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NOTES

THE HOBBS LEVIATHAN: THE DANGEROUS
BREADTH OF THE HOBBS ACT AND
OTHER CORRUPTION STATUTES

John S. Gawey*

"[T]he more corrupt the State, the greater the number of its
laws."¹

BACKGROUND

On March 2, 1942 the Supreme Court infamously upheld the Sec-
ond Circuit's reversals of extortion convictions for the Local 807
branch of the International Brotherhood of Teamsters in United States
v. Local 807 International Brotherhood of Teamsters.² For years, Local 807
routinely stopped out-of-state non-union trucks carrying large quanti-
ties of merchandise as they entered New York City and demanded,
sometimes violently,³ that the drivers pay regular union-fees and per-

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own.

Translation 212 (George Gilbert Ramsay trans., 1904). Tacitus wrote that after the
Decemviri drew up the Twelve Tables in 452 B.C., Roman legislation up to Caesar
Augustus displayed troubling signs of class dissension that led to the "ruin of individu-
als." Id. at 211–12.
² 315 U.S. 521 (1942).
³ Violence even surrounded the trial. Several days before, a key government
witness was murdered while driving on the West Side Highway in New York City. The
witness, Charles A. Brown, was an employee of Local 807 who placed union-men on
the non-union trucks entering New York. See Union Aide Slain on Express Drive, N.Y.
Times, Mar. 23, 1940, at 3; FBI Joins Inquiry into Killing Here, N.Y. Times, Mar. 27, 1940,
at 23.
mit union-members to drive and unload the trucks. In affirming the reversals, the Court focused on an exception in the Anti-Racketeering Act of 1934. That Act prohibited:

Any person who, in connection with or in relation to any act in any way or in any degree affecting trade or commerce or any article or commodity moving or about to move in trade or commerce—

(a) Obtains or attempts to obtain, by the use of or attempt to use or threat to use force, violence, or coercion, the payment of money or other valuable considerations, or the purchase or rental of property or protective services, not including, however, the payment of wages by a bona fide employer to a bona fide employee, or

(b) Obtains the property of another, with his consent, induced by wrongful use of force or fear, or under color of official right . . . .

Reasoning that Congress intended to exempt militant labor-activity from the statute's reach, the Court held that an "outsider who 'attempts' unsuccessfully by violent means to achieve the status of an employee and to secure wages for services falls within the exception." Local 807 set the stage for the enactment of the Hobbs Act, the federal government's comprehensive extortion statute. The case was the first high-profile prosecution under the 1934 Act, and it failed. Congress reacted promptly. In April of 1943 the House passed an amendment to the Anti-Racketeering Act, but the measure died in the Senate. Undeterred, the House passed another bill in 1945. Representative Hancock of New York stated that the bill's purpose was to counteract the Supreme Court's decision in Local 807, because the ruling "legaliz[ed] in certain labor disputes the use of robbery and extortion." Representative Eberharter of Pennsylvania asked the bill's proponents if the amendment would change the federal definition of extortion. The bill's opponents worried that without a special exception for militant labor-activity, the definition of extortion in the amendment was "so broad as to permit one to drive a coach.

4 Local 807, 315 U.S. at 526.
6 Id. at 979–80 (emphasis added).
7 Local 807, 315 U.S. at 531.
8 See Racket Conviction of Union Is Upset, N.Y. Times, Apr. 6, 1941, at 36 (chronicling the overturning of the conviction by the Second Circuit).
10 Id.
11 Id. (statement of Rep. Herman Eberharter).
12 See id. at 11,901 (statement by Rep. Emanuel Celler).
and six through" it. In reality, Congress adopted essentially the same extortion definition as the one contained in section (b) of the 1934 Act. Yet looking back nearly sixty-five years, trepidations about the statute's breadth have proven remarkably prescient, albeit not in the context of organized labor. The amended version of the federal anti-racketeering law, the Hobbs Act, prohibits interference with interstate commerce by robbery or extortion. The Act defines extortion as:

[T]he obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

Violators face up to twenty years of imprisonment. The problems of breadth did not arise from extortion by force, violence, or fear, but instead from the clause that was an afterthought. Under its current reading, extortion "under color of official right" affords prosecutors a wide range of discretion. Danger exists in this discretion. In broad terms, when Congress targets criminal activity—whether it is a corrupt labor union or a dirty politician—it often creates over-inclusive and overlapping statutes. For instance, an extortion victim could also be punished for bribery. Official right extortion also threatens to

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13 Id.
15 Id. (emphasis added). The Anti-Racketeering Act of 1934 proscribed: "Obtain[ing] the property of another, with his consent, induced by wrongful use of force or fear, or under color of official right . . . ." See Anti-Racketeering Act of 1934, Pub. L. No. 376, 48 Stat. 979, 980.
16 See, e.g., Evans v. United States, 504 U.S. 255, 281 (1992) (Thomas, J., dissenting) (arguing that official right extortion at common law was limited to false pretenses); Sara Sun Beale, Comparing the Scope of the Federal Government's Authority to Prosecute Federal Corruption and State and Local Corruption: Some Surprising Conclusions and a Proposal, 51 HASTINGS L.J. 699, 706 (2000) (discussing a "shift in the interpretation of the extortion provisions of the Hobbs Act to encompass official bribery"); Meredith Lee Hager, The Hobbs Act: Maintaining the Distinction Between a Bribe and a Gift, 83 Ky. L.J. 197, 204 (1995) (arguing that the courts eliminated the need for coercion from official right extortion); Charles F.C. Ruff, Federal Prosecution of Local Corruption: A Case Study in the Making of Law Enforcement Policy, 65 GEO. L.J. 1171, 1176 (1977) (arguing that extortion under the Hobbs Act has exceeded its common law roots); Stephen F. Smith, Proportionality and Federalization, 91 VA. L. REV. 879, 904-08 (2005) (arguing that with (i) an unclear common law distinction between bribery and extortion; and (ii) highly disproportionate punishments for bribery and extortion, the Supreme Court should not have read the Hobbs Act to include the passive acceptance of bribes by public officials).
17 I define a victim of extortion as someone who pays for no more than fair treatment from a public official. If he pays for better than fair treatment, he is no longer a victim of extortion but instead should be guilty of bribery. See infra note .
criminalize blameless conduct in the perpetually gray area of political contributions. This is because most public corruption statutes punish public officials who accept payments intended to influence their official acts. Although influential political donations are unsettling, if one accepts the proposition that campaign donations routinely affect politicians’ official acts, the Hobbs Act becomes no longer a law but a license for unchecked discretion. Yet Justice Thomas’s alternative interpretation—limiting official right extortion to false pretense crimes—lacks both a solid historical grounding and a majority vote. Even putting that aside, limiting only the Hobbs Act does little to solve the problem. Official right extortion does not operate in a vacuum. Various statutes now proscribe official right extortion, thus any solution should be comprehensive.

This Note will point out the constant parry and thrust between the Department of Justice and the Supreme Court, and also suggest solutions for over-criminalization in the federal corruption statutes. Official right extortion in the Hobbs Act will be the focus: Its history, its language, and the expansions and retractions in its scope. It will show that once the Supreme Court curtails a sweeping statute, federal prosecutors have at their disposal other sections of Title 18, so the parry and thrust continues. To be clear, extortion should not go unpunished. It cannot be seen as “just another crime,” because it “destroys democracy, replacing the vote of the people with the vote of the dollar.”

Part I will examine the roots of extortion. The crime will be traced from the Hobbs Act to its beginnings in thirteenth century England. It will show that although the crime in the 1940s contemplated private racketeering, extortion at common law chiefly connoted governmental corruption. Part II will recount the

18 The phrases “extortion under color of official right” and “official right extortion” will be used interchangeably in this Note.
19 See, e.g., Joseph R. Weeks, Bribes, Gratuities and the Congress: The Institutionalized Corruption of the Political Process, the Impotence of Criminal Law to Reach It, and a Proposal for Change, 13 J. LEGIS. 123, 123 (1986) (“Virtually every member of Congress has been compelled to become a crook.”).
20 See, e.g., 21 AM. JUR. 2D Criminal Law § 135 (2010) (“Criminal statutes requiring no mens rea are generally disfavored.”).
22 See infra Part II.C–E.
federalization of common law extortion in the twentieth century. It will demonstrate that the Hobbs Act’s expansion was not an isolated incident but instead part of a larger trend by the Justice Department to target political corruption. Part of the story is how other federal statutes aimed at political corruption expanded concurrently with the Hobbs Act. All of the statutes are in danger of losing a critical part of the crime’s common law heritage. This stems from courts reading out the term “corruptly.” Finally, Part III offers solutions aimed at narrowing the reach of the public corruption statutes while still enabling federal prosecutors to convict corrupt officials. Congress should revise the criminal code to eliminate the tendency of the public corruption crimes to have uneven elements and punishments. At the very least, federal courts should interpret the statutes more narrowly. The system can and should do a better job of limiting punishment to those who act with an evil mind.

I. THE HISTORY OF OFFICIAL RIGHT EXTORTION IN THE HOBBs ACT

This Part will support a broad reading of official right extortion as a matter of history. However, the Note will question the wisdom of providing prosecutors with such a broad crime, especially considering the weak reading given to “corruptly” in the public corruption statutes.

Colloquially, extortion does not connote the passive acceptance of bribes by public officials. We think extortion requires threatening a victim for private gain—making someone "an offer he can’t refuse." The common law roots of extortion demonstrate otherwise; the crime encompassed many types of corrupt reciprocities. The word “corruption” is often used as an umbrella term for extortion, bribery, fraud, kickbacks, illegal gratuities and racketeering in general. Governmental corruption is an improper reciprocity between private individuals and the State. Different reciprocities between individuals and the State can be represented by the image of tree rings. In the middle is the dark core: Extortion. Moving outward, lighter shades emerge, such as consensual bribery, illegal gratuities, and legitimate campaign contributions. So all official right extortions are reciprocities, yet of course not all reciprocities are criminal. The distinction turns upon what the lawmaker says is a good or bad reci-

24 See infra Part.II.B.
26 In fact, our perception of reciprocity can inform our notion of justice. See, e.g., Susan Sharpe, The Idea of Reparation, in HANDBOOK OF RESTORATIVE JUSTICE 24, 24-27 (Gerry Johnstone & Daniel W. Van Ness eds., 2007) (“Keeping our social accounts in
To be fair, reciprocities can make for a more efficient government. That being said, it has been a centuries-long practice for Anglo-American societies to prohibit corrupt takings by public officials for private gain. The usual normative justification for corruption statutes is that public officials owe their constituents a neutral decision-making process—individual rights should never be bought or sold. From the Roman Republic to twentieth century, the prosecution of tainted officials has been a painful yet indispensable self-cleansing of the State.

From the outset, this Note assumes that corruption statutes, properly used, can achieve good ends for a community. Nevertheless balance appears to be a basic human drive. . . . (R)eciprocity gives rise not only to social obligations, but also to our drive for justice.

27 See JOHN T. NOONAN, JR., BRIBES 3 (1984) ("Bribery is an act distinguished from other reciprocities only if it is socially identified and socially condemned."); Daniel H. Lowenstein, Political Bribery and the Intermediate Theory of Politics, 32 UCLA L. REV. 784, 786 (1985) ("[B]ribery is the black core of a series of concentric circles representing the degrees of impropriety in official behavior."). Judge Noonan also argued that extortion and bribery were mutually exclusive crimes, chiefly because extortion always required coercion. NOONAN, supra at 398. Yet the Supreme Court and other scholars have emphatically disagreed with Judge Noonan’s distinction. See Evans v. United States, 504 U.S. 255, 267–68 (1992) (holding that extortion under color of official right encompasses passive acceptance of contributions in return for an agreement to perform specific official acts); James Lindgren, The Theory, History, and Practice of the Bribery-Extortion Distinction, 141 U. PA. L. REV. 1695, 1703 (1993) ("Since early common law, extortion by public officials has included receiving unwarranted payments—whether by coercion, false pretenses, or bribery.").

28 See, e.g., David Mills & Robert Weisberg, Corrupting the Harm Requirement in White Collar Crime, 60 STAN. L. REV. 1371, 1379–81 (2008) ("[G]raft may sometimes encourage productive economic transactions and prod the government to help entrepreneurs at critical times in economic development by reducing the uncertainties of investment.").

29 In 70 B.C., Marcus Tullius Cicero made his mark as an emerging Roman leader in large part because of his courageous prosecution of the corrupt praetor Gaius Verres ("Hog"). See NOONAN, supra note , at 46–54. The prosecution was particularly risky for Cicero because he was a candidate for public office, which Hog sought to sabotage. Some of Hog’s more egregious crimes included: (i) For a kickback, waiving the liability of a man who was responsible for the crooked columns on the Castor and Pollux temples; (ii) taking money to let a pirate captain escape trial; (iii) taking money to appoint provincial senators; and (iv) most despicably, crucifying a Roman citizen. Id. at 46–47. Likewise, Attorney General Robert F. Kennedy was faced with the unenviable case of federal judge Vincent Keogh. Keogh’s brother, a congresswoman, had been instrumental in helping to elect John F. Kennedy to the presidency. Yet persuasive evidence showed that Judge Keogh had accepted a bribe in exchange for inducing a fellow judge to be lenient on a defendant. President Kennedy remarked, “My God, I hope that [Robert] doesn’t [prosecute Vincent Keogh]. Gene Keogh was my friend, and, if there’s any way I can honestly help him, I’d want to help him.” Vincent Keogh was convicted and sentenced to two years imprisonment. See ARTHUR M. SCHLESINGER, JR., ROBERT KENNEDY AND HIS TIMES 382–84 (1978).
ertheless, the scope of the Hobbs Act and its sister statutes must be constrained if we are to provide our public officials with any guidance on the lines between proper and improper reciprocities. The rub is that Congress and the courts cannot decide exactly what constitutes an improper reciprocity—the tree rings are poorly demarcated. The courts were correct in the 1970s when they interpreted the Hobbs Act to proscribe governmental corruption. Yet the Act’s modern application strays dangerously far from its common law roots. Despite the growing severity of the punishments, public faith in government is shrinking.30

A. Legislative History

The legislative history of the phrase “color of official right” is, in the words of one scholar, “scant.”31 Although the Anti-Racketeering Act of 1934 did not contain the word “extortion,” the term as defined by the Hobbs Act copied language from the 1934 Act.32 That language came from New York law.33 When Congress passed the 1934 Act, legislators did not debate the official right language, probably because they passed it in response to “price fixing and economic coercion extortion by professional gangsters” such as John Dillinger.34 Indeed, Washington’s motivation for the 1934 Act stemmed from violence and kidnapping.35 When the House debated the Hobbs Act in 1943, the same focus remained. Legislators discussed official right extortion briefly: the bill’s opponents sought to strike the “official right” language because they thought it might apply “to an initiation fee in a labor union.”36 Representative Hobbs, the bill’s sponsor,

31 See Ruff, supra note 1, at 1182.
32 The Hobbs Act defines extortion as: “[T]he obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.” 18 U.S.C. §1951(b)(2) (2006). The relevant language of the Anti-Racketeering Act of 1934 made it criminal to “[obtain] the property of another, with his consent, induced by wrongful use of force or fear, or under color of official right . . . .” Pub. L. No. 376, 48 Stat. 979, 980.
33 91 CONG. REC. 11,900 (1945) (statement of Rep. Clarence Hancock) (“The bill contains definitions of robbery and extortion which follow the definitions contained in the laws of the State of New York.”)
35 See, e.g., Joseph B. Keenan, Uncle Sam Presses His New War on Crime, N.Y. TIMES, Aug. 20, 1933, at XX.
assured legislators that the language was narrow: "[Y]ou pretend to be a police officer, you pretend to be a deputy sheriff, but you are not." 37

As it happens, the Hobbs Act might not apply to a citizen posing as a public official. In United States v. Abbas, 38 the Seventh Circuit held that the crime did not extend to a private citizen masquerading as a public official. Posing as an FBI agent, Abbas had promised several immigrants favorable treatment in exchange for cash. In holding that the Hobbs Act did not reach Abbas’s conduct, the Seventh Circuit specifically addressed Representative Hobbs’s statement. The court wrote that Hobbs’s opinion was “completely at odds with the accepted interpretation of the term [under color of official right] both before and after the Hobbs Act was enacted.” 39

Although Representative Hobbs gave an undoubtedly abbreviated description of official right extortion, he might not have been entirely wrong. The language in the 1934 Act and the Hobbs Act came from a proposed penal code for New York known as the Field Code. 40 The Field Code in turn formed the foundation of New York’s Penal Code of 1881. 41 The Hobbs Act and the Field Code use nearly identical language; the Field Code defines extortion as “the obtaining of property from another, with his consent, induced by a wrongful use of force or fear, or under color of official right.” 42 The Penal Code of 1881 elaborated on official right extortion under the article "Extortion and Oppression":

A public officer, or a person pretending to be such, who, unlawfully and maliciously, under pretense or color of official authority:

1. Arrests another, or detains him against his will; or,
2. Seizes or levies upon another’s property; or,
3. Dispossesses another of any lands or tenements; or,
4. Does any other act, whereby another person is injured in his person, property, or rights;

Commits extortion and is guilty of a misdemeanor. 43

In 1909, the article’s name changed to “Extortion and Threats” and the definition’s final clause read “[c]ommits oppression and is

37 Id. at 3,229 (statement of Rep. Steve Hobbs).
38 560 F.3d 660 (7th Cir. 2009).
39 Id. at 663–64 n.3.
42 FIELD CODE, supra note 40, § 613 at 220.
43 N.Y. PENAL LAW § 556 (1881) (emphasis added).
guilty of a misdemeanor." Professor Lindgren argues that because the 1881 supplementary definition was listed under the article "Extortion and Oppression," the definition contained a typographical error and should have read "commits oppression" instead of "commits extortion." He also points out that no other section in the article mentioned oppression. This would explain the corresponding change in 1909. Yet the supplementary definition in 1909 was not listed under "Extortion and Oppression"; it was listed instead under "Extortion and Threats" with other sections that did contain "threat" definitions. On that basis, it would be reasonable to conclude that corruptly impersonating a public official constituted official right extortion under New York law.

In any event, with both the 1934 Act and the Hobbs Act, Congress preoccupied itself with coercive—i.e., by violence or fear—extortion. John Dillinger and Local 807 were the priorities, not corrupt public officials. As far as the bill's proponents were concerned, as long as the amended statute reached the payment of wages obtained by violence or threats, their job was complete. Although indeed scant and ambiguous, the legislative history of official right extortion in the Hobbs Act is illuminating in two respects. First, it demonstrates that members of Congress can be careless in drafting their bills. Second, it reinforces the implication, already evident in the Act's language, that Congress looked to the Field Code and New York law for its definition of extortion.

B. New York Law

New York adopted most of the Field Code in 1881, and the legislature further defined official right extortion. Section 557 of the 1881 Penal Code provided:

A public officer who asks or receives, or agrees to receive, a fee or other compensation for his official service, either,

1. In excess of the fee or compensation allowed to him by statute therefor; or

2. Where no fee or compensation is allowed to him by statute therefor;
Commits extortion . . .

44 N.Y. Penal Law § 854 (Consol. 1909) (emphasis added).
45 See Lindgren, supra note, at 898.
46 See Lindgren, supra note, at 889–90.
47 See supra note .
48 N.Y. Penal Law § 557 (1881) (emphasis added).
Section 557 merits attention because it indicates that official right extortion in New York included the acceptance of a bribe by a public official. In parallel fashion, Section 67 of the same Penal Code defined bribery by a member of the legislature as: "[A] member of . . . the legislature of this state, who asks, receives, or agrees to receive any bribe." Similarly, the current federal bribery statute states:

Whoever . . .

(2) being a public official . . . directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity, in return for:

(A) being influenced in the performance of any official act;

(B) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(C) being induced to do or omit to do any act in violation of the official duty of such official or person . . . [commits bribery].

Early New York law offers other clues for the common law understanding of extortion. In a note under its definition, the Field Code pointed to an 1827 case to illustrate the crime. In People v. Whaley, a justice of the peace postponed the adjournment of a debt because the plaintiff failed to appear. In private, the defendant later admitted to the justice that he owed the money. The justice ruled in favor of the plaintiff, and demanded the amount owed as well as three or four dollars in court costs. The defendant paid the justice the amount owed plus twelve and one half cents. On these facts a jury convicted the justice of official right extortion. On appeal, the court first held that because "the cause had become discontinued by the laches of the plaintiff," the justice had no jurisdiction and his judgment was void. Appealing the extortion conviction, the justice argued that he did not take the money for personal use. The court held that it was unnecessary to show that he took the money for personal use. Instead, it

49 Id. at § 67 (emphasis added). See also Field Code, supra note 40, § 126 at 39 ("Every judicial officer of this State who asks, receives, or agrees to receive any bribe upon any agreement or understanding that his vote, opinion or decision upon any matter or question which is or may be brought before him for decision shall be thereby influenced, is punishable by imprisonment . . . ." (emphasis added)).


51 See Field Code, supra note 40, § 613, at 220 (cmt.).

52 6 Cow. 661 (N.Y. Sup. Ct. 1827).

53 See id. at 662.

54 Id. at 664.

55 See id. at 663.

56 See id.
was “sufficient that he extorted it by color of his office.” The court also emphasized that “the defendant received from Butler, one shilling, by color of his office.”

Without additional commentary by the Field Code, Whaley’s significance can only be inferred. The court appeared ambivalent to the amount extorted and its eventual beneficiary. Put another way, based on the court’s sparse opinion, the extorted money could have been the amount owed to the plaintiff or the twelve and one half cents. So Whaley might reinforce the ancient view that extortion is an offense against the public justice, not an individual. In addition, the court copied Hawkins’ definition of extortion. So in another sense the case could serve as a bridge between the American and the English traditions. Extortion, as defined by Hawkins and the court, was “any oppression under color of right. . . . In a stricter sense, it signifies the taking of money by any officer, by color of his office; either where none at all is due, or not so much due, or when it is not yet due.”

As discussed above, Congress substantially copied the Field Code’s language in the Anti-Racketeering Act of 1934 and later in the Hobbs Act. The Supreme Court has recognized that the Hobbs Act was based on New York law, and for that reason should be consistent with common law extortion. Because Whaley is explicitly mentioned in the Field Code as an example of official right extortion, it makes sense to afford it at least some precedential value in interpreting the Hobbs Act.

Yet the Supreme Court dismissed Whaley’s significance nearly 180 years later in Wilkie v. Robbins. In Wilkie, a ranch-owner brought a Racketeer Influenced and Corrupt Organizations Act (RICO) claim against Bureau of Land Management employees for extorting an easement on his land. The Court dismissed Robbins’ claims, in part because it held that the National Government could not be the intended beneficiary of an extortionate act. The Court rejected

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57 Id.
58 Id. at 664.
59 See Ruff, supra note , at 1179 (noting that Blackstone categorized extortion as “an abuse of public justice” (quoting 4 William Blackstone, Commentaries *141 (1769))).
60 Whaley, 6 Cow. at 663–64 (citing W. Hawkins, A Treatise of the Pleas of the Crown 316 (6th ed. 1788))
61 See Evans v. United States, 504 U.S. 255, 264 (1992) (remarking that “the reference to New York law is consistent with an intent to apply the common-law definition”).
63 See id. at 564 (“While Robbins is certainly correct that public officials were not immune from charges of extortion at common law, . . . the crime of extortion
Robbins' reliance on *Whaley* because "the case involved illegally obtaining property for the benefit of a private third party, [so] it does not stand for the proposition that an act for the benefit of the Government alone can be extortion."64 Yet as discussed earlier, the *Whaley* court held that it was unnecessary to prove that the justice extorted for his own benefit in the form of fees.65

It remains debatable whether the defendant in an extortion case must be the beneficiary of a scheme. At common law, the beneficiary of extortion could be both the State and the public official; the King received the fee, and the public official took his share.66 Although the Supreme Court in *Wilkie* pointed out that the Hobbs Act had never been used to punish government employees who extorted for the government's benefit, the Court has not hesitated to recognize other long-dormant capabilities in the Act's language.67 The Supreme Court might have narrowed the statute's language because it could expose a large number of government employees to civil claims or criminal charges.68 In this respect then, the Hobbs Act might not be in sync with its New York and common law foundations.

C. Common Law Extortion

Before discussing common law extortion, bribery and official right extortion in the context of public officials should be distinguished. At early common law, extortion and bribery were not separate offenses because bribery did not become a crime in its own right until the early seventeenth century.69 The difference between bribery

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focused on the harm of public corruption, by the sale of public favors for private gain, not on the harm caused by overzealous efforts to obtain property on behalf of the Government." (citations omitted)).

64 Id. at 565.
65 See *Whaley*, 6 Cow. at 663.
66 See Jeremy Gayed, Note, "Corruptly": Why Corrupt State of Mind is an Essential Element for Hobbs Act Extortion Under Color of Official Right, 78 Notre Dame L. Rev. 1731, 1737 (2003); see also Willett v. Devoy, 170 A.D. 203, 204 (N.Y. App. Div. 1915) (holding that in action for extortion where defendant paid the fees into the municipal treasury, "[n]o distinction is made on the ground that the official keeps the fee himself").
67 Prosecutors did not take advantage of the Hobbs Act's "official right" language until the 1970s. See infra Part II.A.
68 See also United States v. Peterson, 544 F. Supp. 2d 1363, 1371 (M.D. Ga. 2008) (holding that sheriff could not be charged with official right extortion under the Hobbs Act because, after charging inmates for room and board at the jail, he remitted the funds to the county commissioners).
69 See Lindgren, supra note 1, at 839 (citing Edmund Coke, The Third Part of the Institutes of the Law of England 145–49 (1797)).
of a public official and official right extortion is that bribery covers both sides of a reciprocity. Whereas official right extortion reaches only the public official who receives a bribe, bribery reaches both the public official and the briber.\footnote{70}{The Model Penal Code's definition of bribery states: "[P]ayments . . . to respond to extortionate threats by public officials are within the prohibition." \textsc{Model Penal Code} § 240, introductory note for §§ 240.1–240.7 (1980). The Model Penal Code overlooks an important distinction among bribes, that is, a bribe can be given to receive either fair or better-than-fair treatment. When the payment is for better-than-fair treatment, the bribe-giver should be categorized as corrupt. \textit{See} \textsc{Noonan, supra} note 27, at 179 (writing that it is possible without sin "to buy back one's own right from a judge when one cannot otherwise have it" (quoting \textit{Thomas de Chobham, Summa Confessorum} 518–20 (Revd. F. Broomfield ed., 1968))); \textsc{Lindgren, supra} note , at 1699.}

The earliest English extortion statute, the First Statute of Westminster, consisted of fifty-one chapters, each seeking to address an evil documented in 1275 A.D. by an appointed commission of King Edward I.\footnote{71}{\textit{See} \textsc{Noonan, supra} note , at 235.} The commission recorded the evils in Latin in \textit{The Hundred Rolls}.\footnote{72}{\textit{See} \textsc{Lindgren, supra} note , at 842.} The Articles of Inquest, the record of questions leading to the \textit{Rolls}, referred to instances of graft by the King's officers with conjugations of the Latin verb "extorquere."\footnote{73}{"Extorquere" means "to twist out." \textit{Id.} at n.127.} The First Statute of Westminster was the King's remedy. In some instances, the extortion provisions of the Statute proscribed activities that sound to the modern ear like bribery: "[N]o Sheriff, nor other the King's Officer, take any Reward to do his Office, but shall be paid of that which they take of the King; and he that so doth, shall yield twice as much, and shall be punished at the King's Pleasure."\footnote{74}{Statute of Westminster I (1275) ch. 26, 3 Edw. Statutes of the Realms 33 (emphasis added). The word "reward" is often used to describe bribery. \textsc{Lindgren, supra} note , at 847.} Other chapters sound like run-of-the-mill extortion:

And Forasmuch as many complain themselves of Officers, Cryers of Fee, and the Marshals of Justices in Eyre, \textit{taking Money wrongfully} of such as recover Seisin of Land, or of them that obtain their Suits, and Fines levied, and of Jurors, Towns, Prisoners, and of others attached upon Pleas of the Crown, otherwise than they ought to do . . . the King commandeth that such Things be no more done from henceforth . . . .\footnote{75}{Statute of Westminster I (1275) ch. 30, 3 Edw. Statutes of the Realms 34 (emphasis added).}
The gist of early common law extortion was that the rights of citizens could be neither bought nor sold, a notion that can be traced to the Magna Carta. Extortion cases following the Statute covered all species of unwarranted takings, from coercive takings and extortion under false pretenses to the receipt of bribes. The common thread throughout was that officers of the King committed the crime. For example, extortion encompassed (i) a deputy to a purveyor of poultry who extorted chicken-farmers by force (coercive extortion); (ii) a bailiff collecting dues from farmers according to an expired customary fee (false pretenses); and (iii) a jail-keeper accepting forty shillings to excuse a prisoner from being branded with a hot iron, “his legal punishment” (bribery).

Early treatise writers' definitions were consistent with the ancient understanding of extortion. Edward Coke wrote:

[Extortion] is a great misprision, by wresting or unlawfully taking by any officer, by colour of his office, any money or valuable thing of or from any man, either that is not due, or more than is due, or before it be due.

William Hawkins wrote:

[E]xtortion in a large sense signifies any oppression under colour of right; but that in a strict sense, it signifies the taking of money by any officer, by colour of his office, either where none at all is due, or not so much is due, or where it is not yet due.

Blackstone defined extortion as “an abuse of public, justice which consists in an officer’s unlawfully taking, by colour of his office, from any man, any money or thing of value, that is not due him, or more than is due, or before it is due.” At its core, extortion at early com-

76 See MAGNA CARTA, June 15, 1215, ch. 40, at 327 (J. Holt ed. 1965) (“To no one will we sell, to no one will we deny or delay right or justice.”).

77 For a comprehensive history of the varieties of early common law extortion, see Lindgren, supra note , at 848–57.

78 See id. at 851 (citing CALENDAR OF ASSIZE RECORDS: HERTFORDSHIRE INDICTMENTS, ELIZABETH I, at 64, no. 400 (J. Cockburn ed. 1975) (Sharpe 1586)).


80 See id. at 854 (citing CALENDAR OF ASSIZE RECORDS: KENT INDICTMENTS, ELIZABETH I, at 101, no. 568 (J. Cockburn ed. 1979) (Johnson 1571)).

81 EDWARD COKE, 3 LORD COKE'S FIRST INSTITUTE OF THE LAWS OF ENGLAND 145 (J. Thomas ed. 1826). Interestingly, comment (P) states that “[n]either is it criminal for an officer to take a reward voluntarily offered him for the more diligent or expeditious performance of his duty.” Id. However, “a promise to pay him money for any act of duty which the law does not suffer him to receive, is absolutely void.” Id.

82 HAWKINS, supra note , at 316.

83 BLACKSTONE, supra note 59, at 141.
mon law concerned itself with unwarranted takings by public officials. The federal definition of extortion in the Hobbs Act covers even more.

The Hobbs Act includes extortion by public officials ("under color of official right") as well as all private extortion ("by wrongful use of actual or threatened force, violence, or fear"). The Supreme Court has observed that this is a marked enlargement of common law extortion, because official right extortion was the only kind of extortion at common law. Therefore, the definition of extortion in the Field Code and subsequent New York law was indeed faithful to the concept of common law extortion because it included all forms of official right extortion. It differed from common law extortion because it enlarged the crime's scope to include violent and threatening conduct by private citizens and groups. When the crime became federalized in the late twentieth century, it continued to grow.

II. The Federalization of Common Law Extortion

A. Dormant Language

Beginning with United States v. Kenny in 1972, federal prosecutors began using the latent "official right" language of the Hobbs Act to prosecute corrupt public officials. Since 1949, John Kenny had been the boss of the Democratic political-machine in Jersey City, New Jersey. Federal prosecutors Frederick Lacey and Herbert J. Stern charged Kenny and his henchmen with, among other things, extor-

84 See Lindgren, supra note 84, at 847 ("[The extortion provisions] were not concerned with whether citizens were coerced by a corrupt official, were paying to pervert justice in their favor, or were paying after being misled about the proper fee. These provisions . . . were concerned with whether public officers took unwarranted payments—nothing more."). However, common law extortion also occasionally punished private individuals who charged more than a set fee. See Hawkins, supra note 85, at 317 (noting that a ferryman who charges more than his set fee is guilty of extortion).
86 Evans v. United States, 504 U.S. 255, 261 (1992) ("Congress has unquestionably expanded the common-law definition of extortion to include acts by private individuals pursuant to which property is obtained by means of force, fear, or threats.").
87 462 F.2d 1205 (3d Cir. 1972).
88 Id. at 1210.
89 Before the Third Circuit's decision, Stern wrote an influential law review article arguing for a broad reading of official right extortion in the Hobbs Act. See Hon. Herbert J. Stern, Prosecutions of Local Political Corruption Under the Hobbs Act: The Unnecessary Distinction Between Bribery and Extortion, 3Seton Hall L. Rev. 1, 17 (1971) ("The distinction between bribery and extortion that has developed under the Hobbs Act is unnecessary when that Act is used to prosecute corruption in public office.").
ion under color of official right. The evidence at trial demonstrated that contractors with Jersey City paid ten percent of every contract price to Kenny and his crew, "otherwise they were excluded from bidding." Kenny’s henchmen were convicted, while his own trial was severed because of ill health. On appeal the defendants challenged the trial court’s definition of extortion, which read:

The term "extortion" means the obtaining of property from another with his consent induced either by wrongful use of fear or under color of official right. The term ‘fear’, as used in the statute, has the commonly accepted meaning. It is a state of anxious concern, alarm, apprehension of anticipated harm to a business or of a threatened loss.

Extortion under color of official right is the wrongful taking by a public officer of money not due him or his office, whether or not the taking was accomplished by force, threats or use of fear. You will note that extortion as defined by Federal Law is committed when property is obtained by consent of the victim by wrongful use of fear, or when it is obtained under color of official right, and in either instance the offense of extortion is committed.

The defendants argued that the instruction incorrectly defined extortion disjunctively, i.e., that extortion could be committed "either by use of fear or under color of official right." The Third Circuit held that, in fact, the Hobbs Act distinguished between extortion by fear and official right extortion, and affirmed the convictions. Kenny cast the Hobbs Act in an entirely new light: The Hobbs Act and the federal bribery statute merged together. What is more, Kenny legitimized the federal policing of local corruption. To be fair, the push for increased federal prosecution at the local level had been in motion for over a decade. Attorney General Robert Kennedy vigorously lobbied for expansive anti-racketeering laws to combat organized crime in the early 1960s. Still, the Kenny decision stands as a

90 See Noonan, supra note , at 585.
91 Id.
92 Kenny, 462 F.2d at 1229 (citations omitted).
93 Id. (emphasis added).
94 Id. ("The ‘under color of official right’ language is plainly disjunctive. That part of the definition repeats the common law definition of extortion, a crime which could only be committed by a public official, and which did not require proof of threat, fear, or duress.").
95 See Noonan, supra note , at 585-86. Until Dixon v. United States, 465 U.S. 482 (1984), the bribery statute was not used to prosecute state and local officials.
watershed moment. In the thirty years since the Hobbs Act's enactment, it had never been used to prosecute political corruption. After Kenny, the Act's reach kept growing.

Take for example the conviction of a former Pennsylvania state senator in United States v. Mazzei. The Third Circuit upheld the conviction of Senator Mazzei, who was convicted of official right extortion under the Hobbs Act. Senator Mazzei had reached an agreement with the owner of a building in his district: The building owner was eager to lease unused space in his building, so Mazzei suggested that he submit a proposal to the State to house the new Bureau of State Lotteries. He told the owner "it was the practice on all state leases that a ten per cent of the gross amount of the rentals would be paid to a senate finance re-election committee." On appeal Mazzei argued that he had not used the power of his office because "[e]veryone knew legislators had no leasing authority." The Third Circuit disagreed, holding that "[a] violation of the statute may be made out by showing that a public official through the wrongful use of office obtains property not due him or his office, even though his acts are not accompanied by the use of 'force, violence or fear.'" As long as the victim reasonably believed that his payment would influence official action on the part of the public official, the public official committed extortion.


The Justice Department has done anything but slow down in its mission to root out corruption. In 1974, the Department successfully

Ruff, supra note , at 1172 n.2 (discussing the legislative results of Attorney General Kennedy's anti-racketeering campaign). The context of these statutes must be understood to appreciate the intent of their proponents; to prosecute organized crime, Kennedy needed to expand the Department of Justice's jurisdiction. See Schlesinger, supra note , at 264 ("In 1959 the FBI New York office had over four hundred agents working on communism, four on organized crime."); id. at 268 ("Kennedy was resolved to force the FBI into action against the mob. If lack of jurisdiction was Hoover's alibi, then Kennedy would make FBI jurisdiction explicit; at least this would weaken the alibi.").

97 521 F.2d 639 (3d Cir. 1975).
98 Id. at 641.
99 Noonan, supra note , at 586.
100 Mazzei, 521 F.2d at 645 (quoting United States v. Staszcuk, 502 F.2d 875, 878 (7th Cir. 1974)).
101 As Judge Noonan writes, this effectively eliminated any line between bribery and extortion under color of official right, because "no briber pays unless he thinks it is necessary to pay." Noonan, supra note , at 586.
prosecuted 213 public officials. This number more than doubled to 440 in 1977. In 2009, the Department convicted 1,061 individuals for public corruption: 426 federal officials, 102 state officials, 257 local officials, and 276 others involved in public corruption. Paradoxically, public faith in government has not grown with corruption law.

To make matters worse, official right extortion’s resurrection under the Hobbs Act was not uniformly faithful to its common law roots. To be sure, not every divergence from the common law is necessarily a bad thing, such as extortion growing to cover coercive fraud by private citizens. However, the mens rea required to commit official right extortion is in danger of extinction, threatening to make it a strict liability crime. Contrary to the current trend, extortion and bribery at common law required a corrupt state of mind. For a bribe-giver, a corrupt mind “act[s] with the specific intent to secure an unlawful advantage or benefit.” With this understanding of bribery in mind (i.e., not including a victim paying for fair treatment), the mens rea for official right extortion is necessarily the reverse. The public official must know “that he is not entitled to the payment.”

As mentioned in Part I, many early extortion cases dealt with public officials taking more than their set fees. The public officials knew their fees; it was self-evident that they had an unlawful purpose, and many cases did not discuss state of mind. The element’s absence in the Hobbs Act should be irrelevant in light of Morissette v. United States, because “extortion” is a term of art with established common

103 Id.
105 See, e.g., Johnston, supra note 30, at 49 (“Many Americans believe corruption runs rampant in political life.”).
106 See Gayed, supra note , at 1740–45.
108 See supra note .
110 See Gayed, supra note , at 1742 (“[T]he idea of ‘state of mind’ as it is currently conceived was not an ascendant concept in the law prior to the nineteenth century.”) (citing JOHN KAPLAN ET AL., CRIMINAL LAW 205–06 (4th ed. 2000)); id. at 1742 (“Many of the cases contain nothing but a bare description of facts and the holding, but all the cases contain two common elements: (1) a fee was taken, and (2) the taker knew that the amount was inappropriate.”).
111 342 U.S. 246 (1952).
law elements. The underlying reason behind the element’s disappearance is obscure, but it did not pose a problem until the advent of prosecutions under the Hobbs Act for bribery after Kenny.

Still, the courts had ample opportunity to incorporate “corruptly” into official right extortion. Kenny essentially brought parts of 18 U.S.C. § 201 under the umbrella of the Hobbs Act, and § 201(b)(2) expressly proscribes a public official from “corruptly demand[ing], seek[ing], receiv[ing], accept[ing], or agree[ing] to receive or accept anything of value personally or for any other person or entity.” Courts often illustrated their analyses of the corrupt element in bribery by referring to an exchange as a “quid pro quo.” For example, in United States v. Strand, a summer employee of the U.S. Customs Service in the Port of Sumas was convicted of accepting a bribe when an undercover agent paid him $800.00 to help smuggle a pound of cocaine into the country. On appeal, the defendant challenged the trial court’s instruction on the requisite intent. The instruction read:

An act is “corruptly” done, if done voluntarily and intentionally, and with the bad purpose of accomplishing either an unlawful end or result, or a lawful end or result by some unlawful method or means.

The motive to act “corruptly” is ordinarily a hope or expectation of either financial gain or other benefit to one’s self, or some aid or profit or benefit to another.

The district court also emphasized that bribery “require[d] proof of specific intent,” which was defined as “knowingly [doing] an act which the law forbids, purposely intending to violate the law.” The Ninth Circuit affirmed. Quid pro quo, of course, was part of the corrupt intent. Strand had to know that the $800.00 was consideration for smuggling the cocaine. But, he also had to have a “bad purpose.” As opposed to defining the corrupt intent, quid pro

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112 See id. at 263 (“And where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.”).

113 See Gayed, supra note , at 1736 n.20 (“Codifications of the common law that did not include an express corrupt state of mind element, such as the Field Code, may have obscured the common law definition of color of right extortion.”).


115 574 F.2d 993 (9th Cir. 1978).

116 Id. at 996.

117 Id. (alteration in original).
quo spoke instead to the transaction's structure, distinguishing it from an illegal gratuity.118

Yet in some courts, the existence of a quid pro quo completely satisfies the corrupt element in charges of bribery and, by extension, official right extortion. In United States v. Alfisi,119 prosecutors alleged that wholesalers of produce routinely bribed United States Department of Agriculture (USDA) inspectors in exchange for the inspectors downgrading their assessments of the produce, thus “allow[ing] the wholesalers to renegotiate downward the price of a load of produce” with the farmers.120 Alfisi, a wholesaler, maintained that “USDA officials at the market were operating an extortion scheme and that [he] was coerced into paying [an inspector] solely to ensure that [the inspector] would do his job properly.”121 Alfisi was convicted of bribery under § 201. On appeal, he argued that he did not make the payment with a corrupt intent, that is, to “procure a violation of the public official’s duty.”122 The Second Circuit, over a dissent by Judge Sack, held that evidence of a quid pro quo showed intent “to influence any official act,” and satisfied the term “corruptly” in the statute.123 The majority cited Justice Scalia’s opinion in United States v. Sun-Diamond Growers of California,124 which held that “for bribery there must be a quid pro quo—a specific intent to give or receive something of value in exchange for an official act.”125 Finally, the majority argued, it was sound policy to risk “a danger of overinclusion in a broad definition,”126 especially when the extorted individual should report the coercion to authorities.127

118 See id. at 995 (“It is this element of quid pro quo that distinguishes the heightened criminal intent requisite under the bribery sections of the statute from the simple mens rea required for violation of the gratuity sections.”). Whether a distinction exists between bribery and illegal gratuities remains unclear. The difference would turn upon the difference between a “quid pro quo” and a “link.” Cf. George D. Brown, Putting Watergate Behind Us—Salinas, Sun-Diamond, and Two Views of the Anticorruption Model, 74 Tul. L. Rev. 747, 774 (2000) (“The Court has essentially eliminated the separate crime of unlawful gratuity and turned it into a lesser included offense of bribery.”).
119 308 F.3d 144 (2d Cir. 2002).
120 Id. at 148.
121 Id.
122 Id. at 150.
123 Id. at 151.
125 Id. at 404-05.
126 Alfisi, 308 F.3d-at 151.
127 Id. at 150 n.1 (opining that “[t]he proper response to coercion by corrupt public officials should be to go to the authorities, not to make the payoff” (quoting United States v. Kahn, 472 F.2d 272, 278 (2d Cir. 1973))); see also United States v.
In dissent, Judge Sack argued that the majority had read the term "corruptly" out of the bribery statute. He began with the Act's language: the bribery statute prohibits "corruptly giving, offering, or promising something of value to [a] public official . . . with intent . . . to influence any official act performed or to be performed." As Justice Scalia explained in *Sun-Diamond*, quid pro quo speaks to the "influence any official act" language in the statute. If that clause spoke to the requisite intent to commit bribery, then the term "corruptly" would be superfluous language. And as Judge Sack pointed out, "it is a 'well-settled rule of statutory construction that all parts of a statute, if at all possible, are to be given effect.'" The term "corruptly" should have been given a separate meaning, i.e., that to act corruptly is "to act with the specific intent to secure an unlawful advantage or benefit." Not only would this reading have been consistent with common law, it would also limit the statute's reach to defendants who acted with an evil mind.

Contrast the result in *Alfisi* with the First Circuit's holding in *Roma Construction Co. v. aRusso*. In *Roma* the plaintiffs entered into a real-estate development with the DePetrillos, who had independently reached an agreement with Mayor aRusso of Johnston, Rhode Island. Per the agreement, the DePetrillos made payments to aRusso to receive approvals for the development. After the DePetrillos exited the venture, aRusso informed the plaintiffs of his agreement with the DePetrillos and warned them that the "project was 'dead'" unless they made payments. The plaintiffs continued the scheme until their investment was safe and reported the plot to the FBI. Then, they

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128 *Alfisi*, 308 F.3d at 154 (Sack, J., dissenting) (alterations in original).
129 *Sun-Diamond*, 526 U.S. at 404. *Sun-Diamond* did not explicitly hold that evidence of a quid pro quo satisfies the "corruptly" element of 18 U.S.C. § 201(b). Instead, *Sun-Diamond* addressed the differences between §§ 201(b) and 201(c) of Title 18. Section 201(b) prohibits giving something with the "intent to influence any official act," whereas § 201(c) prohibits giving something "for or because of any official act." Justice Scalia, writing for the majority, held that the "intent to influence" language connotes a quid pro quo, while "for or because of any official act" requires only a "link between a thing of value conferred upon a public official and a specific 'official act.'" *Id.* at 414. It remains within the realm of possibility that the Supreme Court could give teeth to the term "corruptly" in § 201(b).
131 *Id.* at 155 (quoting Appellant's Letter to the District Court at 2, United States v. *Afisi*, 308 F.3d 144 (2d Cir. 2002)).
132 96 F.3d 566 (1st Cir. 1996).
133 *Id.* at 568.
brought civil racketeering charges. The district court dismissed the charges "on the grounds that the plaintiffs' own conduct rendered them unable to maintain standing to press their claims." The district court reasoned that the plaintiffs had participated in bribery according to the Model Penal Code, which does not distinguish between victims of extortionate schemes and corrupt bribe-givers. The First Circuit rejected the Model Penal Code's policy, however, favoring an approach consistent with the common law understanding of "corruptly." Rhode Island's bribery statute, like 18 U.S.C. § 201(b), required a bribe to be "corruptly" given. The court held that to give a bribe corruptly, the bribe-giver must intend to "obtain ill-gotten gain." Because the facts indicated that the plaintiffs could have been "the innocent victims of a criminal enterprise," the First Circuit reversed the district court. Roma demonstrates that evidence of a quid pro quo is a necessary but not sufficient element of official right extortion. A corrupt intent should also be required, not only for bribery but any public corruption crime. Otherwise, an extortion victim or a blameless public official could be swept within bribery or extortion's reach. An overinclusive statute might catch more wrongdoers, but American criminal jurisprudence is premised on the "fundamental value determination" that "it is far worse to convict an innocent man than to let a guilty man go free." With that in mind, the "corruptly" element serves a significant purpose—a purpose for which "quid pro quo" is inadequate.

Like bribery, federal law also requires evidence of a quid pro quo in official right extortion. The doctrine emerged from the Supreme Court's decision in McCormick v. United States. Robert L. McCormick, a member of the West Virginia House of Delegates, was indicted and convicted on five counts of extorting under color of official right in violation of the Hobbs Act. McCormick avidly supported a legislative program in his state whereby foreign-educated doctors were allowed to practice medicine in West Virginia while studying for the state licensing exams. At the same time, he received several thousand

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134 Id.
135 See id. at 573. See supra note for a discussion of the Model Penal Code’s stance on bribery.
136 See id. at 573 (distinguishing Rhode Island law from the Model Penal Code).
137 Id. at 574.
138 Id.
dollars in donations from foreign doctors. The bill passed. Two weeks later, he received another payment from the doctors. The jury convicted McCormick after the trial judge instructed them that the “payment . . . influence[d] [his] official conduct, and with knowledge on the part of Mr. McCormick that they were paid to him with that expectation by virtue of the office he held.” It does not strain the imagination to recognize that this description of extortion would apply to a substantial number of campaign contributions viewed post-hoc. The Fourth Circuit affirmed on the reasoning that official right extortion did not require proof of a quid pro quo.

The Supreme Court granted certiorari to determine the appropriate relationship between a payment and an official action. Writing for the majority, Justice White held that anything less than explicit proof of a quid pro quo would open to prosecution not only conduct that has long been thought to be well within the law but also conduct that in a very real sense is unavoidable so long as election campaigns are financed by private contributions or expenditures, as they have been from the beginning of the Nation.

Without elaborating on what satisfied the standard, the Court held that the facts of the case were insufficient to show extortion. Justice White’s opinion is interesting in that it is “neither textual nor historical.” Instead, it is an entirely policy-based interpretation of the Hobbs Act. Read between the lines, it demonstrates the tension between the Court and the Department of Justice. Whatever the shortcomings of the American campaign system, the lower court’s broad reading of the Hobbs Act would have been untenable. Extortion required explicit quid pro quos.

Quid pro quo is important for Hobbs Act prosecutions because it serves as a weak buffer between innocent and criminal conduct. Quid

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141 Id. at 257.
142 Id. at 265.
143 Id. at 266.
144 Id. at 272.
145 Lindgren, supra note, at 1709.
146 Michael W. Carey, the United States Attorney for West Virginia, painted a grim picture for West Virginians about their so-called ethics crisis: “The whole thing is starting to crumble, and we’re going to see a stronger state government.” B. Drummond Ayres, Jr., Corruption Cases Leave State in Search of Ethics, N.Y. Times, Sept. 18, 1989, at A14.
147 See United States v. Kincaid-Chauncey, 556 F.3d 923, 937 (9th Cir. 2009) (noting that, although McCormick spoke only to campaign contributions, almost every circuit requires a quid pro quo for extortion under color of official right).
pro quo falls short as an effective standard because a prosecutor can easily paint ordinary political business as a nefarious quid pro quo.\textsuperscript{148} As long as a prosecutor can muster evidence of a quid pro quo, a public official may be guilty of extortion under color of official right, and a private party may be guilty of bribery. If the term “corruptly” simply means “quid pro quo,” then the scope of the Hobbs Act, already quite large if otherwise read faithfully to the common law, could create a “federal leviathan.”\textsuperscript{149} An alternative reading of the term corruptly would alleviate this problem, because quid pro quos are not necessarily corrupt.\textsuperscript{150} Although Justice White used the term “explicit” in his opinion, most courts have held that the quid pro quo need not be stated in express terms, “for otherwise the law’s effects could be frustrated by knowing winks and nods.”\textsuperscript{151} Put another way, the \textit{McCormick} standard became an illusory protection between innocent and evil intent.

The Supreme Court’s next opportunity to address official right extortion under the Hobbs Act came in \textit{Evans v. United States}.\textsuperscript{152} John H. Evans was the Commissioner of DeKalb County, Georgia. In a sting operation by the FBI, Evans allegedly accepted money to approve a rezoning request for a real estate developer. The undercover FBI agent instigated a series of meetings that led to the exchange of approximately $8000.\textsuperscript{153} Evans reported some of the money as cam-

\textsuperscript{148} See, e.g., United States v. Barber, 668 F.2d 778, 783 (4th Cir. 1982) (“[I]f read literally, the [Hobbs Act] could arguably prohibit a public official from personally soliciting a campaign contribution.”); Lowenstein, \textit{supra} note , at 787 (“[T]he [bribery] statutes as interpreted are susceptible of being applied, and occasionally have been applied, to situations that occur on an everyday basis in American politics.”); Weeks, \textit{supra} note , at 126–27 (“What is happening here is precisely what appears to be happening. In the case of incumbent candidates seeking reelection, money is being solicited and accepted from PACs and individuals with a particular interest in the legislation that candidate is or will be considering and voting upon, in exchange for the officeholder being influenced to favor the donor in the performance of his duties.”); \textit{id.} at 143 (“If a congressman will not accept the PAC and other special interest contributions and support their agendas in return, they will find someone else who will, and this person might well be the congressman’s next opponent.”).

\textsuperscript{149} See \textit{Noonan}, \textit{supra} note , at 584 (comparing the Catholic Church’s suppression of simony in the eleventh century to the federal government’s assumption of the responsibility to battle corruption at every level during the twentieth century).

\textsuperscript{150} It would be naïve to assume that politicians are not influenced by contributions. \textit{See} Lindgren, \textit{supra} note , at 1736 (“The problem that the Court is trying to solve is that elected officials often receive contributions from people with pending government business.”).


\textsuperscript{152} 504 U.S. 255 (1992).

\textsuperscript{153} \textit{id.} at 257–58.
campaign contributions and told the developer: "If you gave me six, I'll do exactly what I said I was gonna do for you. If you gave me one, I'll do exactly what I said I was gonna do for you." Evans was convicted of extortion under color of official right. On appeal, Evans argued that official right extortion required proof of inducement on the part of the public official. He based his argument on the Act's language: "'Ex'ortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." Thus, the Court was tasked with determining whether "induced" applied to the entire clause or just coercive extortion. Writing for the majority, Justice Stevens held that it applied only to coercive extortion. Even if "induced" did apply to official right extortion, it did not mean "that the transaction must be initiated by the recipient of the bribe." Evans' conviction was affirmed. Although a disjunctive reading of the statute is strained, it is not necessarily at odds with common law extortion to hold that the passive acceptance of bribes constitutes extortion.

The disconnect between common law and modern extortion still remains, however, because courts are not giving "corruptly" its due weight.

McCormick and Evans show that members of the Court are growing uncomfortable with the Act's reach. The Act's legislative history indicates that it was not meant to be an ethics-in-government statute, yet the Act reads otherwise. An expansive reading would be appropriate as long as the Act was read with the "corruptly" element. Evans and McCormick presented the Court with opportunities to limit the Act's language while remaining faithful to its common law meaning. In McCormick, the Justice Department pushed for a wide reading to exempt an explicit quid pro quo from the statute; the Court pushed back. In Evans, the Justice Department pushed for the elimination of inducement; the Court relented. The two cases are just the tip of the

156 See Evans, 504 U.S. at 265 ("First, we think the word 'induced' is a part of the definition of the offense by the private individual, but not the offense by the public official.").
157 Id. at 266.
158 See id. at 273–74 (Kennedy, J., concurring) (opining that the word "induced" applies to official right extortion, yet is satisfied by the existence of a quid pro quo); Lindgren, supra note 157, at 1716 ("Thus, while I agree with Justice Thomas that the word 'induced' probably applies to official extortion, I agree with Justice Stevens and the majority that the word 'induced' adds nothing to the other elements required for extortion.").
The following sub-sections will show that regardless of the title affixed to the crime, several other statutes cover the same conduct as official right extortion. This overlap frustrates uniformity in the crimes' elements and punishments. In essence, the problem is systemic.

C. Public Official Salaries

18 U.S.C. § 209(a) states:

Whoever receives any salary, or any contribution to or supplementation of salary, as compensation for his services as an officer or employee of the executive branch of the United States Government, . . . from any source other than the Government of the United States . . . ; or

Whoever . . . makes any contribution to, or in any way supplements, the salary of any such officer or employee under circumstances which would make its receipt a violation of this subsection—

Shall be subject to the penalties set forth in section 216 of this title.\(^{160}\)

The first clause of the statute punishes whoever receives the payment “for his services,” while the second clause punishes the payor who makes a contribution to the officer “under circumstances” that would violate the first clause. Section 216 provides that anyone who “engages in the conduct” may be imprisoned for up to one year, and if it is done so “willfully” for up to five years.\(^{161}\) Finally, it allows the Attorney General to file a civil complaint against violators of § 209.\(^{162}\)

In *United States v. Project on Government Oversight*,\(^{163}\) the D.C. Circuit addressed the intent element of the second clause. The case concerned a lump-sum paid by the Project on Government Oversight (POGO) to Robert A. Berman, a senior economist at the Interior Department. POGO had engineered an enormous settlement between the United States and several companies which allegedly underpaid the government in oil royalties. Berman was instrumental in POGO’s investigation. He had multiple telephone conversations

\(^{159}\) Compare United States v. Manzo, 714 F. Supp. 2d 486, 500 (D.N.J. 2010) (refusing to extend official right extortion under the Hobbs Act to candidate for public office who never won election), with United States v. Meyers, 529 F.2d 1033, 1038 (7th Cir. 1976) (holding that an indictment charging conspiracy to commit official right extortion under the Hobbs Act which began during defendant’s candidacy and ended when he was a genuine public official was proper).


\(^{162}\) Id.

\(^{163}\) 616 F.3d 544 (D.C. Cir. 2010).
with POGO’s executive director about the underpayments and helped
draft several Freedom of Information Act requests. The Justice
Department filed civil complaints against POGO and Berman under

At issue on appeal was the level of intent required to find POGO
liable. Both parties agreed that to find Berman liable, the payment
must have been received “‘as compensation for his services as an
officer or employee of the executive branch.’”\textsuperscript{164} Berman had to
know that the acts in question were official acts. Yet what did POGO
have to know? The government had to prove either that POGO paid
Berman for actions that turned out to be official acts, or that POGO
“intended [the payment] as compensation for [Berman’s] services as
an officer or employee of the United States.”\textsuperscript{165} In other words the
court needed to determine whether § 209(a), insofar as it concerned
the payor, was a strict liability crime or not. The distinction was criti-
cal because POGO’s defense relied on their belief that Berman’s work
was outside the scope of his office.\textsuperscript{166}

Despite the statute’s awkward phrasing, the court held that the
statute did indeed carry a mens rea requirement. POGO had to know
that the payments were made for Berman’s service as a government
employee. Citing Morissette,\textsuperscript{167} the court avoided a strict liability read-
ing and rejected the consequences of the Justice Department’s read-
ing. For instance, a strict liability reading would criminalize a
“publishing company that pays a Justice Department lawyer to write a
manual on appellate advocacy on his own time . . . if—unbeknownst
to the company—the Department has assigned the employee to write
a similar manual as part of his official duties.”\textsuperscript{168} The case demon-
strates the same tensions as McCormick and Evans. While POGO’s pay-
ment to Berman might not have been ethically sound, the court was
unwilling to punish POGO at the expense of endangering future
defendants. Section 209 was thus read consistently with the common
law because it required intent to obtain ill-gotten gain. Nevertheless,
Congress has provided federal prosecutors with other opportunities.

\textsuperscript{164} Id. at 548 (quoting 18 U.S.C. § 209(a) (2006)).

\textsuperscript{165} See id. (alterations in original) (quoting POGO’s Requested Instructions).

\textsuperscript{166} Id. at 560 (“The heart of the defense was that the defendants did not intend
the payment to be for Berman’s government service.”).

\textsuperscript{167} Morissette v. United States, 342 U.S. 246, 263 (1952) (“[The] mere omission
. . . of any mention of intent will not be construed as eliminating that element . . . ”).

\textsuperscript{168} Project on Government Oversight, 616 F.3d at 551.
D. Paved with Good Intentions: The Path to § 666

Section 666 of Title 18 occupies an interesting place in the Justice Department’s arsenal for combating political corruption. The statute punishes any state, local, or tribal official who:

[E]mbezzles, steals, obtains by fraud, or otherwise without authority knowingly converts to the use of any person other than the rightful owner or intentionally misapplies, property that is valued at $5,000 or more, and is owned by, or is under the care, custody, or control of such organization, government, or agency[,] or

... or

corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more.[169]

The statute also punishes anyone who:

[C]orruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more.[170]

Congress ostensibly designed the statute to “‘extend federal bribery prohibitions to bribes offered to state and local officials employed by agencies receiving federal funds,’ thereby filling the regulatory gaps.”[171] A particularized statute aimed at corrupt state and local officials would be beneficial, but serious problems arise with § 666. First, local and state bribery are more than adequately covered by official right extortion under the Hobbs Act and have been since the 1970s.[172] Second, the statute’s sweep is “truly stunning.”[173] The jurisdictional hook of the statute, receiving $10,000 or more in federal funds every year, could subject nearly every city and county to the statute’s reach.[174]

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170 § 666(a)(2).
172 See supra Part II.A.
173 Beale, supra note , at 710.
174 See id.
So far, the Supreme Court has endorsed the statute's sweeping nature. In *Sabri v. United States*, the Court rejected real estate developer Basim Omar Sabri's argument that his conviction under § 666(a) (2) was unconstitutional on its face "because it fails to require proof of any connection between a bribe or kickback and some federal money." The Court found that Congress's Spending Power authorized Congress to spend for the general welfare, and the Necessary and Proper Clause authorized Congress to take reasonable steps to prevent corruption in the benefitted agency. The Court concluded the statute was a reasonable step, and no nexus was required between the criminal activity and the federal funds. Although requiring a direct connection between the funds and the corruption would have been difficult, the Court gave the statute enormous latitude.

Courts will continue to flesh out the scope of § 666. It has the potential to eclipse bribery, mail fraud, and the Hobbs Act because it contains the elements of each offense, besides embezzlement and outright stealing. It stands as a wide-open alternative, ripe for an expansive interpretation whenever the Court limits its sister statutes. Recent decisions construing the statute give some cause for concern. For example, some circuits allow § 666 to reach illegal gratuities whereas others would limit it strictly to bribes.

### E. Honest Services Fraud

Concurrently with the Hobbs Act's expansion in the 1970s, federal prosecutors began utilizing other dormant language in Title 18 to prosecute political corruption. Beginning with *Shushan v. United States* in 1941, federal prosecutors developed an "intangible rights doctrine" under the mail and wire fraud statute. The mail fraud statute, originally enacted in 1872, makes it a federal crime to "devise any scheme or artifice to defraud" using mailing in furtherance of the scheme. Congress amended the statute in 1909 to read "any

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176 Id. at 604.
177 U.S. Const. art. I, § 8, cl. 1.
178 Id. cl. 18.
179 See *Sabri*, 541 U.S. at 613 (Thomas, J., concurring) ("No connection whatsoever between the corrupt transaction and the federal benefits need be shown.").
182 117 F.2d 110 (5th Cir. 1941), overruled by United States v. Cruz, 478 F.2d 408 (5th Cir. 1973).
183 Act of June 8, 1872, ch. 335, § 301, 17 Stat. 283, 323.
scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises.” As a general proposition, most prosecutions under the mail fraud statute contemplated schemes defrauding victims of conventional property such as money. In Shushan, a public official allegedly accepted bribes from businessmen to urge city action favorable to the bribe-givers. The Fifth Circuit held that a scheme to obtain a favorable treatment from a public official by the use of bribery “would not only be a plan to commit the crime of bribery, but would also be a scheme to defraud the public.”

This language was the main source of caselaw for federal prosecutors as they advanced an honest services theory of mail fraud in the late 1960s. The honest services doctrine differed from traditional fraud because “[w]hile the offender profited, the betrayed party suffered no deprivation of money or property.” In fact, the betrayed party, if given favorable government treatment, could actually profit from a fraudulent scheme. One of the bases for this reading of the mail fraud statute was the disjunctive posture of the statute because of the “or” in § 1341. Like the Hobbs Act after Kenny, mail fraud swallowed bribery of public officials. Like Representative Hobbs, the mail fraud statute's architects probably did not envision such breadth. In contrast with official right extortion under the Hobbs Act, the intangible rights theory of mail fraud encompassed private fraud.

The Supreme Court checked the intangible rights theory of mail fraud in McNally v. United States, written by Justice White, also the author of McCormick. The scheme to defraud in McNally proceeded as follows: Kentucky elected a Democratic governor, who essentially gave Howard P. "Sonny" Hunt, chairman of the state's Democratic Party, control over selecting insurance agencies for the State. Hunt chose the Wombwell Insurance Company of Lexington in consideration for Wombwell sharing commissions with other insurance agencies selected by Hunt. The recipient agencies included Seton Investments, Inc., a company controlled by Hunt, James E. Gray, and Charles J. McNally. Gray was a former public official, while McNally was a private individual. Hunt was convicted of mail and tax fraud. Gray and McNally were charged with, inter alia, a charge of mail fraud on the

185 Id. (emphasis added); see also Skilling v. United States, 130 S. Ct. 2896, 2926 (2010) (tracing the history of § 1341's language).
186 Shushan, 117 F.2d at 115.
187 Skilling, 130 S. Ct. at 2926.
188 See id.
189 See id. at 2926–27.
basis that they "had devised a scheme ... to defraud the citizens and government of Kentucky of their right to have the Commonwealth's affairs conducted honestly." A jury found them guilty, and the Sixth Circuit affirmed. Tracing mail fraud's development from its roots in the 1800s, the Supreme Court reversed on the grounds that the mail fraud statute as passed by Congress protected only traditional property rights and did not contemplate the body-politic's right to honest and impartial governmental services. Although not stated by the Court, it is implicit in the opinion that the statute's language had been pushed too far in becoming an ethics-in-government act. Even Justice Stevens in dissent admitted "there may have been some overly expansive applications of section 1341 in the past."

Similar to its reaction after Local 807, Congress amended the mail and wire fraud statutes to counteract the Supreme Court's decision in McNally. In 1988, an addition was added to the Omnibus Drug Bill that restored mail fraud's reach to the deprivation of honest services, later codified as 18 U.S.C. § 1346. The honest-services statute states: "For the purposes of th[e] chapter [of the United States Code that prohibits, inter alia, mail fraud, § 1341, and wire fraud, § 1343], the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." Though it took over twenty years, the Supreme Court returned the favor in 2010 with its decision in Skilling v. United States.

In Skilling, a former top-ranking executive of the Enron Corporation was charged with, among other things, wire fraud on the basis that he deprived Enron's shareholders the intangible right of his honest services by propping up Enron's financial stability before it went bankrupt. At issue on appeal was whether § 1346 was unconstitutionally vague. To avoid vagueness, a criminal statute must "define the criminal offense [1] with sufficient definiteness that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement." While not throwing out the entirety of § 1346 on the basis

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191 Id. at 353.
192 Id. at 376 (Stevens, J., dissenting); see also Julie R. O'Sullivan, The Federal Criminal "Code" Is a Disgrace: Obstruction Statutes as Case Study, 96 J. CRIM. L. & CRIMINOLOGY 643, 663 (2006) (criticizing the pre-Skilling "draconian" reach of § 1346).
195 Id.
196 130 S. Ct. 2896 (2010).
197 See id. at 2908.
198 Id. at 2927–28 (quoting Kolender v. Lawson, 461 U.S. 352, 357 (1983)).
of vagueness, the Court pared down the statute to reach only bribes and kickbacks.\textsuperscript{199} Because the reach of the honest services doctrine was in "disarray," the Court limited the statute's construction to preserve its constitutionality.\textsuperscript{200} Still, the honest services doctrine can reach beyond public official bribery to private conduct.\textsuperscript{201} Skilling is positive in the sense that it makes the crime of honest services fraud more well-defined. Still, the problems of breadth inherent in the bribery statute and the Hobbs Act remain with honest services fraud. In this sense, it is as powerful as the Hobbs Act, especially because in 2002 Congress extended the maximum prison sentence for honest services fraud from five to twenty years.\textsuperscript{202}

It might be helpful to put this in perspective. In contrast to the twenty-year maximums for honest services fraud and official right extortion, violators of the bribery statute face up to fifteen years of imprisonment. Violators of § 666 face imprisonment of up to ten years. Finally, violators of the illegal gratuities statute face imprisonment of no more than two years. Troublingly, the same conduct could be described as quid pro quo (bribery or extortion), linked to an official act (illegal gratuity), or a scheme to defraud the public of honest services. Arguably, the same conduct should receive a uniform punishment in federal courts,\textsuperscript{203} yet the maximum sentences range from two to twenty years.\textsuperscript{204} The reality of this statutory overlap is that the prosecutor becomes a one-man legislator by defining the crime while Congress shirks its duty to make the law. Prosecutorial discre-

\textsuperscript{199} Id. at 2931.
\textsuperscript{200} Id. at 2929.
\textsuperscript{201} See id. at 2931 n.42 (listing examples of bribery and kickback schemes with employee-employer and union official-union member relationships).
\textsuperscript{203} For a discussion of the dangers of overlapping federal crimes with disproportionate punishment, see generally Smith, \textit{supra} note .
\textsuperscript{204} Granted, the U.S. Sentencing Guidelines aim to coordinate the incarceration periods for bribery, official right extortion, and honest services fraud. For example, a public official who received a $6000 bribe and was a first-time offender would face between thirty-three and forty-one months in prison. It would not matter whether he was convicted of bribery, official right extortion, or honest services fraud. These calculations also assume that the bribe was not in the furtherance of another crime, which would ratchet up the sentence. If, on the other hand, he were convicted for the receipt of an illegal gratuity, he could not face more than twenty-four months in prison, no matter the circumstances. See U.S. SENTENCING GUIDELINES MANUAL § 2C1.1 (2010). In addition, because the Guidelines are only advisory, it is well within a federal judge's prerogative to abide only by the statutory maximums. See United States v. Booker, 543 U.S. 220, 345 (2005).
tion of this nature does not bode well for a country that claims to be "a government of laws and not of men." 205

The case of United States v. Siegelman 206 illustrates many of the problems in the federal corruption statutes. On June 29, 2006, a jury in Alabama convicted former governor Don Siegelman on charges of bribery, honest services mail fraud, and obstruction of justice. The bribery charges stemmed from the relationship between Siegelman and Richard Scrushy, the former CEO of HealthSouth. Siegelman was elected governor in 1998 on a campaign platform advocating a state lottery to fund education. To this end, he established the Alabama Education Lottery Foundation after his victory. Acquaintances of Siegelman and Scrushy testified that Scrushy believed he needed to contribute to the Foundation to obtain a seat on the Certificate of Need Review Board ("CON Board"). A seat was attractive to Scrushy because the Board determines whether a healthcare provider can open a new facility in Alabama. Eventually, Scrushy directed nearly $500,000 to the Foundation and Siegelman appointed him to the Board. On appeal, Siegelman argued that the evidence was insufficient to support the jury's finding of a quid pro quo. The central piece of the prosecution's case was a conversation between Siegelman and Nick Bailey after Scrushy dropped off a check for $250,000:

Bailey testified that after Scrushy left, Siegelman showed [Scrushy's] check to Bailey and told him that Scrushy was "halfway there." Bailey asked, "what in the world is [Scrushy] going to want for that?" Siegelman replied, "the CON Board." Bailey then asked, "I wouldn't think that would be a problem, would it?" Siegelman responded, "I wouldn't think so." 207

Siegelman argued on appeal that this conversation fell far short of McCormick's explicit quid pro quo standard. 208 The Court rejected Siegelman's argument, and the implications are troubling. The more broadly a court reads the quid pro quo standard, the more endangered the political process becomes. The disconcerting reality is that politicians must solicit funds to further agendas. Not surprisingly, political appointees are routinely heavy donators. Scrushy's qualifica-

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205 See Morrison v. Olson, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting) (quoting MASS. CONST. art. XXX (1780)); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) ("The government of the United States has been emphatically termed a government of laws, and not of men.").

206 561 F.3d 1215 (11th Cir. 2009) vacated, 130 S.Ct. 3542 (2010).

207 Id. at 1221.

208 Although McCormick addressed the Hobbs Act and the Alabama jury convicted Siegelman of bribery under § 666, the two statutes utilize the federal definition of bribery found in § 201.
tions were not at issue: He had served on the CON Board under three previous Alabama governors.

The holding in Siegelman is also in tension with Wilkie. Wilkie held that a public official is incapable of committing official right extortion when the intended beneficiary is the federal government. Likewise, the bribery charges against Siegelman did not allege that Siegelman accepted Scrushy's donations for personal use. Instead, the donations were directed towards a lottery fundraiser. Nevertheless, the jury convicted Siegelman on charges of bribery, even though the intended beneficiary was the state of Alabama.

Even if Governor Siegelman did not become a target by virtue of party affiliation, the unchecked prosecution of high-profile public figures provides a host of unhealthy incentives. The political circumstances of the case were "extraordinary." After the governor's conviction, a bipartisan group of fifty-two state attorneys general raised ethical concerns about the prosecution. For instance, the United States Attorney for Montgomery, Alabama, Leura G. Canary, recused herself from the prosecution because her husband "was Alabama's top Republican operative who had worked closely with [Karl] Rove for years." However, documents released by a Department of Justice staffworker indicated that Canary continued to offer the prose-


211 See, e.g., George D. Brown, New Federalism's Unanswered Question: Who Should Prosecute State and Local Officials for Political Corruption?, 60 WASH. & LEE L. REV. 417, 441 (2003) (noting that corruption cases in Chicago during the 1970s "had increased the stature of prosecutors"); Matthew N. Brown, Prosecutorial Discretion and Federal Mail Fraud Prosecutions for Honest Services Fraud, 21 GEO. J. LEGAL ETHICS 667, 668 (2008) (arguing that, pre-Skilling, the honest services doctrine encouraged abuse by prosecutors); Ralph E. Loomis, Comment, Federal Prosecution of Elected State Officials for Mail Fraud: Creative Prosecution or an Affront to Federalism?, 28 AM. U. L. REV. 63, 78–79 (1978) ("The dangers of this activist approach are twofold: it legitimatizes the United States Attorney as a political actor and advocates a broad unchecked use of discretion."); Abbe David Lowell et al., "Not Every Wrong is a Crime": The Legal and Practical Problems with the Federal "Honest-Services" Statute, 63 VAND. L. REV. EN BANC 11, 14 n.16 (2010) (noting that broad discretion in the federal corruption statutes can incentivize politically expedient prosecutions).

212 Siegelman, 561 F.3d at 1219.


214 Id.
In the eyes of many the governor became a target because he was a Democrat, perhaps from the highest levels of power.

**Conclusion**

Although the Hobbs Act's history indicates that it was not meant to be an ethics-in-government statute, it did contain common law language pregnant with the possibility of prohibiting corruption in government. Besides rules of statutory interpretation and precedent, social forces coalesced to push the statute towards its modern-day form. Prosecutors and judges have squeezed and stretched the Act's language for decades in an attempt to reach a balance between two legitimate goods: the public's interests in both honest government and honorable prosecutions. The pendulum has swung too far in one direction. Part of the problem is that Congress did not legislate carefully. Yet even when Congress passed a particularized statute with § 666, it cut too wide a swath. The blame also lies with overzealous

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215  *Id.*

216  See Adam Zagorin, *Selective Justice in Alabama?* TIME (Oct. 4, 2007), http://www.time.com/time/nation/article/0,8599,1668220-3,00.html. (“Several people involved in the Siegelman case who spoke to TIME say prosecutors were so focused on going after Siegelman that they showed almost no interest in tracking down what Young said about apparently illegal contributions to Sessions, Pryor, other well-known figures in the Alabama G.O.P. and even a few of the state’s Democrats. ‘It just didn’t seem like that was ever going to happen,’ said an individual present during key parts of the investigation. ‘Sessions and Pryor were on the home team’.”).


218  Overcriminalization in response to corruption is as old as republican government itself. In 63 B.C., under the consulship of Cicero, the Roman Republic passed an anti-corruption statute that sought to curb the solicitation of votes, or *ambitus.* See *Noonan,* supra note, at 39-41. Under the statute, *ambitus* included “payment of men to greet a candidate or to follow him,” reserving seats for voters at public games, and giving free banquets. *Id.* Immediately, the impracticability of the law became apparent. The intractable Cato the Younger charged L. Licinius Murena with *ambitus* after he lost the next consul election to Murena. Defending Murena, Cicero argued that it was not *ambitus* to give favors to friends but instead when the “public was indiscriminately invited.” Moreover, the granting of favors to the electorate was an ancient tradition for candidates. *Ambitus,* Cicero argued, was a flexible crime “whose discernment required astute political judgment.” Although a faithful reading of the statute seemed damning to Murena, Cicero's argument prevailed. Purchasing elections was a habit too far engrained in Roman politics. In short, the statute was pointless.

It could be argued that the German historian Oswald Spengler predicted the parallels between the influence of money in Cicero’s Rome and modern-day Washington. *See generally Oswald Spengler, The Decline of the West: An Abridged Edition* (Helmut Werner & Arthur Helps eds., Charles Francis Atkinson trans., 1932) (1991)
prosecutors, who sometimes demand public corruption convictions based on the national mood.219 As Justice Jackson warned, "[t]he [federal] prosecutor has more control over life, liberty, and reputation than any other person in America."220

With so many overlapping crimes, differing elements, and disproportionate punishments, the criminal justice system would be well-served by a criminal code that spoke with clarity and consistency to public corruption offenses. When the Supreme Court checks one public corruption statute, prosecutors can turn to others. For example, it still remains a question whether a bribery charge under mail or wire fraud would require proof of a quid pro quo.221 To that end, synthesizing the public corruption offenses into one statute would alleviate the confusion engendered when any major decision is made on any of the corruption statutes. A comprehensive statute would punish any public official who corruptly demands, seeks, receives, or agrees to receive property to which he is not entitled. Likewise, federal law should punish the briber who corruptly offers, gives, or agrees to give property to a public official. Congress should also explicitly define “corruptly” as knowledge of fact and law. Finally, the line between bribery and illegal gratuities is superfluous. Without serious campaign finance reform, the difference between a payment hoping to curry influence and a payment actually influencing an official act is too hazy. What we currently have is not a coherent scheme of offenses but instead a patchwork of statutes aimed at corrupt public officials, some by design and others by accident. The same conduct can be called receipt of an illegal gratuity, bribery, extortion, or honest services mail fraud. Even if the punishments were consistent, there

(noting the influence of money in politics). Spengler argued that it was an inevitability of history for great cultures to decline as they transitioned into static civilizations. The transition was marked first by the domination of money in political life, followed by the rise of an Imperial State and a strong leader. Id. at 378–79. Accordingly, Cicero’s Rome was on the cusp of Caesarism, and we now live in the age of the Imperial Presidency. See generally Arthur M. Schlesinger, Jr., The Imperial Presidency (1973) (paralleling the two phenomena).

219 See, e.g., George D. Brown, Carte Blanche: Federal Prosecution of State and Local Officials After Sabri, 54 CATH. U. L. REV. 403, 405 (2005) (discussing the political nature of public corruption cases); Robert H. Jackson, The Federal Prosecutor, 31 AM. INST. CRIM. L. & CRIMINOLOGY 3, 5 (1940) (“In times of fear or hysteria political, racial, religious, social, and economic groups, often from the best of motives, cry for the scalps of individuals or groups because they do not like their views.”).

220 Jackson, supra note 219, at 3 (alteration in original).

221 Cf. United States v. Kincaid-Chauncey, 556 F.3d 923, 943 (9th Cir. 2009) (requiring that under the wire fraud statute, when the scheme to defraud involves paying off a public official, the government must prove evidence of a quid pro quo).
would remain within the prosecutor’s discretion the decision to stigmatize a defendant with an indictment for extortion as opposed to receipt of an illegal gratuity. Even an indictment would likely wreck a public official’s reputation and his career.

Admittedly, a generous rewriting of Title 18 threatens to take years or even decades. In the meantime, federal courts ought to immediately reinvigorate the term “corruptly.” Corruptly should mean that the public official knows he is receiving a payment to which he is not entitled. This conception of extortion more closely conforms to its roots in common law and serves a much-needed role in separating innocent from criminal conduct. While they do not explicitly contain the word “corruptly,” the Hobbs Act, honest services fraud, § 209 and § 666 have swallowed § 201 and should correspondingly require the same state of mind. Whatever the merits of incentivizing private citizens to report extortionate behavior, victims of extortion should never be charged with bribery. A victim of extortion, unlike a true briber, is paying for a fair shake.

Any correction would of course be imperfect. It is in the nature of a federal system for inconsistencies to appear with “concurrent jurisdiction” between States and the federal government.222 Even if federal courts rejuvenated the corrupt intent element in their interpretation of the federal corruption statutes, the problem of state predicate offenses wrapped up in a Travel Act charge would still remain. State bribery laws can of course be narrower than their federal counterpart, but in some cases they are more expansive. For example, California law does not require that a bribe be tied to a specific official action.223 Therefore, a charge under the Travel Act could use a state bribery crime as a predicate offense to circumvent any repairs done to federal law.

Nevertheless, reform of federal law would spare numerous public officials and victims of extortion from unwarranted prosecutions and would also serve as a model to state legislatures and courts. What constitutes an improper reciprocity may differ from culture to culture, but it should at least be consistent within a culture. Because most perpetrators of white-collar crime are rational actors, the aggressive prosecution of corruption has the desired benefit of deterring other

223 See People v. Gaio, 97 Cal. Rptr. 2d 392, 400 (Cal. Ct. App. 2000) (remarking that “[a]ppellants’ contention that a bribe must be tied to a specific official action derives from an entirely different and distinguishable source”).
rational-minded criminals from engaging in similar activities.224 Yet this desire for deterrence should never overwhelm a basic tenet of the criminal law: limiting punishment to those who act with an evil mind.