vote buying scandal).

It is submitted that the primary harm was to the other innocent candidates who contested the election. Campbell's vote buying deprived these innocent candidates of their right to a fair election. That is, an election in which the outcome is not manipulated through the buying of votes. The fact that the results of the election may subsequently have been declared void does not detract from the fact that these innocent candidates' interests were set back. Moreover, the invasion to their interests was not trivial since the elected candidate would have benefitted financially from their appointment (i.e. they would have received remuneration). It is arguable that Campbell's misconduct therefore constituted a setback to the financial interests (a welfare interest) of these innocent candidates.

As to the indirect harm, we have previously argued that vote buying constitutes a set back to the community interests of the electorate. Of course, we are referring here to those innocent members of the electorate whose rights to a democratic election were set back. It follows from this that we are excluding the voters involved in our current example. It is submitted that these voters cannot be regarded as victims for the simple reason that they voluntarily agreed to sell their votes. In terms of the indirect harm suffered by the innocent members of the electorate, it is submitted that both the voters and Campbell distorted the electoral process; thereby setting back the public interest in a properly functioning and democratic election.

Now let us consider the remote harm arising from our example. The general literature on corruption tells us that vote buying adversely affects the proper functioning of the government which in turn can result in a number of undesirable remote harms. For example, if electoral fraud (such as vote buying) were to become pervasive, it is arguable that the public would lose confidence in the integrity of elections, public officials, and the government. The reason for this disconnection is the fact that corruption in the electoral process leads to the wrong people being elected and therefore subverts the democratic will. The resulting government is less representative and less accountable than it would otherwise be. Those who are elected also have less of an incentive to promote the interests of their constituents. In addition, it has been said that pervasive corruption in the electoral process has consequences

that go beyond the bounds of representation and democratic accountability such as civil unrest, violence, and even civil war.⁴⁰²

Lastly, let us consider the wrongdoing resulting from our example. It is submitted that the primary victims in our example, the innocent candidates, were wronged when Campbell interfered with their right to a fair election. As a direct result of Campbell's vote buying, these innocent candidates were denied an equal opportunity of being elected. The fact that the results of the election were most likely declared void does not alter the wrongdoing suffered by these innocent candidates.

10. THE HARM IN CORRUPTION

The aim of this chapter was twofold. First, to remedy the gap which we have previously identified as existing in the scholarship on corruption. Second, to provide a complete account of the harm and wrongdoing which flows from acts of corruption. Let us consider these overlapping aims.

In chapter II, we undertook a review of the literature on the harm and wrongdoing in corruption. This showed us that the scholarship in this area can broadly be divided into three distinct strands: political harm, economic harm, and moral wrongdoing. The general consensus amongst both political scientists and economic theorists is that corruption is objectionable because it results in remote harms. The former submit that corruption is a threat to the proper functioning of government and the rule of law. The latter argue that corruption is inefficient because it stifles competition, distorts the allocation of resources, and retards economic development. As for moral wrongdoing, there is small but emerging body of philosophical literature. The most prominent of the legal philosophers suggests that the offering a bribe is wrong because it induces another to commit an unlawful act. By contrast, it is said that the receipt of a bribe is wrong because it causes the recipient to act in breach of a duty owed to a principal or principle.

⁴⁰² Sarah Birch, 'Electoral Corruption' in Todd Landman and Neil Robinson (eds), *The SAGE Handbook of Comparative Politics* (SAGE Publications, 2009) 395-409.

Although none of these claims have been disputed (indeed some of them were adopted as part of our analysis of remote harms), it is clear from our literature review that the scholarship in this area is incomplete because it underemphasises the harm and wrongdoing resulting from corruption. In particular, it fails to provide an account of the harm and wrongdoing suffered by those innocent actors whose interests are wrongfully set back by the corrupt acts of others. Instead, it focuses almost exclusively on the remote harms which result from corruption.

One reason for this omission may be due to the fact that there have been no systematic analyses of the different types of harm that result from acts of corruption (i.e. primary harm, indirect harm, and remote harm). Although these harms are descriptive (rather than definitional) features, it is submitted that they are typically to be found in core cases of corruption. In addition, the literature also fails to make the connection between the primary harm and the wrongdoing suffered by those innocent actors whose rights are set back by corruption.

In this chapter, we have sought to plug these gaps by systematically analysing a number of different case studies. Our approach has been to take the analytical framework set out in chapter III and to apply that framework to a range of carefully selected cases studies of core cases of corrupt conduct.

Perhaps the first thing to note about our analyses is that the coverage between the law in England and Wales and the law in the USA is largely identical. We should not be surprised at this. After all, corruption is a transnational phenomenon. But the similarity of coverage shows that core cases of corruption travel well. Of course, this may not hold true for corruption in the wider sense. However, the fact that core cases of corruption are also proscribed in the USA suggests that our project has a normative value which extends beyond England and Wales.

Turning to the harm and wrongdoing, our systematic analysis has allowed us to demonstrate that in core cases of corruption there are at least three types of harm that result: primary harms, indirect harms, and remote harms. By articulating all the harms which result from corruption, we have been able to demonstrate the direct connection between the harm and the wrongdoing suffered by the innocent victims of corruption. These findings confirm that the general literature on the harm and wrongdoing in corruption is incomplete. Contrary to the general literature, our project has shown that the harm in corruption is not limited to remote harms.

Interestingly, our analysis has also shown that the harm and wrongdoing which results from corruption differs from case study to case study (and from example to example). Moreover, so do the identities of the innocent actors whose interests are wrongfully set back by the corrupt acts of others. However, this is not surprising given that the term “corruption” describes a family of conduct rather than one particular type of misconduct.

For example, as part of our first case study (bribery), we looked at the harm and wrongdoing caused by a public official, Munir Patel, who had been convicted of bribery contrary to section 2 of the 2010 Act. We concluded that the primary harm was to those innocent insurance companies whose interests were wrongfully set back by the corrupt conduct of Patel. That is, because they had carried risks at an inappropriate cost and effectively insured bad drivers as if they were good drivers. Not only did this deprive these innocent insurance companies of valuable revenue, it also meant that they were exposed to a risk (i.e. the likelihood of the insured driver being at fault for a road traffic accident) which they had not fully appreciated. As to the indirect harm, we concluded that this was to the public’s community interest in the proper functioning of the administration of justice. This was fairly easy to develop as an argument since most people have an interest in a fair and impartial criminal justice system. However, in terms of the remote harm, our analysis dovetailed neatly with the general literature and showed that an entrenched culture of bribery amongst public officials would most likely lead to corruption spilling over into other areas. There was also the risk that the criminal justice system would lose legitimacy in the eyes of the public. Finally, when looking at the question of wrongdoing, we made a connection between the primary harm and the wrongdoing suffered by the innocent insurance companies. In short, we argued that the primary harm to the insurance companies consisted of a setback to their welfare interests (they suffered a financial setback). Given the importance of welfare interests, this setback simultaneously wronged the innocent insurance companies.

By contrast, recall our examination of noble cause corruption. In both of our examples, Judith Ward and the Birmingham Six, the harm and wrongdoing were particularly striking. In both examples, the defendants had been wrongfully imprisoned for many years. For example, Ward spent nearly 18 years in prison because of the corrupt conduct of forensic scientists who had misled the court by concealing evidence which might have changed the course of the trial.

Our analysis of Ward’s case showed that the primary harm resulting from the miscarriage of justice was to Ward. It was clear that she was the primary victim of the forensic scientists’

misconduct. As a result of this misconduct, she had suffered the most egregious of harms by being wrongfully deprived her liberty for almost two decades. This deprivation of liberty set back almost all her interests. For example, she was unable to pursue many routine activities which most of us take for granted such as securing employment and starting a family. But she was not the only victim. Upon further analysis, it became clear that Ward's family had also been indirectly harmed by the forensic scientists' misconduct. After all, they had been deprived of a daughter and sister for almost 18 years. As with all our cases studies, the remote harm in Ward's case aligned exactly with the remote harms described in the general literature. For example, we observed that if noble cause corruption were to become pervasive there would be a breakdown in the administration of the criminal justice system. Finally, we considered the wrongdoing suffered by Ward as a result of the forensic scientists' misconduct. We noted how this was directly connected to the primary harm suffered by Ward. That is, because she had been deprived of her liberty, almost all her rights and interests (welfare and ulterior) had been unlawfully violated. However, of all of these rights and interests, the most important violations were arguably to her right to liberty and her right to a fair trial. She was denied both of these as a direct result of the forensic scientists' misconduct.

As we can see from these two case studies (bribery and noble cause corruption), the harm and wrongdoing varies from case study to case study (as does the identity of the innocent actors affected by the corruption of others). By contrast, the general literature falls into error by providing an incomplete account of the harm and wrongdoing which results from acts of corruption. One reason for this failure may be the fact that the literature does not acknowledge that the identity of the innocent victims may vary from case to case. This may be because in cases of corruption, unlike most (though not all) other types of crimes, the innocent victim is usually unaware that their rights and interests have been set back. As a result, there is a popular misconception that white collar offences such as corruption and fraud are victimless crimes.

By approaching the matter systematically, we have been able to plug the gap in the literature by articulating a complete account of the harm and wrongdoing in a selection of case studies of corrupt conduct. Our account of the harm in corruption has shown that core cases of corrupt conduct give rise to harm in three dimensions: primary harms, indirect harms, and remote harms. This is in addition to the wrongdoing which also results from corruption. It is important to distinguish the harm in this way since the primary harm provides the basis for

understanding how corruption wrongs those innocent actors whose rights and interests are set back by the corrupt acts of others.

V

CONCLUSION

This thesis has sought to articulate a coherent theory of the harm in corruption. It is submitted that we have achieved this aim. In this final chapter, we shall review our research question, look at our methodology, revisit our findings, and discuss our coherent theory of the harm in corruption.

Let us begin by considering the central elements of our research question. First, our use of the word “coherent” is a reference to the fact that our project is concerned with articulating a complete account of the harm caused to those innocent actors whose interests are setback by the corrupt acts of others. Our research question is framed in this way because the existing literature in this area is incomplete as it provides only a partial account of the harm caused to these innocent actors. Second, the word “harm” in our research question is used in an extended sense. That is, it is used to describe both simple harm (i.e. a setback to interests) and wrongdoing (i.e. the indefensible violation of a person’s rights). In order to aid precision, we subdivided simple harm into primary harms, indirect harms, and remote harms. This systematic approach was adopted in order to aid the articulation of a complete account of the harm in corruption. Lastly, although the word “corruption” is used to describe a large family of conduct, we limited the ambit of our enquiry, for analytical reasons, to core cases of corrupt conduct.

Turning to the question of methodology, it will be recalled that our research question was prompted by a critical review of the literature on the harm and wrongdoing in corruption. During our review of the scholarship, it became apparent that the general scholarship is defective insofar as it fails to provide a complete account of the harm and wrongdoing which results from corruption.

Our literature review showed that the scholarship in this area can be broadly divided into three distinct but overlapping strands: political harm, economic harm, and moral wrongdoing. The first two strands are largely concerned with remote harms whereas the last strand is concerned with the question of wrongdoing.

The literature on political and economic harm consists of contributions from political scientists and economic theorists. Although a minority from both groups (the revisionists) argue that corruption is beneficial and efficient, these views are regarded by most observers as false. The fact that most countries have some form of anti-corruption legislation casts considerable doubt over the claims made by the revisionists. By contrast, the majority (the post-revisionists) argue that corruption is harmful. To this end, they submit that corruption may, if left unchecked, undermine the proper functioning of government and the efficient operation of the economy. Whilst we did not dispute these claims, it quickly became apparent during our literature review that the post-revisionists' account of the harm in corruption is incomplete insofar as it focuses on remote harms. In short, they underestimate the primary and indirect harms suffered by those innocent actors whose rights and interests are set back by the corrupt acts of others.

The third strand consists of a small but emerging body of literature which is concerned with the wrongdoing in corruption. The chief proponent of this emerging field is Green. According to Green, what makes an act wrongful is some intrinsic violation of a freestanding moral duty rather than the consequences of the act. To this end, he advocates an approach based upon everyday norms. He identifies disloyalty as the everyday norm which is breached by bribery (although it is not clear how Green arrived at this conclusion). Green analyses the moral wrongdoing in bribery in two parts: passive bribery and active bribery. According to Green, the receipt of a bribe (passive bribery) is wrong because it causes the duty-holder to breach his duty of loyalty to a principal or principle. By contrast, the offer of a bribe (active bribery) is wrong because it induces the recipient to commit a wrongful act.

However, our literature review showed Green's analysis to be incomplete in two important respects. First, his analysis fails to acknowledge that corruption may result in harm to other innocent actors (i.e. besides principals). Second, he fails to make any connection between the simple harm stemming from acts of corruption and the wrongdoing caused by such conduct.

As a result of our literature review, we identified a gap in the scholarship. In short, there are no complete accounts of the harm (i.e. primary, indirect, and remote) and wrongdoing in corruption. Moreover, there is no explanation of the nexus between these two elements. It was this gap in the literature which prompted us to articulate a coherent theory of the harm in corruption.

In order to answer our research question, we set out a three-part analytical framework. It was necessary to do this for a number of reasons. The first part of our framework allowed us to identify core cases of corrupt conduct. It was necessary to do this because corruption consists of a large family of conduct and there is no agreement on which types of conduct should be included within any definition. For analytical reasons, we limited the ambit of our enquiry to core cases of corruption. We identified core cases by taking conduct which is commonly regarded as being a core case of corruption and applying the improper conduct offences in the 2010 Act.

As to the 2010 Act, we observed that the general offences in sections 1 (offences of bribing another person) and 2 (offences relating to being bribed) do not extend the old law. The same is true of the discrete offence in section 6 which proscribes the bribery of foreign public officials. What is new in the 2010 Act is section 7 which makes it an offence for a commercial organisation to fail to prevent bribery. However, this does not extend criminal liability beyond that which might be regarded as bribery in the popular sense.

The second part of our framework consisted of a summary of some carefully selected anti-corruption statutes from the USA. These federal and state level statutes allowed us to demonstrate that core cases of corruption are also contrary to the law in the USA. In other words, we were able to show that core cases of corruption travel well; thereby adding support to the claim that our coherent theory of the harm and wrongdoing in corruption is of normative value.

The third and final part of our analytical framework consisted of a streamlined and supplemented version of Feinberg's restatement of the harm principle. By adopting Feinberg's version of the harm principle, we had a ready-made and powerful tool for identifying harm. In particular, we were able to explain what we meant by simple harm (a setback to interests) and wrongdoing (an indefensible violation of a person's rights). We expanded Feinberg's account of simple harm so as to include primary harms, indirect harms, and remote harms. As to wrongdoing, we supplemented the harm principle with Hohfeld's account of the form of rights, and MacCormick's theory as to the function of rights.

In chapter IV, we applied our analytical framework to a range of different case studies (or core cases of corruption). We applied our analytical framework to each of these case studies. The application of the first part required us to apply the improper conduct offences in the 2010

Act to a given case study so as to confirm its classification as a core case of corruption. But this occasionally caused a real strain as we tried to shoehorn various case studies into the 2010 Act. For example, our examination of noble cause corruption, which is regarded by many scholars as a core case of corruption, required some imaginative thinking. The misconduct of the forensic scientists (in the Judith Ward case) and the police officers (in the Birmingham Six case) did not have the look of bribery. There was no meeting of minds between these actors and prosecution counsel. The similarity with bribery lay not only in the improper conduct of the forensic scientists and the police officers in conferring an advantage on prosecution counsel (without his knowledge), but also in the harm and wrongdoing which stemmed from their misconduct. However, it may be that our difficulties in trying to fit noble cause corruption into the 2010 Act is indicative of a more fundamental problem involving correct labelling. Perhaps such conduct is better categorised as an example of perverting the course of justice. But it is only by undertaking a systematic analysis of the kind found in this thesis that one can begin to challenge existing labels.

The application of the second part of our framework allowed us to ascertain whether there are any key differences in terms of coverage with the law in the USA. Although the law in the USA is piecemeal in nature, it transpires that coverage is largely the same. This confirms two things. First, that core cases of corruption travel well. Second that our theory of the harm and wrongdoing in corruption has a normative value which extends beyond England and Wales.

The third and final part of our analytical framework is also the most important. By applying our streamlined version of the harm principle to our case studies, we were able to demonstrate that, at the very least, core cases of corruption give rise to three types of simple harm (primary harms, indirect harms, and remote harms) as well as wrongdoing. These descriptive features were found in each and every one of our nine case studies. Moreover, our analysis of these case studies allowed us to demonstrate the nexus between harming (in particular primary harms) and wrongdoing. Feinberg's version of the harm principle tells us that a setback to a person's welfare interest is so serious that it simultaneously constitutes a wrong. Our case studies show that corruption sets back the welfare interests of innocent actors and thereby wrongs them.

We concluded our analysis by drawing together our findings and articulating a coherent theory of the harm and wrongdoing in corruption. In short, we argued that a coherent theory of the harm and wrongdoing in core cases of corruption must, at the very least, be able to

provide an account of the primary, indirect, and remote harms which stem from core cases of corruption together with an account of the wrongdoing. Any theory which fails to do this is at serious risk of being defective. We argued that only by approaching the matter systematically is it possible to articulate a complete (as opposed to partial) account of the harm and wrongdoing in corruption.

At the outset of this thesis, we sought to furnish a coherent theory of the harm in corruption. By rethinking the harm and wrongdoing in corruption, this thesis has plugged the gap in the literature and successfully articulated a complete account of the harm and wrongdoing in core cases of corruption.

Word count: 97,863 (including footnotes).

BIBLIOGRAPHY

Abrams, Fran, 'Export Credits Guarantee Department' (BBC Radio 4 Programme, Broadcast 30 November 2004)

<http://news.bbc.co.uk/nol/shared/bsp/hi/pdfs/30_11_04_export_credit.pdf> accessed 12 January 2008

Abueva, Jose Velso, 'The Contribution of Nepotism, Spoils and Graft to Political Development' (1966) 3 (1) East-West Center Review 45

Aidt, Toke S, 'Economic Analysis of Corruption: A Survey' (2003) 113 (491) The Economic Journal 632

Ala'i, Padideh, 'The Legacy of Geographical Morality and Colonialism: A Historical Assessment of the Current Crusade Against Corruption' (2000) 33 (4) Vanderbilt Journal of Transnational Law 877

Alam, M. Shahid, 'Anatomy of Corruption: An Approach to the Political Economy of Underdevelopment' (1989) 48 (4) American Journal of Economics and Sociology 441

Alexander, Richard, 'Corruption as a Financial Crime' (2009) 30 (4) Company Lawyer 98

Alldrige, Peter, 'The Law Relating to Free Lunches' (2002) 23 (9) Company Lawyer 264

---, 'Reforming the Criminal Law of Corruption' (2000) 11 Criminal Law Forum 287

Anderson, Terence, David Schum and William Twining, *Analysis of Evidence* (2nd edn, Cambridge University Press, 2005)

Argandona, Antonio, 'Corruption and Companies: The Use of Facilitating Payments' (2005) 60 (3) Journal of Business Ethics 251

---, 'Private-to-Private Corruption' (2003) 47 (3) Journal of Business Ethics 253

Ashworth, Andrew, *Principles of Criminal Law* (5th edn, Oxford University Press, 2006)

Azfar, Omar, Young Lee and Anand Swamy, 'The Causes and Consequences of Corruption' (2001) 573 (1) *Annals of the American Academy of Political and Social Science* 42

Bainbridge, Stephen M., 'An Overview of US Insider Trading Law: Lessons for the EU?' (2005) 2 (1) *European Company Law* 22

Bardhan, Pranab, 'Corruption and Development: A Review of Issues' (1997) 35 (3) *Journal of Economic Literature* 1320

---, 'The Economist's Approach to the Problem of Corruption' (2006) 34 (2) *World Development* 341

Baron, Marcia, *The Moral Status of Loyalty* (Kendall Hunt Publishing, 1984)

Barreto, Raul A. and James Alm, 'Corruption, Optimal Taxation, and Growth' (2003) 31 (3) *Public Finance Review* 207

Bayley, David H., 'The Effects of Corruption in a Developing Nation' (1966) 19 (4) *Western Political Quarterly* 719

BBC News, 'Building Companies Fined £129.5m' *BBC News* (London, 22 September 2009) <<http://news.bbc.co.uk/1/hi/business/8268116.stm>> accessed 31 October 2009

---, 'Jail Sentence for German Referee' *BBC News* (London, 17 November 2005) <<http://news.bbc.co.uk/sport1/hi/football/europe/4445896.stm>> accessed 25 October 2009

Becker, Gary S. and George J. Stigler, 'Law Enforcement, Malfeasance, and Compensation of Enforcers' (1974) 3 (1) *Journal of Legal Studies* 1

Bellow, Adam, *In Praise of Nepotism* (Doubleday, 2003)

Ben-Dor, Gabriel, 'Corruption, Institutionalization, and Political Development: The Revisionist Theses Revisited' (1974) 7 (1) *Comparative Political Studies* 63

Bentham, Jeremy, *First Principles Preparatory to Constitutional Code* (Philip Schofield (ed), *The Collected Works of Jeremy Bentham*, Clarendon Press, 1989)

Berman, Mitchell N., 'On the Moral Structure of White Collar Crime' (2007) 5 (1) *Ohio State Journal of Criminal Law* 301

Bhagwati, Jagdish N., 'Directly Unproductive Profit-Seeking (DUP) Activities' (1982) 90 (5) *Journal of Political Economy* 988

Birch, Sarah, 'Electoral Corruption' in Todd Landman and Neil Robinson (eds), *The SAGE Handbook of Comparative Politics* (SAGE Publications, 2009)

Blackburn, Keith, Niloy Bose and M. Emranul Haque, 'The Incidence and Persistence of Corruption in Economic Development' (2006) 30 (12) *Journal of Economic Dynamics and Control* 2447

---, 'Public Expenditures, Bureaucratic Corruption and Economic Development' (2005) University of Manchester, Centre for Growth and Business Cycle Research, Discussion Paper No. 2005/053 <<http://www.socialsciences.manchester.ac.uk/cgbcr/dpcgbr/dpcgbr53.pdf>> accessed 1 January 2008

Blackburn, Keith and Jonathan Powell, 'Corruption, Inflation and Growth' (2011) 113 (3) *Economics Letters* 225

Bowcott, Owen, 'Magistrates' Court Clerk is First to be Convicted Under Bribery Act' *The Guardian* (London, 14 October 2011) <<http://www.guardian.co.uk/law/2011/oct/14/magistrates-court-clerk-bribery-act>> accessed 14 April 2012

Brownsberger, William N., 'Development and Governmental Corruption - Materialism and Political Fragmentation in Nigeria' (1983) 21 (2) *Journal of Modern African Studies* 215

Burke, Jason, 'India corruption protesters dump snakes in busy tax office' *The Guardian* (London, 1 December 2011) 33 <<http://www.guardian.co.uk/world/2011/nov/30/india-corruption-protest-snakes-tax-office>> accessed 22 February 2012

Caiden, Gerald E., 'Toward a General Theory of Official Corruption' (1988) 10 (1) *Asian Journal of Public Administration* 3

Caiden, Gerald E. and Naomi J. Caiden, 'Administrative Corruption' (1977) 37 (3) *Public Administration Review* 301

Calvert, Jonathan, 'Money Talks at Oxford' *The Sunday Times* (London, 24 March 2002) News 3

---, 'Revealed: Degrees for Sale at Oxford College' *The Sunday Times* (London, 24 March 2002) News 1

Carson, Thomas L., 'Bribery, Extortion, and the Foreign Corrupt Practices Act' (1985) 14 (1) *Philosophy and Public Affairs* 66

Carvajal, Raul, 'Large-scale Corruption: Definition, Causes, and Cures' (1999) 12 (4) *Systemic Practice and Action Research* 335

Cheston, Paul and Jonathan Brown, 'James Sanders: The Trader Who Thought He Was Untouchable' *The Independent* (London, 21 June 2012)

Committee on Standards in Public Life (Nolan Committee), *Standards in Public Life: First Report of the Committee on Standards in Public Life* (1995, Cm 2850-I)

Crime and Misconduct Commission (Queensland), 'University of Queensland matter' (Press Release, 9 December 2011) <<http://www.cmc.qld.gov.au/news-and-media/media-releases/cmc-media-statement-university-of-queensland-matter>> accessed 30 May 2012

Delattre, Edwin J., *Character and Cops: Ethics in Policing* (American Enterprise Institute, 1989)

Dennis, Ian, 'The Bribery Act 2010' [2010] (6) *Criminal Law Review* 439

---, 'It Looks Like Bribery, Therefore it is' [2009] (2) *Criminal Law Review* 61

---, 'Miscarriages of Justice and the Law of Confessions: Evidentiary Issues and Solutions' [1993] *Public Law* 291

Director of the Serious Fraud Office and the Director of Public Prosecutions, *Bribery Act 2010: Joint Prosecution Guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions* (30 March 2011)

Doig, Alan and Heather Marquette, 'Corruption and Democratisation: The Litmus Test of International Donor Agency Intentions?' (2005) 37 (2-3) *Futures* 199

Doig, Alan and Robin Theobald (eds), *Corruption and Democratisation* (Frank Cass, 2003)

Dommen, Edward, 'Paradigms of Governance and Exclusion' (1997) 35 (3) *Journal of Modern African Studies* 485

Donsanto, Craig C. and Nancy L. Simmons, *Federal Prosecution of Election Offenses* (7th edn, US Government Printing, 2007)

Dunlop, John T. and Benjamin Higgins, 'Bargaining Power and Market Structures' (1942) 50 (1) *Journal of Political Economy* 1

Dworkin, Ronald, *Taking Rights Seriously* (Duckworth, 2004)

Dymond, Glenn, 'The Appellate Jurisdiction of the House of Lords' (20 November 2009) House of Lords Library Note No. 2009/010 <<http://www.parliament.uk/documents/lords-library/lln2009-010appellate.pdf>> accessed 8 January 2010

Ehrbar, Al, 'Supply' in David R Henderson (ed), *Concise Encyclopedia of Economics* (Library of Economics and Liberty, 2008) <<http://www.econlib.org/library/Enc/Supply.html>> accessed 20 December 2009

Electoral Commission, 'Summary of Electoral Offences' (Factsheet, July 2012) <http://www.electoralcommission.org.uk/__data/assets/pdf_file/0005/149729/List-of-electoral-offences.pdf> accessed 1 August 2012

Elliot, G. F. S., *Thoughts on the Subject of Bribery and Corruption at Elections* (James Ridgway, 1853)

Elster, Jon, *The Cement of Society: A Study of Social Order* (Cambridge University Press, 1989)

Emerson, Robert W., *Business Law* (5th edn, Barron's Educational Series, 2009)

Fallon Jr, Richard H., 'Two Senses of Autonomy' (1994) 46 (4) *Stanford Law Review* 875

Fan, C. Simon, 'Kleptocracy and corruption' (2006) 34 (1) *Journal of Comparative Economics* 57

Feinberg, Joel, 'Duties, Rights, and Claims' (1966) 3 (2) *American Philosophical Quarterly* 137

---, 'The Nature and Value of Rights' (1970) 4 *The Journal of Value Inquiry* 243

---, *Harm to Others* (The Moral Limits of the Criminal Law, Oxford University Press, 1984)

---, *Offense to Others* (The Moral Limits of the Criminal Law, Oxford University Press, 1985)

---, *Harmless Wrongdoing* (The Moral Limits of the Criminal Law, Oxford University Press, 1990)

Fennell, Phil and Philip A. Thomas, 'Corruption in England and Wales: An Historical Analysis' (1983) 11 *International Journal of the Sociology of Law* 167

Financial Services Authority, 'Three Sentenced for Insider Dealing' (Press Release, 20 June 2012) <<http://www.fsa.gov.uk/library/communication/pr/2012/067.shtml>> accessed 21 July 2012

Flatters, Frank and W. Bentley MacLeod, 'Administrative Corruption and Taxation' (1995) 2 (3) *International Tax and Public Finance* 397

Fortson QC, Rudi, 'Understanding the Bribery Act 2010' (1 July 2011) <http://www.rudifortson4law.co.uk/legaltexts/Bribery_Act_2010_R.Fortson_QC_1stJuly2011_v2.pdf> accessed 26 August 2012

Freeman, Michael, *Lloyd's Introduction to Jurisprudence* (8th edn, Sweet & Maxwell, 2008)

Gabriel, D. Bruce, 'The Scope of Bribery under the Travel Act' (1979) 70 (3) *The Journal of Criminal Law and Criminology* 337

Gardner, Frank, 'Tunisia one year on: Where the Arab Spring started' *BBC News* (London, 17 December 2011) <<http://www.bbc.co.uk/news/world-africa-16230190>> accessed 30 December 2011

Gardner, Hannah, 'Chinese football bosses jailed in match-fixing crackdown' *The Times* (London, 14 June 2012)

Gentle, Stephen, 'The Bribery Act 2010: Part 2: the Corporate Offence' [2011] (2) *Criminal Law Review* 101

Gibb, Frances, 'Clerk of Court is Convicted of Bribery' *The Times* (London, 15 October 2011) <<http://www.thetimes.co.uk/tto/news/uk/crime/article3195319.ece>> accessed 14 October 2012

Gofur, Abdul, 'A Panoptic Study of Corruption' (2006) 1 (1) *Opticon* 1826 28

—, 'White Collar, Paper Tiger: Corruption in the UK' (2007) 13 (4) *Tilburg Foreign Law Review* 317

Goldsmith, Arthur A., 'Slapping the Grasping Hand: Correlates of Political Corruption in Emerging Markets' (1999) 58 (4) *American Journal of Economics and Sociology* 865

Graafland, Johan J., 'Self-interest' in Jan Pell and Irene van Staveren (eds), *Handbook of Economics and Ethics* (Edward Elgar Publishing Ltd, 2009)

Green, Stuart P., *Lying, Cheating, and Stealing: A Moral Theory of White-Collar Crime* (Oxford University Press, 2006)

Grossman, Herschel I., 'Kleptocracy and Revolutions' (1999) 51 (2) *Oxford Economic Papers* 267

Guriev, Sergei, 'Red tape and corruption' (2004) 73 (2) *Journal of Development Economics* 489

Harcourt, Bernard E., 'The Collapse of the Harm Principle' (1999) 90 (1) *Journal of Criminal Law and Criminology* 109

Harris, Robert, *Political Corruption: In and Beyond the Nation State* (Routledge, 2003)

Hart, H. L. A., 'Are There Any Natural Rights?' (1955) 64 (2) *Philosophical Review* 175

---, *Essays on Bentham* (Clarendon Press, 1982)

---, *The Concept of Law* (2nd edn, Oxford University Press, 1997)

Hasen, Richard L., 'Vote Buying' (2000) 88 (5) *California Law Review* 1323

Heidenheimer, Arnold J. and Michael Johnston (eds), *Political Corruption: Concepts and Contexts* (3rd edn, Transaction Publishers, 2002)

Herman, Michael, 'Dentist Neel Uberoi 'made £150,000 through insider trading with intern son'' *The Times* (London, 16 October 2009)

Hill, H., 'The Indonesian Economy: The Strange and Sudden Death of a Tiger' in G. Forrester and R. May (eds), *The Fall of Soeharto* (Crawford House, 1998)

Hohfeld, Wesley, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1917) 26 (8) *Yale Law Journal* 710

---, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 (1) *Yale Law Journal* 16

---, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (Yale University Press, 1919)

Holzer, Ben, 'Political Vote Buying Statutes: Textual Limits, Enforcement Challenges, and the Need for Reform' (2008) 12 (1) *Journal of Legislation and Public Policy* 211

Home Office, *Corruption: Draft Legislation* (2003, Cm 5777)

---, *Draft Corruption Bill: The Government Reply to the Report from the Joint Committee on the Draft Corruption Bill* (2003, Cm 6086)

---, *Bribery: Reform of the Prevention of Corruption Acts and SFO Powers in Cases of Bribery of Foreign Officials: A Consultation Paper* (December 2005)

Hooper LJ and David Ormerod, *Blackstone's Criminal Practice 2012* (Oxford University Press, 2012)

Horder, Jeremy, 'Bribery as a Form of Criminal Wrongdoing' (2011) 127 (January) *Law Quarterly Review* 37

Houghton, Des, 'University of Queensland nepotism furore prompts changes to accountability rules' *The Courier Mail* (Brisbane, 18 May 2012) <<http://www.couriermail.com.au/news/queensland/university-of-queensland-nepotism-furore-prompts-changes-to-accountability-rules/story-e6freoof-1226359356447>> accessed 30 May 2012

Hu, Jie and Thomas H. Noe, 'The Insider Trading Debate' (1997) 82 (4) *Economic Review* 34

Huntington, Samuel P., *Political Order in Changing Societies* (Yale University Press, 1968)

---, 'Modernization and Corruption' in Arnold J Heidenheimer and Michael Johnston (eds), *Political Corruption: Concepts and Contexts* (3rd edn, Transaction Publishers, 2002)

Hurst, Daniel, 'UQ nepotism scandal report to go public' *Brisbane Times* (Brisbane, 28 May 2012) <<http://www.brisbanetimes.com.au/queensland/uq-nepotism-scandal-report-to-go-public-20120528-1zenm.html>> accessed 2 June 2012

Jain, Arvind K., 'Models of Corruption' in Arvind K Jain (ed), *Economics of Corruption* (Kluwer Academic Publishers, 1998)

Johnston, Michael, 'The Political Consequences of Corruption: A Reassessment' (1986) 18 (4) *Comparative Politics* 459

Joint Committee on the Draft Bribery Bill, *Draft Bribery Bill: First Report of Session 2008-09* (HC 430-II, HL Paper 115-II)

Joint Committee on the Draft Corruption Bill, *Draft Corruption Bill: Report and Evidence* (2002-03, HL Paper 157, HC Paper 705)

Jones, David Lewis, 'The Judicial Role of the House of Lords before 1870' in Louis Blom-Cooper, Gavin Drewry and Brice Dickson (eds), *The Judicial House of Lords 1870-2009* (Oxford University Press, 2009)

Jones, Peter, *Rights* (Palgrave, 1994)

Jordan, Jon, 'The OECD's Call For an End to "Corrosive" Facilitation Payments and the International Focus on the Facilitation Payments Exception Under the Foreign Corrupt Practices Act' (2011) 13 (4) University of Pennsylvania Journal of Business Law 881

Joshi, Shashank, 'After Gaddafi: Libyan revolution 'still has far to go'' *BBC News* (London, 21 October 2011) <<http://www.bbc.co.uk/news/world-africa-15398802>> accessed 22 February 2012

Judiciary of England and Wales, 'R v Munir Patel (Southwark Crown Court): Sentencing Remarks of HHJ Alistair McCreath' (Press Release, 18 November 2011) <<http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/munir-patel-sentencing-remarks.pdf>> accessed 19 November 2011

Kang, David C., *Crony Capitalism: Corruption and Development in South Korea and the Philippines* (Cambridge University Press, 2002)

Karahan, Gokhan R., R. Morris Coats and William F. Shughart II, 'Corrupt Political Jurisdictions and Voter Participation' (2006) 126 (1) Public Choice 87

Khan, Mushtaq H., 'The Efficiency Implications of Corruption' (1996) 8 (5) Journal of International Development 683

---, 'The New Political Economy of Corruption' in Ben Fine, Costas Lapavitsas and Jonathan Pincus (eds), *Development Policy in the Twenty-First Century: Beyond the Post-Washington Consensus* (Routledge, 2001)

---, 'Determinants of Corruption in Developing Countries: The Limits of Conventional Economic Analysis' in Susan Rose-Ackerman (ed), *International Handbook on the Economics of Corruption* (Edward Elgar Publishing, 2006)

Khan, Mushtaq H. and Kazi A. Toufique, 'Sand or Oil in the Machine?: A Comment on Corruption and Entrepreneurship' (1995) 23 (1-2) *Bangladesh Development Studies* 129

Khemani, R. S. and D. M. Shapiro, 'Glossary of Industrial Organisation Economics and Competition Law' (OECD, 1993) <<http://www.oecd.org/dataoecd/8/61/2376087.pdf>> accessed 8 July 2012

Kleinig, John, 'Rethinking Noble Cause Corruption' (2002) 4 (4) *International Journal of Police Science and Management* 287

Koch, Rebecca, 'The Foreign Corrupt Practices Act: It's time to cut back the grease and add some guidance' (2005) 28 (2) *Boston College International and Comparative Law Review* 380

Kochan, Nick and Robin Goodyear, *Corruption: The New Corporate Challenge* (Palgrave Macmillan, 2011)

Kramer, Matthew H., 'Rights Without Trimmings' in Matthew H Kramer, N E Simmonds and Hillel Steiner (eds), *A Debate Over Rights: Philosophical Enquiries* (Clarendon Press, 1998)

Kramer, Matthew H. and Hillel Steiner, 'Theories of Rights: Is There a Third Way?' (2007) 27 (2) *Oxford Journal of Legal Studies* 281

Krause, Cheryl A and Elisa T Wiygul, 'FCPA Compliance: The Vanishing "Facilitating Payments" Exception?' (2010) 2 (8) *Financial Fraud Law Report* 730

Krishnan, Chandrashekhar and Robert Barrington, *Corruption in the UK: Overview and Policy Recommendations* (Transparency International UK, 2011)

Krueger, Anne O., 'The Political Economy of the Rent-Seeking Society' (1974) 64 (3)
American Economic Review 291

Ladd, John, 'Loyalty' in Paul Edwards (ed), *Encyclopedia of Philosophy*, Vol V (Routledge, 1972)

Laing, Aislinn, 'Dentist and son jailed for three years for insider trading' *The Telegraph* (London, 11 December 2009)

Lamond, Grant, 'Coercion, Threats, and the Puzzle of Blackmail' in AP Simester and ATH Smith (eds), *Harm and Culpability* (Clarendon Press, 1996)

Landler, Mark, 'Germany Still Consumed by a Scandal' *The New York Times* (New York, 23 March 2005)

<http://www.nytimes.com/2005/03/23/sports/soccer/23soccer.html?pagewanted=1&_r=1>
accessed 25 October 2009

Lane, Bernard, 'All clear' for UQ after nepotism scandal' *The Australian* (Sydney, 14 May 2012) <<http://www.theaustralian.com.au/higher-education/all-clear-for-uq-after-nepotism-scandal/story-e6frgcjx-1226354925933>> accessed 30 May 2012

Lanham, David, 'Bribery and Corruption' in Peter Smith (ed), *Criminal Law: Essays in Honour of JC Smith* (Butterworths, 1987)

Law Commission, *Legislating the Criminal Code: Corruption* (1997, Law Com Paper No 145)

---, *Legislating the Criminal Code: Corruption* (1998, Law Com Report No 248)

---, *Reforming Bribery: A Consultation Paper* (2007, Law Com Paper No 185)

---, *Reforming Bribery* (2008, Law Com Report No 313)

Leff, Nathaniel H., 'Economic Development Through Bureaucratic Corruption' (1964) 8 (8)
American Behavioral Scientist 8

Leigh, David and Rob Evans, 'British Family Firm Accused of Getting Rich by Building Bridges to Nowhere' *The Guardian* (London, 20 December 2005)
<<http://politics.guardian.co.uk/foi/story/0,9061,1671092,00.html>> accessed 12 January 2008

---, 'SFO Studies Corruption Claims Against UK Bridge Builders' *The Guardian* (London, 21 December 2005) <<http://politics.guardian.co.uk/foi/story/0,9061,1671721,00.html>> accessed 12 January 2008

Lengwiler, Yvan and Elmar Wolfstetter, 'Auctions and Corruption: An Analysis of Bid Rigging by a Corrupt Auctioneer' (2010) 34 (10) *Journal of Economic Dynamics and Control* 1872

Lewis, David J., 'Corruption in Bangladesh: Discourse, Judgements and Moralities' (1996) University of Bath, Centre for Development Studies, Occasional Paper No. 05/96

Leys, Colin, 'What is the Problem about Corruption?' (1965) 3 (2) *The Journal of Modern African Studies* 215

Lindgren, James, 'The Theory, History, and Practice of the Bribery-Extortion Distinction' (1993) 141 (5) *University of Pennsylvania Law Review* 1695

---, 'Unraveling the Paradox of Blackmail' (1984) 84 (3) *Columbia Law Review* 670

Lui, Francis T., 'An Equilibrium Queuing Model of Bribery' (1985) 93 (4) *Journal of Political Economy* 760

Macaulay, Michael and Gary Hickey, *National Integrity System Assessment: United Kingdom* (Transparency International UK, 2011)

MacCormick, Neil, 'Rights, Claims and Remedies' (1982) 1 (2) *Law and Philosophy* 337

---, *Practical Reason in Law and Morality* (Oxford University Press, 2008)

Machiavelli, Niccolo, *The Prince* (Penguin Books, 2003)

- Machlup, Fritz, 'Characteristics and Types of Price Discrimination' in National Bureau of Economic Research (ed), *Business Concentration and Price Policy* (Princeton University Press, 1955)
- Manove, Michael, 'The Harm from Insider Trading and Informed Speculation' (1989) 104 (4) *Quarterly Journal of Economics* 823
- Marcotti, Gabriele, 'Penalties Reduced in Italian Scandal' *The Times* (London, 26 July 2006) 68
- Martinelli, Thomas J., 'Unconstitutional Policing: The Ethical Challenges in Dealing with Noble Cause Corruption' (2006) 73 (10) *Police Chief* 146
- Mauro, Paolo, 'Corruption and Growth' (1995) 110 (3) *Quarterly Journal of Economics* 681
- , 'The Persistence of Corruption and Slow Economic Growth' (2002) IMF Working Paper No. WP/02/213 <www.imf.org/external/pubs/ft/wp/2002/wp02213.pdf> accessed 3 March 2008
- , 'Why Worry About Corruption?' (1997) 6 *Economic Issues* 1
- McGuire, Martin C. and Mancur Olson, 'The Economics of Autocracy and Majority Rule: The Invisible Hand and the Use of Force' (1996) 34 (1) *Journal of Economic Literature* 72
- Mcinerney, Thomas F., 'The Regulation of Bribery in the United States' (2002) 73 (1) *International Review of Penal Law* 81
- Mehta, Suketu, *Maximum City: Bombay Lost and Found* (Review, 2005)
- Meon, Pierre-Guillaume and Khalid Sekkat, 'Does Corruption Grease or Sand the Wheels of Growth?' (2005) 122 (1/2) *Public Choice* 69
- Mill, John Stuart, *On Liberty and Other Writings* (Cambridge University Press, 1989)

Miller, Seumas, 'Corruption' in Edward N Zalta (ed), *Stanford Encyclopedia of Philosophy* (Spring 2011 edn) <<http://plato.stanford.edu/archives/spr2011/entries/corruption/>> accessed 19 March 2012

---, 'Noble Cause Corruption in Policing' (1999) 8 (3) *African Security Review* 12

Ministry of Justice, *Bribery: Draft Legislation (Draft Bill)* (2009, Cm 7570)

---, *The Bribery Act 2010: Guidance* (March 2011)

Mishra, Ajit, 'Persistence of Corruption: Some Theoretical Perspectives' (2006) 34 (2) *World Development* 349

Monte, Alfredo Del and Erasmo Papagni, 'Public Expenditure, Corruption, and Economic Growth: the Case of Italy' (2001) 17 (1) *European Journal of Political Economy* 1

Monteith, Charlie, 'The Bribery Act 2010: Part 3: Enforcement' [2011] (2) *Criminal Law Review* 111

Muller, Julius, *The Christian Doctrine of Sin*, Vol II (William Pulsford (tr), T&T Clark, 1853)

Myrdal, Gunnar, *Asian Drama: An Inquiry into the Poverty of Nation*, Vol II (Pantheon, 1968)

Naniuzeyi, Mabiengwa Emmanuel, 'The State of the State in Congo-Zaire: A Survey of the Mobutu Regime' (1999) 29 (5) *Journal of Black Studies* 669

Nelken, David and Michael Levi, 'The Corruption of Politics and the Politics of Corruption: An Overview' (1996) 23 (1) *Journal of Law and Society* 1

Newman, Paul, 'German Referee Jailed for Two Years' *The Independent on Sunday* (London, 18 November 2005) <<http://www.independent.co.uk/sport/football/european/german-referee-jailed-for-two-years-515756.html>> accessed 25 October 2009

Nicholls, Colin and others, *Corruption and Misuse of Public Office* (Oxford University Press, 2006)

Nussbaum, David, 'Money Versus Morality: Is Corruption Just a Matter of Misaligned Incentives?' (18 October 2006) London School of Economics, Public Lecture <http://www2.lse.ac.uk/PublicEvents/pdf/20061018_Nussbaum.pdf> accessed 28 January 2007

Nye, Joseph S., 'Corruption and Political Development: A Cost-Benefit Analysis' (1967) 61 (2) *American Political Science Review* 417

Nzongola-Ntalaja, Georges, *Class Struggles and National Liberation in Africa* (Omenanna, 1982)

O'Halloran, Julian, 'Builders' Bid-Rigging 'Endemic' *BBC News* (London, 16 July 2007) <http://news.bbc.co.uk/1/hi/programmes/file_on_4/6284126.stm> accessed 20 July 2007

O'Neill, Sean and Richard Ford, 'Reid Faces Questions on Sex-for-Visas Scandal' *The Times* (London, 22 May 2006) 4

Office of Fair Trading, 'Construction Firms Fined for Illegal Bid-Rigging' (Press Release, 22 September 2009) <<http://www.offt.gov.uk/news/press/2009/114-09>> accessed 31 October 2009

Olsen, William P, *The Anti-Corruption Handbook* (John Wiley & Sons, 2010)

Olson, Mancur, 'Dictatorship, Democracy, and Development' (1993) 87 (3) *American Political Science Review* 567

Organisation for Economic Co-operation and Development, *Guidelines for Fighting Bid Rigging in Public Procurement: Helping Governments to Obtain Best Value for Money* (2009)

---, 'Phase 3 Report on Implementing the OECD Anti-Bribery Convention in the United Kingdom' (March 2012) <<http://www.oecd.org/dataoecd/52/19/50026751.pdf>> accessed 5 May 2012

Padhy, Krushna Singh, *Corruption in Politics (A Case Study)* (BR Publishing, 1986)

Patten, Simon N., 'Cost and Utility' (1893) 3 (1) *Annals of the American Academy of Political and Social Science* 17

Philips, Michael, 'Bribery' (1984) 94 (4) *Ethics* 621

Pope, Jeremy, *TI Source Book 2000* (2nd edn, Transparency International, 2000)

Preston, Ian and Stefan Szymanski, 'Cheating in Contests' (2003) 19 (4) *Oxford Review of Economic Policy* 612

Prime Minister's Committee on Local Government Rules of Conduct (Redcliffe-Maud Committee), *Conduct in Local Government* (1974, Cmnd 5636)

Pritchard, Michael S., 'Bribery: the Concept' (1998) 4 (3) *Science and Engineering Ethics* 281

Raz, Joseph, 'Legal Rights' (1984) 4 (1) *Oxford Journal of Legal Studies* 1

---, 'On the Nature of Rights' (1984) 93 *Mind* 194

Reichman, Nancy, 'Insider Trading' (1993) 18 *Crime and Justice* 55

Ripstein, Arthur, 'Beyond the Harm Principle' (2006) 34 (3) *Philosophy and Public Affairs* 215

Rogers, W. V. H., *Winfield & Jolowicz on Tort* (16th edn, Sweet & Maxwell, 2002)

Rose-Ackerman, Susan, *Corruption: A Study in Political Economy* (Academic Press, 1978)

---, *Corruption and Government: Causes, Consequences, and Reform* (Cambridge University Press, 1999)

Royal Commission on Standards of Conduct in Public Life (Salmon Commission), *Report of the Salmon Commission* (1976, Cmnd 6524)

Russell, Jonathan, 'Insider Dealing Trio Sentenced to Over Five Years' *The Telegraph* (London, 20 Jun 2012) <<http://www.telegraph.co.uk/finance/financial-crime/9344446/Insider-dealing-trio-sentenced-to-over-five-years.html#>> accessed 21 July 2012

Ryan, Leo V, 'Combating Corruption: The 21st-Century Ethical Challenge' (2000) 10 (1) *Business Ethics Quarterly* 331

Sardan, J. P. Olivier de, 'A Moral Economy of Corruption in Africa?' (1999) 37 (1) *The Journal of Modern African Studies* 25

Schenone, Osvaldo H. and Samuel Gregg, *A Theory of Corruption* (Acton Institute, 2003)

Schofield, Philip, 'Jeremy Bentham on Political Corruption: A Critique of the First Report of the Nolan Committee' (1996) 49 *Current Legal Problems* 395

Scott, James C., 'The Analysis of Corruption in Developing Nations' (1969) 11 (3) *Comparative Studies in Society and History* 315

Select Committee on Home Affairs, *Police Disciplinary and Complaints Procedure* (1997-98, HC 258-I)

Sentencing Guidelines Council, 'Robbery: Definitive Guideline' (July 2006)
<http://sentencingcouncil.judiciary.gov.uk/docs/web_robbery-guidelines.pdf> 13 October 2012

---, 'Sentencing for Fraud - Statutory Offences: Definitive Guideline' (October 2009)
<http://sentencingcouncil.judiciary.gov.uk/docs/web_sentencing_for_fraud_statutory_offences.pdf> accessed 13 October 2012

---, 'Theft and Burglary in a Building other than a Dwelling: Definitive Guideline' (December 2008)
<http://sentencingcouncil.judiciary.gov.uk/docs/web_Theft_and_Burglary_of_a_building_other_than_a_dwelling.pdf> 13 October 2012

Silver, Hilary, 'Reconceptualizing Social Disadvantage: Three Paradigms of Social Exclusion' in Gerry Rodgers, Charles Gore and Jose B Figueiredo (eds), *Social Exclusion: Rhetoric, Reality, Responses* (International Labour Organisation, 1995)

Simester, A. P. and G. R. Sullivan, *Criminal Law: Theory and Doctrine* (3rd edn, Hart Publishing, 2007)

Smith, A. T. H., *Property Offences: The Protection of Property Through the Criminal Law* (Sweet & Maxwell, 1994)

Soanes, Catherine and Angus Stevenson (eds), *The Oxford Dictionary of English* (Oxford University Press, 2005)

Spence, Alex, 'Two-year jail sentence for insider trader' *The Times* (London, 11 December 2009)

Sullivan, G. R., 'The Bribery Act 2010: Part 1: An Overview' [2011] (2) *Criminal Law Review* 87

---, 'Reforming Bribery: Law Commission Consultation Paper 185: (2) Reforming the Law of Bribery (LCCP No 185): Bribery Outside England and Wales; Corporate Liability; Defences; Consent to Prosecution' [2008] (9) *Criminal Law Review* 687

Svoboda, Miroslav, 'History and Troubles of Consumer Surplus' (2008) 17 (3) *Prague Economic Papers* 230

Tadros, Victor, *Criminal Responsibility* (Oxford University Press, 2005)

Tanzi, Vito, 'Corruption Around the World: Causes, Consequences, Scope, and Cures' in George T Abed and Sanjeev Gupta (eds), *Governance, Corruption, and Economic Performance* (International Monetary Fund, 2002)

Tanzi, Vito and Hamid Davoodi, 'Corruption, Public Investment, and Growth' (1997) IMF Working Paper No. WP/97/139 <www.imf.org/external/pubs/ft/wp/wp97139.pdf> accessed 3 March 2008

---, 'Roads to Nowhere: How Corruption in Public Investment Hurts Growth' (1998) 12 *Economic Issues* 1

Tarun, Robert W., *The Foreign Corrupt Practices Act Handbook: A Practical Guide for Multinational General Counsel, Transactional Lawyers and White Collar Criminal Practitioners* (American Bar Association, 2010)

Tavernise, Sabrina, 'A Russian Tilts at Graft (It Could be a Quixotic Task)' *The New York Times* (New York, 10 February 2003) 3

Taylor, John B. and Akila Weerapana, *Economics* (6th edn, Houghton Mifflin Company, 2009)

Thompson, Dennis F., *Ethics in Congress: From Individual to Institutional Corruption* (Brookings Institution Press, 1995)

Tollison, Robert D. and Roger D. Congleton (eds), *The Economic Analysis of Rent Seeking* (Edward Elgar Publishing, 1995)

Transparency International, 'New Bribery Act will help Restore UK's International Reputation' (Press Release, 8 April 2010) <<http://www.transparency.org.uk/all-news-releases/134-new-bribery-act-will-help-restore-uks-international-reputation>> accessed 5 May 2012

---, 'Plundering Politicians and Bribing Multinationals Undermine Economic Development, says TI' (Press Release, 25 March 2004) <http://ww1.transparency.org/pressreleases_archive/2004/2004.03.25.gcr_relaunch.html> accessed 7 January 2007

---, 'Transparency International Country Study Report: Bangladesh' (2003) <<http://www.transparency.org/content/download/1628/8305/file/bangladesh.pdf>> accessed 20 December 2009

---, *Global Corruption Report 2005* (Pluto Press, 2005)

Tullock, Gordon, 'Corruption Theory and Practice' (1996) 14 (3) *Contemporary Economic Policy* 6

---, 'The Welfare Costs of Tariffs, Monopolies, and Theft' (1967) 5 (3) *Western Economic Journal* 224

Turner, J. W. Cecil, *Russell on Crime* (12th edn, Stevens & Sons, 1964)

Turow, Scott, 'What's Wrong With Bribery?' (1985) 4 (4) *Journal of Business Ethics* 249

Tweedie, Neil, 'Col Gaddafi killed: a narcissist who believed his deranged publicity and paid for it' *The Telegraph* (London, 20 October 2011)

<<http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/8839957/Col-Gaddafi-killed-a-narcissist-who-believed-his-deranged-publicity-and-paid-for-it.html>> accessed 22 April 2012

Twining, William, 'Have Concepts, Will Travel: Analytical Jurisprudence in a Global Context' (2005) 1 (1) *International Journal of Law in Context* 5

United States' Department of Justice, 'Helmerich & Payne Agrees to Pay \$1 Million Penalty to Resolve Allegations of Foreign Bribery in South America' (Press Release, 30 July 2009)

<<http://www.justice.gov/opa/pr/2009/July/09-crm-741.html>> accessed 9 June 2012

---, 'Owner of Insulation Service Company Pleads Guilty to Million Dollar Bid-Rigging and Fraud Conspiracies at New York City Hospital' (Press Release, 11 July 2012)

<http://www.justice.gov/atr/public/press_releases/2012/285024.htm> accessed 14 July 2012

United States' Securities and Exchange Commission, 'SEC Files Settled Enforcement Action Against the Dow Chemical Company for Foreign Corrupt Practices Act Violations' (Press Release, 13 February 2007) <<http://www.sec.gov/litigation/litreleases/2007/lr20000.htm>> accessed 10 June 2012

University of Queensland, 'Memorandum on the making of offers into the 2011 undergraduate-entry MBBS program' (Press Release, 9 December 2011)

<<http://www.uq.edu.au/about/planning-docs/2011-mbbs-program-admissions/>> accessed 2 June 2012

Venard, Bertrand and Mohamed Hanafi, 'Organizational Isomorphism and Corruption in Financial Institutions: Empirical Research in Emerging Countries' (2008) 81 (2) *Journal of Business Ethics* 481

von Hirsch, Andrew, 'Extending the Harm Principle: 'Remote' Harms and Fair Imputation' in AP Simister and ATH Smith (eds), *Harm and Culpability* (Clarendon Press, 1996)

von Hirsch, Andrew and Nils Jareborg, 'Gauging Criminal Harm: A Living-Standard Analysis' (1991) 11 (1) Oxford Journal of Legal Studies 1

Wacks, Raymond, *Philosophy of Law* (Oxford University Press, 2006)

Warren, Mark E., 'What Does Corruption Mean in a Democracy?' (2004) 48 (2) American Journal of Political Science 328

Wei, Shang-Jin, 'Why Is Corruption So Much More Taxing Than Tax? Arbitrariness Kills' (1997) National Bureau of Economic Research Working Paper No. 6255
<http://www.nber.org/papers/w6255.pdf?new_window=1> accessed 1 May 2010

Wenar, Leif, 'The Nature of Rights' (2005) 33 (3) Philosophy & Public Affairs 223

---, 'Rights' in Edward N Zalta (ed), *Stanford Encyclopedia of Philosophy* (Fall 2010 edn)
<<http://plato.stanford.edu/archives/fall2010/entries/rights/>> accessed 21 November 2010

Werner, Simcha B., 'The Development of Political Corruption: A Case Study of Israel' (1981) 31 (4) Political Studies 620

---, 'New Directions in the Study of Administrative Corruption' (1983) 43 (2) Public Administration Review 146

---, 'The Development of Political Corruption in Israel' in Arnold J. Heidenheimer and Michael Johnston (eds), *Political Corruption: Concepts and Contexts* (3rd edn, Transaction Publishers, 2002)

Weston, J. Fred, 'A Generalized Uncertainty Theory of Profit' (1950) 40 (1) The American Economic Review 40

White, Isobel and Charley Coleman, 'Postal Voting and Electoral Fraud' (22 June 2011) House of Commons Library Note No. SN/PC/3667
<<http://www.parliament.uk/documents/commons/lib/research/briefings/snpc-03667.pdf>>
accessed 1 August 2012

Williams, Glanville, 'The Concept of Legal Liberty' (1956) 56S (8) Columbia Law Review 1129

Wilson, James G. S., 'Rights' in R. E. Ashcroft and others (eds), *Principles of Health Care Ethics* (2nd edn, John Wiley & Sons Ltd, 2007)

World Bank, 'Helping Countries Combat Corruption: The Role of the World Bank' (1997) <<http://www1.worldbank.org/publicsector/anticorrupt/corruptn/corrptn.pdf>> accessed 30 May 2006

World Chess Federation, 'FIDE Laws of Chess' (adopted at the 79th FIDE Congress between 23-25 November 2008, entered into force 1 July 2009) <<http://www.fide.com/component/handbook/?id=124&view=article>> accessed 29 December 2010

Wrage, Alexandra Addison, *Bribery and Extortion: Undermining Business, Governments, and Security* (Praeger Security International, 2007)

Yardley, Jim, 'Leader of Corruption Protest Arrested in India' *The New York Times* (New York, 17 August 2011) A4 <<http://www.nytimes.com/2011/08/17/world/asia/17india.html>> accessed 22 February 2012

Yockey, Joseph W, 'FCPA Settlement, Internal Strife, and the "Culture Of Compliance"' [2012] (2) *Wisconsin Law Review* 689

Young, Crawford, 'Zaire: Is There A State?' (1984) 18 (1) *Canadian Journal of African Studies* 80