Defining Corruption: A Comparison of the Substantive Criminal Law of Public Corruption in the United States and the United Kingdom

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Abstract

Though it is the FBI's highest criminal priority[1], there is no crime of "public corruption" in the United States. Instead, acts we generally believe to constitute public corruption are criminalized in a broad array of overlapping statutes against acts such as bribery, extortion, and fraud. An ad hoc development of public corruption doctrine has resulted in a messy, confusing regime that remains full of open questions. This paper seeks to identify those questions and describe how they are dealt with in the United Kingdom.

Part I will identify the toughest, most important open doctrinal questions in this field. Part II will describe the UK legal regime and compare it to existing American legal doctrine.

[1] The FBI website, under "What We Investigate", lists their national security priorities (overall 1-3) in one column, and criminal priorities in another column. Available at http://www.fbi.gov/hq.htm , last visited March 13, 2009.

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Introduction

There is no crime of public corruption in American federal criminal law. Federal criminal law contains numerous statutes that criminalize various acts by public officials ordinarily thought to be corrupt. The primary statutes criminalizing acts of public corruption criminalize unlawful gratuities, bribery, and doctrinally complex crimes called "extortion under color of official right" and "fraudulent deprivation of the public's right to honest services". However, these statutes, in tandem with their common law development, do not form a coherent whole. Most troubling, the doctrine itself is rather messy, and the legal categories are not neatly drawn. For example, it is controversial what the standard should be for telling when some particular behavior constitutes:

1) A lawful gratuity versus an unlawful gratuity
2) An unlawful gratuity versus a bribe
3) A bribe versus official extortion
4) A deprivation of honest services

It is important to note that the messiness comes before assessing any particular fact pattern. The question is not which fact patterns fit which category, with ordinary legal blurring happening at the edges. The question is how the legal standards themselves should draw the lines between the legal categories. For example, the Supreme Court in *United States v. Sun-Diamond Growers of California* drew the legal line between a lawful gratuity and an unlawful gratuity at

a different place than the government in that case attempted to draw the line.[2] The way that line is drawn, in turn, has practical implications for the way the legal line is drawn between unlawful gratuity and bribery. Some think bribery and extortion overlap at their core,[3] and some think they are and should be totally different.[4] The doctrine of fraudulent deprivation of intangible rights to honest services has given rise to myriad intractable doctrinal issues.

In this paper I will first lay out the federal legal regime criminalizing public corruption in the United States. In doing so, I will attempt to identify the most important open questions that complicate the doctrine of that regime. Last, I shall consider whether the legal regime criminalizing public corruption in the United Kingdom provides any guidance in answering the open questions of the American system.

Why it's so hard to get the doctrine right

Criminalizing acts of public corruption is difficult in part because of the loose nature of the term "corruption". The goal of criminalizing public corruption is to get the statutes to "comport with widely held intuitions about which transactions really are corrupt."[5] Several different definitions of corruption exist,

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[2] *United States v. Sun-Diamond Growers of California*, 526 U.S. 398 (1999) [hereinafter *Sun-Diamond*].
[3] *See, e.g.*, James Lindgren, *The Theory, History, and Practice of the Bribery-Extortion Distinction*, 141 U. Pa. L. Rev. 1695 (1993).
[4] *See, e.g., McCormick v. United States*, 500 U.S. 257, 276-280 (1991) (Scalia, J., concurring), and *Evans v. United States*, 504 U.S. 255, 278-297 (1992) (Thomas, J., dissenting).
[5] Daniel Hays Lowenstein, *Political Bribery and the Intermediate Theory of Politics*, 32 UCLA L. Rev. 784, 829 (1985).

in both sociological literature and legal literature, and largely define public corruption widely to include any misuse of public office for private gain.[6] Up one level of abstraction, one commentator says corruption is essentially turning group power into personal benefit – suppressing a potential public interest for personal gain.[7] Such misuse or abuse of office can take many different forms, including bribery, nepotism, misappropriation of public funds, kickbacks, influence-peddling, check-kiting, and skimming.[8]

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[6] *See, e.g.*, Cheryl W. Gray & Daniel Kaufmann, *Corruption and Development*, Fin. And Dev., Mar. 1998, at 7 *available at* http://www.worldbank.org/fandd/english/0398/articles/020398.htm. (defining corruption as "the use of public office for private gain"); Bruce E. Gronbeck, *The Rhetoric of Political Corruption*, in Political Corruption: A Handbook, Transaction Publishers, New Brunswick, 173, 173 (Arnold J. Heidenheimer, Michael Johnston, Victor T. Le Vine eds., 1999) ("the term 'political corruption encompasses those acts whereby private gain is made at public expense.") [hereinafter Handbook]; Gunnar Myrdal, *Corruption as a Hindrance to Modernization in South Asia*, in Political Corruption: Readings in Comparative Analysis, Transaction Books, New Brunswick, 229 (A. Heidenheimer, ed., 1970) (corruption includes "all forms of improper or selfish exercise of power and influence attached to a public office…") [hereinafter Readings]; J.S. Nye, *Corruption and Political Development: A Cost-Benefit Analysis*, 61 Am. Pol. Sci. Rev. 417, 419 (1967) (defining corruption as "behavior which deviates from the formal duties of a public role because of private-regarding (personal, close family, private clique) pecuniary or status gains; or violates rules against the exercise of certain types of private-regarding influence. This includes such behavior as bribery (use of a reward to pervert the judgment of a person in a position of trust); nepotism (bestowal of patronage by reason of ascriptive relationship rather than merit); and misappropriation (illegal appropriation of public resources for private-regarding uses)"); Inter-American Convention Against Corruption, March 29, 1996, 35 I.L.M. 724, 729, art. VI(1)(c) (defining corruption as "any act or omission in the discharge of his duties by a government official… for the purpose of illicitly obtaining benefits for himself or for a third person.").

[7] Lindgren, *supra* note 3, at 6.

[8] *See* Nye, *supra* note 6; *see also* Peter J. Henning, *Public Corruption: A Comparative Analysis of International Corruption Conventions and United States Law*, 18 Ariz. J. Int'l & Comp. L. 793, 802 (2001).

While there are many forms of corruption, bribery is widely regarded as the quintessential form of corruption. In a widely cited passage, Lowenstein describes its place in the pantheon of corrupt acts:

> [T]he crime of bribery is the black core of a series of concentric circles representing the degrees of impropriety in official behavior. In this conception, a series of gray circles surround the bribery core, growing progressively lighter as they become more distant from the center, until they blend into the surrounding white area that represents perfectly proper and innocent conduct.[9]

But while bribery is the core act, it is not entirely agreed why it is harmful. There is no obvious victim, like in ordinary crimes such as murder and rape. It could be thought to be harmful because of its negative, distorting effects on a market, or as harmful in itself, insofar as it undermines the rule of law and established democratic processes. The lack of clarity about the source of harm in certain acts that might be bribery complicates the effort to identify which acts among those that resemble bribery are in fact harmful and should be regarded as bribery and thus criminalized.

Beyond bribery, officials can abuse their office "in an almost limitless number of ways."[10] Trying to criminalize those misuses of office that legislators and judges haven't thought of yet can be difficult.

Further complicating matters, some acts we intuitively regard as corrupt may only be "wrong", or deserving of punishment, because of certain cultural

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[9] Lowenstein, *supra* note 5, at 786. *See also* Henning, *supra* note 8, at 801 ("Every definition of corruption incorporates bribery as the principal form of misconduct, and then usually seeks to expand the concept to cover a broader array of conduct.").
[10] Henning, *supra* note 8, at 793.

norms.[11] While this is not the case for massive misappropriation of government funds for private uses by public officials, it may be the case for acts that may otherwise resemble lobbying, campaign contributions, or – more broadly – legitimate political activity according to the norms of a particular locale.[12]

In addition to the more theoretical problems, the American law of public corruption has been complicated by its gradual and haphazard development by congressional enactment and judicial interpretation, resulting in no "coherent system of anti-corruption laws."[13] Commentators agree that the law is a "hodgepodge,"[14] and often does not directly criminalize the actual behavior it wishes to punish. The various statutes used to prosecute public corruption – those criminalizing unlawful gratuities, bribery, extortion, and mail fraud – are "indirect, unpredictable, and often ineffective tools"[15] for doing so. Some have suggested that Congress should "enact a statute that directly identifies the proscribed behavior" and that "clearly distinguish[es] among degrees of

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[11] *See* John Noonan, *The Bribery of Warren Hastings: The Setting of a Standard for Integrity in Administration*, 10 Hofstra L. Rev. 1073, 1114 (1982) (There is an "element of convention in the definition of bribery.").

[12] *See* W. Michael Reisman, *Folded Lies: Bribery, Crusades, and Reforms*, 57-58 (1979) (in Heidenheimer, Handbook, *supra* note 6) (noting the importance of normative codes in determining the characterization of certain payments as bribes or legal acts); *see also* Lowenstein, *supra* note 5, at 785 (asking "what kind of political pressure should be proscribed as bribery").

[13] Henning, *supra* note 8, at 799.

[14] Henning, *supra* note 8, at 798 ("the United States does not have a coherent set of domestic anti-corruption laws. Instead, one can best describe the federal law as a hodgepodge").

[15] Charles N. Whitaker, *Federal Prosecution of State and Local Bribery: Inappropriate Tools and the Need for a Structured Approach*, 78 Va. L. Rev. 1617, 1619 (1992).

[culpability]".[16] Indeed, the Department of Justice supported Title 48 of the Violent Crime Prevention Act of 1991, which would have created two new offenses: public corruption and narcotics-related public corruption.[17]

Two other, related concerns cause problems across all the doctrinal categories. First, corruption is a particularly secretive crime, and thus can be difficult to prove. The odd doctrine that has grown up sometimes reflects this. Second, while bribery is the quintessential, paradigmatic example of an act of corruption, it may not be the most pernicious and widespread form of corruption. Instead, *paying for access* to public officials – an activity not clearly criminalized by the current doctrine – may be more common than bribery itself and thus more harmful to the workings of the democratic process. These issues will be considered in more detail below.

Part One. The American Regime: Open Questions

I. Unlawful gratuities and bribery

The federal statute criminalizing bribery of federal public officials is 18 U.S.C. § 201, which criminalizes both the giving and receiving of a bribe. In the following passage, section (1) criminalizes the giving of a bribe, and section (2) criminalizes the receiving of a bribe:

(b) Whoever-

[16] Whitaker, *id.*, at 1619. *See also* Henning, *supra* note 8, at 799 (""Congress has not defined a crime of public corruption… The fault lies not so much with the courts as with Congress, which has not undertaken the task of enacting a clear set of provisions to deal with corruption at the various levels of government.").
[17] Violent Crime Prevention Act of 1991, H.R. 3371, 102nd Cong.

(1) directly or indirectly, corruptly gives, offers or promises anything of value to any public official… with intent
    a. to influence any official act…
(2) being a public official… directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to accept anything of value… in return for:
    a. being influenced in the performance of any official act…

shall be fined … or imprisoned for not more than fifteen years… and may be disqualified from… office[18]

Within the same statute, giving and receiving "unlawful gratuities" is also criminalized in sections (a) and (b), respectively:

(c) Whoever –
    (1) otherwise than as provided by law for the proper discharge of official duty –
        (a) directly or indirectly gives, offers, or promises anything of value to any public official… for or because of any official act performed or to be performed by such public official…; or
        (b) being a public official… directly or indirectly demands, seeks, receives, accepts, or agrees to accept anything of value personally for or because of any official act performed or to be performed by such official…

shall be fined under this title or imprisoned for not more than two years, or both.[19]

It is important, then, to distinguish at least three categories: bribes, unlawful gratuities, and lawful gratuities (if there is such a thing).[20] The first question to take up is the following: when is an act a bribe and when is it an unlawful gratuity?

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[18] 18 U.S.C. § 201(b).
[19] 18 U.S.C. § 201(c).
[20] *See generally United States v. Brewster*, 506 F.2d 62 (D.C. Cir. 1974); *see also* Lowenstein, *supra* note 5, at 797 ("Rather than having to define one difficult boundary (between a bribe and a lawful act) it is necessary to define two such boundaries (between a bribe and an unlawful gratuity and between an unlawful gratuity and a lawful act).").

A. Bribes versus unlawful gratuities

The Supreme Court in *United States v. Sun-Diamond* held that the difference between a bribe and an unlawful gratuity can be found in each crime's intent.[21] The intent of the bribe, per the statutory language, is "to influence" an official act or "to be influenced in an official act", while an unlawful gratuity requires only that the gratuity be given or accepted "for or because of" an official act.[22] "In other words, 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."[23] An illegal gratuity, by contrast, is merely a reward for an official act, and need not be intended to influence the official act.[24] The key distinction, then, is that the intent of the payor in the bribery setting is *to influence* the public official's official act, whereas that is not required for an unlawful gratuity.[25]

Another difference obvious from the statutory language is the requirement that a bribe be committed "corruptly". There is no such requirement for an unlawful gratuity. Commentators disagree on the

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[21] *Sun-Diamond*, *supra* note 2, at 404.
[22] § 201(b) and (c), *supra* notes 18 and 19 and accompanying text.
[23] *Sun-Diamond*, *supra* note 2, at 404-05 (emphasis original).
[24] *Id*.
[25] *Id.*, *see also* Brent Gurney, Jessica Waters, & Julie Edelstein, *United States v. Valdes: "Officially" Defining "Official Act" Under the Federal Gratuities Statute*, 30 Oct Champion 22, 23 (September/ October 2006) ("The key difference between the gratuities and bribery statutes is one of intent: bribery requires a *quid pro quo*, whereas an illegal gratuity 'may constitute merely a reward for some future act that the public official will take (and may already have determined to take), or for a past act that he has already taken.'") (quoting *Sun-Diamond*, *supra* note 2, at 404); *see also* Whitaker, *supra* note 15, at 1622 ("The crucial distinction between a gratuity and a bribe is that a gratuity is not the moving force behind any official act, and there is no overt exchange.").

meaning this adds to the statute.[26] Some have said it just refers to the "*quid pro quo*" requirement itself,[27] and some say it just requires a general wrongfulness.[28]

Another difference is that bribes must precede the official act, or must be forward-looking, whereas unlawful gratuities could be forward- or backward-looking.[29] When a gratuity is backward-looking – i.e., when an official has performed some official act and someone rewards the official with a thing of value "for or because of" that act – it is clear that it is not a bribe, because it does not influence the official act in any way.[30] However, the difficulty arises with acts that might be described either as forward-looking gratuities or as bribes.

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[26] *See* Henning, *supra* note 8, at 801 ("… even within the crime of bribery, there is uncertainty regarding the linkage required between the payment and the official act, and what intent the offeror and public official must have for the transaction to come within the criminal prohibition.").

[27] Charles B. Klein, *What Exactly Is an Unlawful Gratuity After United States v. Sun-Diamond Growers?* 68 Geo. Wash. L. Rev. 116, 128 (1999) ("Under § 201, 'corrupt intent' is the intent to receive a specific benefit in return for the payment. In other words, the payor of a bribe must intend to engage in 'some more or less specific *quid pro quo*' with the official who receives the payment.").

[28] Lowenstein, *supra* note 5, at 798 ("The element of corrupt intent requires that the facts described by the other elements be subject to characterization as wrongful, and thus requires the application, implicitly or explicitly, of normative political standards.").

[29] *United States v. Schaffer*, 183 F.3d 833, 841 (D.C. Cir. 1999) *vacated on other grounds by* 240 F.3d 35 (D.C. Cir. 2001) (Section 201(b) – criminalizing bribes – and Section 201(c) – criminalizing unlawful gratuities – "differ in their temporal focus. Bribery is entirely future-oriented, while gratuities can be either forward or backward looking.").

[30] *See* Henning, *supra* note 8, at 832 ("If the payment is a reward for a previous decision, then the distinction between a bribe and a gratuity is clear."); *see also id.*, at 831 ("Unlike a bribe, which can only occur before an official act, because the crime is the *quid pro quo* arrangement to influence the outcome, a gratuity can be either before or after the official act because the crime is providing the reward regardless of when the act occurred.").

One proposition for which *Sun-Diamond* stands is an explicit statement that bribery requires a *quid pro quo*.[31] The other, more crucial holding, is that an unlawful gratuity, while not requiring a *quid pro quo*, must be *linked* to some specific official act or acts.[32] The Court stated that the statute's "insistence upon an 'official act'" requires "that some particular official act be identified and proved."[33]

The question then becomes: for those payments which *are* linked to some official act – i.e., payments all of which are illegal as either unlawful gratuities or bribes – which are unlawful gratuities and which are bribes? As noted above, those payments that occur after the official act cannot be bribes, because they cannot be intended to influence the official act.[34] Thus, the question can be refined one step further: when is a forward-looking payment – i.e., one linked to an official act that will happen in the future – an unlawful gratuity and when is it a bribe?

This is the first important open question of the American regime criminalizing public corruption. There are two main views. The first view – called "the reward approach" – holds that the forward-looking payment is an unlawful gratuity (and not a bribe with a higher penalty) if it is given as

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[31] *Sun-Diamond*, *supra* note 2, at 404-05.
[32] *Sun-Diamond*, *supra* note 2, at 405-09 (interpreting the statutory prohibition on giving or receiving 'for or because of *any official act* performed or to be performed' to mean "'for or because of some particular official act of whatever identity'".
[33] *Id.* at 406.
[34] Of course, as a trivial matter, a bribe can technically be actually paid after the official act, so long as the *quid pro quo* arrangement – the essential part of the bribe – was set up and agreed to before the official act.

a reward for an act the official *has already committed to perform*.[35] The forward-looking payment is a bribe if it is given with the payor *intending it to influence* specific official conduct. On this view, then, a forward-looking payment intended to influence specific conduct cannot be an unlawful gratuity.[36]

One advantage of this first view is that it provides a bright-line test for distinguishing an unlawful gratuity from a bribe; it makes unlawful gratuities and bribes mutually exclusive categories. Moreover, it more accurately reflects the hugely different penalties for bribery and unlawful gratuities. Bribery carries up to fifteen years in prison, whereas unlawful gratuities carry only up to two years in prison.[37] On this view, bribery *corrupts* public officials, i.e. is intended to influence their decision-making; whereas unlawful gratuities do not corrupt public officials. The differences in culpability between those giving bribes and those giving unlawful gratuities on this view accord with the widely differing statutory penalties.

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[35] Klein, *supra* note 27, at 119 ("A lobbyist commits a traditional 'backward-looking gratuity' violation when giving a gift to a U.S. senator to reward (or thank) the senator for previously voting to pass a particular bill. A lobbyist commits a traditional forward-looking gratuity when giving a gift to a U.S. senator to reward (or thank) the senator for a vote the senator already has committed to make, but has not yet made. In both scenarios, the senator would have taken the particular official action notwithstanding the gift."). *See also United States v. Jennings*, 160 F.3d 1006, 1015 n.3 (4th Cir. 1998).

[36] *See, e.g.*, *United States v. Agostino*, 132 F.2d 1183, 1195 (7th Cir. 1997); *United States v. Patel*, 32 F.3d 340 (8th Cir. 1994); *United States v. Strand*, 574 F.2d 993 (9th Cir. 1978).

[37] § 201(b), *supra* note 18; § 201(c), *supra* note 19. *See also* Klein, *supra* note 27, at 119 ("Because the violator of the gratuity statute actually does not intend to corrupt the public official, the gratuity statute carries a much lighter penalty of up to two – as opposed to fifteen under the bribery statute – years in prison…").

But the first view has a serious drawback: it allows for a category of payments between bribes and unlawful gratuities that are arguably corrupt but cannot be charged under either rubric. On this first view – under which bribes are intended to influence official conduct and unlawful gratuities are not – there could be certain gratuities given that *are* intended to influence official conduct, but yet do not reach the threshold of a *quid pro quo* required for a bribery conviction. Indeed, the difficulty of proving a *quid pro quo* – which may not reflect a lack of culpability – can easily defeat any prosecution whatsoever.[38]

Thus, the other main view allows more to fall under the unlawful gratuity category.[39] In particular, as the D.C. Circuit held in *Sun-Diamond*, a gift to influence specific official conduct may be an unlawful gratuity if the donor's intent does not meet the requisite intent for a bribery conviction.[40] In other words, the forward-looking payment intended to influence specific official conduct can be charged as an unlawful gratuity instead of bribery if the *quid pro quo* required for a bribery conviction just can't be proven. On this view, unlawful gratuity is a lesser-included offense of bribery;[41] it is just a bribe without the requisite intent – corruptly – or the *quid pro quo*. This view, instead of providing a bright-line test

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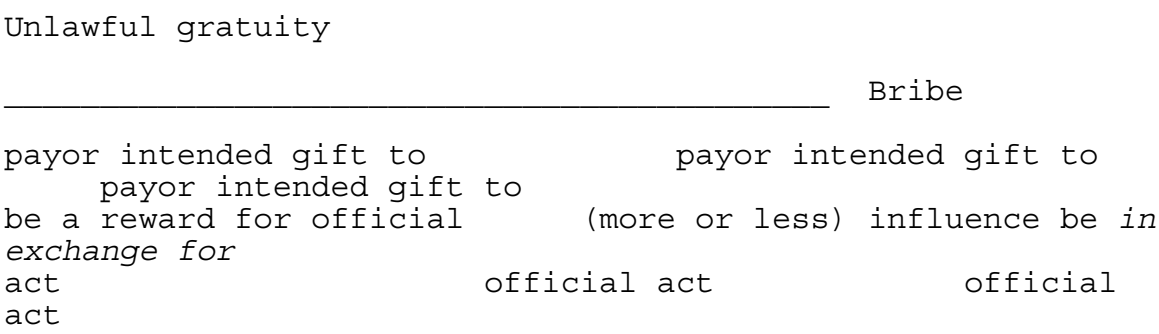
[38] *See* Lowenstein, *supra* note 5, at 786-87 (calling the bribery laws' requirement of a *quid pro quo* "a requirement that is evaded easily, and is difficult to prove when it has not been evaded.").

[39] Henning, *supra* note 8, at 831 ("Section 201(c) [criminalizing gratuities] reaches a broader form of public corruption by prohibiting the offer and receipt of an item related to the performance of a public duty even though the official act is not conditioned on the payment.").

[40] *United States v. Sun-Diamond Growers of California*, 138 F.3d 961, 966, (D.C. Cir. 1998); *see also* Klein, *supra* note 27, at 116-17.

[41] *See United States v. Patel*, 32 F.3d 340, 343 (8th Cir. 1994).

to distinguish between unlawful gratuities and bribes, provides a sliding-scale test to distinguish the two:



This view allows prosecution for any payment intended to influence any official act, all of which are arguably corrupt acts. If the payment is clearly part of a *quid pro quo*, it can be charged as bribery. If the payment is merely offered as reward for an act the official had already decided to take, it can be charged as an unlawful gratuity. And if the payment is offered to influence the official act in some way, but not clearly as part of an explicit *quid pro quo*, it can still be charged as an unlawful gratuity.

This view seems to accord better with our intuitive notion of what makes an act corrupt. It is not the *quid pro quo* nature of the payment that makes it corrupt, but an intent to influence official conduct that makes the payment corrupt.[42]

The corresponding question to ask at the comparative level is this: does the UK separate out forward-looking payments designed to influence an official

[42] *See, e.g.*, *United States v. L'Hoste*, 609 F.2d 796, 807 (5th Cir. 1980), *cert. denied*, 449 U.S. 833 (1980) ("The inquiry under the Louisiana [bribery] statute… is whether the gift is made, not as a *quid pro quo* for specific action, but with the intent to influence the conduct of the public servant, in relation to his position, employment, or duty.").

act from those made “for or because of” an official act *that the official has already committed to perform* (such that the payment is *not* designed to influence an official act but to “reward” the act only)?

B. Unlawful gratuities versus lawful acts

The second question to ask is how to differentiate between unlawful gratuities and lawful acts. The current answer to this question is the holding in *Sun-Diamond* that unlawful gratuities must be linked to some specific official act. To prevent confusion, it is important to note at the outset that this has implications for the previous question – namely, if this holding is correct, that unlawful gratuities must be linked to some specific official act, then unlawful gratuities begin to look a lot like bribes. In other words, if the *Sun-Diamond* holding is correct, then the distinction between bribes and unlawful gratuities drawn by the first view above – one based on intent to influence – seems tenuous and the category of unlawful gratuities will capture few, if any, acts that aren’t out-and-out bribes.

But here, the more important open question is whether the holding of *Sun-Diamond* should be maintained. In other words, should the unlawful gratuities statute be limited to those payments made in connection with some *particular* future decision of a public official, such that payments made only in connection with the official’s position generally would be lawful acts? Indeed, it seems that

outside the realm of traditional *quid pro quo* bribery, it will be much more difficult to distinguish between proper and improper acts to influence public officials.[43]

We know the current law on this issue: the Supreme Court in *Sun-Diamond* said the language of the gratuities statute requiring that the payment be "for or because of" an official's official act required a link to be proven between the payment and some specific, particular official act or acts. The Court rejected the government's position that a payment made solely on behalf of an official's position, by a party who would be likely to have some business before that official, should be regarded as "for or because of" some official act.

The view that *Sun-Diamond* was rightly decided has much to recommend it. First, the statutory language of the unlawful gratuities statute does seem to support this interpretation. Moreover, the Court in *Sun-Diamond* wanted to avoid overcriminalizing gifts. The Court worried that, if any gift given to an official solely because of the official's position could be deemed illegal, then minor gifts like a championship jersey to a president or a lunch for a speaker at a conference could be criminalized.[44] Only by requiring a link to a specific official act could the law properly distinguish between innocent gifts given to officials because of their position and improper efforts to buy influence. Prosecutorial discretion could not be relied upon as the sole protection for innocent conduct. Further, a criminal prohibition on gifts could curtail unnecessarily some beneficial

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[43] *See, e.g.*, George D. Brown, *Putting Watergate Behind Us – Salinas, Sun-Diamond, and Two Views of the Anticorruption Model*, 74 Tul. L. Rev. 747, 770 (2000) ("Once one leaves the domain of bribery, one encounters the fundamental nature of a pluralistic system in which it is taken as a given that a large variety of interests will attempt to secure influence of means.").

[44] *Sun-Diamond*, *supra* note 2, at 406-07.

forms of interaction between government officials and those interested in the policies administered because of fear of prosecution.[45]

The problem, noted by the Judicial Committee in considering a reform of the law, is that

> under current law, a private citizen may keep a public official on retainer by making substantial periodic payments to the official so long as there is an understanding that the money is not intended to influence any specific act, but is instead intended to build a reservoir of goodwill in the event that matters arise that would benefit the private interest.[46]

The unlawful gratuities statute, then, after *Sun-Diamond*, cannot be used to criminalize paying for access to public officials. By requiring the government to prove a link between the payment and a specific official act of the public official, the Court basically eliminated any criminal prohibition on forward-looking gratuities. If the government can prove the link to an official act, it can probably prove bribery. Some people believe there should be a crime separate from bribery, in which the government not only need not prove the *quid pro quo* required for bribery, but need not prove a link between the payment and a specific official action. Rather, the government need only prove that the payment

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[45] Henning, *supra* note 8, at 839 (noting that there are "legitimate forms of lobbying or personal reciprocity that involve providing gifts or other benefits to government officials", and that some interaction between government officials and those subject to their authority are beneficial by "providing an avenue for information to flow from the constituencies affected by government decisions.").

[46] Public Prosecutions Improvement Act, Senate Judicial Committee Report 110-239, 6 n.5 (December 10, 2007). *See also* Henning, *supra* note 8, at 836 (*Sun-Diamond* "ignores the corrupting effect of any transmission of a benefit to a public official motivated primarily by the authority conferred on that official.").

is "for or because of" the official's official position.[47] This was the government's position in *Sun-Diamond* and bills have been introduced in Congress overturning *Sun-Diamond* and providing for this category of crime.

The open question here, again, is the desirability of *Sun-Diamond's* holding that for a gratuity to be unlawful it must be linked to a specific, official act. The corresponding comparative question to ask is how UK law treats payments not linked to any specific official act, but only motivated by the public official's position generally: are they criminal acts or lawful acts?

§ 201's prohibition on bribery and unlawful gratuities, then, is limited. First, it only applies to federal officials.[48] Second, the Court in *Sun-Diamond* limited bribery prosecutions to those in which the government can prove a *quid pro quo*. Third, the Court in *Sun-Diamond* limited unlawful gratuity prosecutions to those in which the government can prove a link between the payment and a specific official act. Because of both (1) the difficulty of proving corruption

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[47] *See* Public Prosecutions Improvement Act of 2007, S. 1946 ("The bill reverses the Supreme Court's holding in *United States v. Sun-Diamond*… which severely restricted the application of the illegal gratuities statute… the Supreme Court in *Sun-Diamond* imposed a new element to the federal gratuities statute, requiring the government to prove a 'link' between the gratuity and an official act… In practice, the nexus requirement means that a spectrum of cases that fall short of a bribe but plainly involve corrupt conduct may not now be charged as gratuities absent a demonstrable link between the payment and specific official action. Yet Congress plainly intended the gratuities statute to capture a far broader range of conduct than the bribery statute, because gratuities is a two-year offense while the statutory maximum penalty for bribery is fifteen years."); *see also* Public Corruption Prosecution Improvements Act of 2009, S. 49 (introduced January 6, 2009), available at http://thomas.loc.gov (similar formulation). This was also the position of the Department of Justice for years prior to *Sun-Diamond*. *See* Richard A. Hibey, *Remarks: The Impact of the Abramoff Scandal on Public Corruption Cases*, 52 Wayne L. Rev. 1363, 1365 (2006).

[48] 18 U.S.C. 666 criminalizes bribery of state and local officials who administer programs that receive more than $10,000 in federal funding.

because of its inherent secrecy and the creativity of its perpetrators, and (2) these doctrinal limits, prosecutions for corruption have migrated more and more toward other doctrines that are less obviously about corruption – mainly extortion and fraud.

II. Bribery versus extortion

Many public corruption prosecutions have been brought under the Hobbs Act, 18 U.S.C. § 1951, which criminalizes different kinds of extortion, one of which is referred to as "extortion under color of official right." The statute, after criminalizing extortion, says:

> The term 'extortion' 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.[49]

There are two large open questions in this area: first, and most important, what is the nature of extortion under color of official right? Can it be used to prosecute bribery, or is it a different kind of offense all together, requiring an affirmative act of inducement by a public official, or false pretenses?

The Supreme Court resolved this first question in *Evans v. United States*.[50] Evans, a county commissioner, was prosecuted for acts that appeared to be bribery – taking money for voting for a rezoning that benefited those who gave him the money.[51] The Court held that no affirmative inducement and no false pretenses are required for the offense of extortion under color of official

[49] 18 U.S.C. § 1951(b)(2).
[50] *Evans v. United States*, 504 U.S. 255 (1992) [hereinafter *Evans*].
[51] *Id.*, at 257.

right. Instead, the Court held, this statute could be used to prosecute run-of-the-mill bribery, basically: "We hold today that the Government need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts."[52] Given the doctrinal limits on the bribery and unlawful gratuities statutes,[53] the Hobbs Act's availability to prosecute bribery under the framework of extortion under color of official right is quite handy for federal prosecutors.

But if the activity charged is bribery, why is it that only the public official is charged, and the briber is regarded as a "victim"? Justice Thomas in *Evans* and Justice Scalia in a preceding case, *McCormick* – discussed more below – tapped into this intuition in dissent and concurrence, respectively.[54] Thus, there are two main views on the relationship between bribery and extortion. The first view, what I'll call the dominant view, because of its victory in *Evans*, is that the Hobbs Act's prohibition on extortion under color of official right can be read broadly to include traditional bribery. The second view, what I'll call the minority view, is that bribery and extortion are wholly different and the Hobbs Act should not be available to prosecute bribery.

Those who take the minority view – that bribery and extortion are different, and extortion under color of official right is not a proper framework for prosecuting bribery – say that bribery and extortion were distinct crimes at common law and should remain so today. (The majority disputes that the two

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[52] *Id.*, at 268.
[53] *See supra*, page 19.
[54] *See supra* note 4.

crimes were different at common law.[55]) They point to three characteristics of extortion that distinguish it from bribery.

First, extortion requires some element of coercion, whereas bribery does not. This seems to reflect the framework of extortion which regards one party as criminal and the other as victim.[56] Those holding the majority view respond that in the 1970's, American courts began to accept that when a public official accepts a bribe, the public official's official status and power provides any coercion necessary for extortion.[57]

Second, say those with the minority view, extortion requires a showing of affirmative inducement by the public official. Again, this seems to reflect the framework of extortion which regards the official as criminal and the payor as victim. Indeed, there seems to be a moral distinction between those officials who passively accept bribes and those who affirmatively induce citizens to pay them improperly.[58] Those in the majority again respond that the public official's position, as with coercion, provides all the inducement necessary to satisfy any

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[55] *See* Henning, *supra* note 8, at 847; *see also* James Lindgren, *The Elusive Distinction Between Bribery and Extortion: From the Common Law to the Hobbs Act*, 35 UCLA L. Rev. 815, 834 (1988).

[56] *See generally* Charles F.C. Ruff, *Federal Prosecution of Local Corruption: A Case Study in the Making of Law Enforcement Policy*, 65 Geo. L.J. 1171, 1173-1201 (1977); Joseph M. Harary, Note, *Misapplication of the Hobbs Act to Bribery*, 85 Colum. L. Rev. 1340 (1985). *See also* Henning, *supra* note 8, at 847 (calling the situation in which a person giving a bribe to a federal official can be charged with violating 201, but person making same payment to state official would be "victim" of extortion under Hobbs Act "anomalous").

[57] Steven C. Yarborough, *The Hobbs Act in the Nineties: Confusion or Clarification of the Quid Pro Quo Standard in Extortion Cases Involving Public Officials,* 31 Tulsa L.J. 781, 786-87 (1996).

[58] *See, e.g.*, Whitaker, *supra* note 15, at 1623 ("Public officials who passively accept unauthorized gratuities do not belong in the same class as those who affirmatively put their office up for sale.").

inducement requirement that might be inherent in the crime of extortion.[59] Lindgren calls it the "situational inducement approach", saying that so long as the official gets the payment "knowing that it's paid on account of his office… official extortion has been committed."[60] One commentator says affirmative inducement is not required because it would both over- and under-criminalize.[61]

Third, extortion under color of official right, in the minority view, requires a showing of false pretenses – i.e., that the official pretended that, because of her position, she was entitled to the payment. Color-of-official-right extortion, under the minority view, would be limited to instances where an official, such as a police officer, performed a service, then charged the beneficiary of the service as though "official right" entitled her to receive that payment. This interpretation seems to accord best with the language "under color of official right", but the majority view rejects it. Lindgren says that bribery and extortion are not such different crimes; in fact, they overlap at their core. Bribery is thought to be paying for better-than-fair treatment, whereas extortion is paying only to buy fair treatment.[62] But this distinction collapses on further analysis, insofar as in many situations, it will be unclear what exactly fair treatment is. In a contract-bidding

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[59] *See, e.g.*, Lindgren, *supra* note 3, at 1716. *See also United States v. Butler*, 618 F.2d 411, 418 (6th Cir. 1980), *cert. denied*, 447 U.S. 927 (1980) ("[A] showing that the motivation for the payment focuses on the recipient's office, regardless of who induces the payments, is sufficient to convict under the Hobbs Act."); *United States v. Braasch*, 505 F.2d 139, 151 (7th Cir. 1974), *cert. denied*, 421 U.S. 910 (1975) (same); Christine Dibble, Note, *Reevaluating the Application of the Hobbs Act to Public Officials*, 3 J.L. Pol. 387, 395 (1986); James P. Fleissner, Comment, *Prosecuting Public Officials Under the Hobbs Act: Inducement as an Element of Extortion Under Color of Official Right*, 52 U. Chi. L. Rev. 1066, 1073-74 (1985).

[60] Lindgren, *supra* note 3, at 1716.

[61] Whitaker, *supra* note 15, at 1633, n.97.

[62] Lindgren, *supra* note 3, at 1699.

situation, for example, a bidder can either pay for better than fair treatment (i.e. to get the contract) – which would be bribery – but if she doesn't pay, she will get worse than fair treatment (definitely not getting the contract) – which would make her the victim of extortion.[63] Thus, bribery and extortion run together more than those with the minority view acknowledge.

Thus, the first open question in this area is: should there be separate crimes for bribery, on the one hand, and extortion under color of official right, carried out by false pretenses and affirmative inducement, on the other? Does the UK have such separate crimes?

The second open question in this area depends on the holding of *Evans* that in fact, a *quid pro quo* of some kind is required for conviction of extortion under color of official right.[64] The question is what that standard should be. In *McCormick v. United States* the Supreme Court said that payments can constitute extortion under color of official right "only if the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act."[65] But this "explicit promise or undertaking" standard laid out in *McCormick* was not used in *Evans*: instead, there, the Court only required a "knowing acceptance" of payment; the official only needed to have obtained a payment knowing it was made "in return for official acts."[66] Which standard is better?

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[63] Lindgren, *supra* note 3, at 1700.
[64] *Evans*, *supra* note at 268.
[65] *McCormick v. United States*, 500 U.S. 257, 273 (1991) [hereinafter *McCormick*].
[66] *Evans*, *supra* note 50 at 268.

The majority in *McCormick* justified its strict "explicit" requirement by arguing that anything less would criminalize ordinary campaign contributions, which are legitimately intended to further the interests of their givers.[67] Scholars disagree on what the Court meant by "explicit".[68]

Like in the bribery context about what kind of *quid pro quo* – if any – should be required for conviction, arguments opposing the "explicit promise" standard of *McCormick* make reference to the difficulty of proving overt agreements. Justice Kennedy concurring in *Evans* said that if the law requires that the perpetrators state their *quid pro quo* "in express terms", it "could be frustrated by knowing winks and nods".[69] The dissent in *McCormick* pointed out that lots of extortion happens without "explicit promises", pointing out that no one "needs to make an explicit threat or an explicit promise to get [their] message across."[70]

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[67] *McCormick*, *supra* note 65, at 272.
[68] *See* Thomas Regan McCartney, Note, *McCormick v. United States: The Supreme Court Endorses Implicit Extortion by Elected Government Officials*, 37 St. Louis U. L.J. 181, 200-03 (1992); Lindgren, *supra* note 3, at 1711; Michael W. Carey et al., *Federal Prosecution of State and Local Public Officials: The Obstacles to Punishing Breaches of the Public Trust and a Proposal for Reform, Part One*, 94 W. Va. L. Rev. 301, 341 (1992); Eric David Weissman, Note, *McCormick v. United States: Quid Pro Quo Requirement in Hobbs Act Extortion Under Color of Official Right*, 42 Cath. U. L. Rev. 433, 461-62 (1993).
[69] *Evans*, *supra* note 65, at 1852 (Kennedy, J., concurring).
[70] *McCormick*, *supra* note 65, at 282 (Stevens, J., dissenting) ("Subtle extortion is just as [harmful] – and probably much more common – than the kind of express understanding that the Court's opinion seems to require."). *See also* Lindgren, *supra* note 3, at 1733; Yarbrough, *supra* note 57, at 782-83 (saying politicians "are rarely foolish enough to expressly articulate such agreements", instead making them "under cloaks of innuendo and ambiguity.").

Thus, the open questions are the following: are bribery and extortion different? If a *quid pro quo* is required for extortion, what does that mean? Does the UK have statutes on bribery and extortion and what do they look like?

III. Fraudulent deprivation of public's right to honest services

Given the holdings of *Sun-Diamond* and the *McCormick* - *Evans* pair, it seems that no prosecution can be brought for public corruption without proving a *quid pro quo*, or at least a connection between a payment and an official act. However, there is one catch-all doctrine that allows prosecution for public corruption that requires no *quid pro quo* and no pesky "links" between payments and official acts: the doctrine of the fraudulent deprivation of the public's intangible right to honest services, or intangible rights fraud.

18 U.S.C. § 1341 and § 1343 criminalize mail and wire fraud. Fraud is a form of larceny, a common law crime that requires proof that the defendant took someone else's property with intent to steal it, and proof that the defendant used deceit to cause the victim to part with the property voluntarily. Like any larceny, ordinary fraud involves a gain to the defendant and a loss to the victim. § 1341 provides in relevant part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses… for the purpose of executing such scheme or artifice… places in any post office… any matter… to be sent… shall be fined under this title or imprisoned not more than 20 years, or both.[71]

[71] 18 U.S.C. § 1341.

At first blush, this framework does not seem to apply at all to acts of public corruption. However, in 1973, in *United States v. States*, a federal court of appeals upheld a new theory of fraud liability, essentially creating a new common law crime based on a violation of the public's intangible right to the honest services of public officials.[72] The theory was essentially that every public official, by virtue of her position, owes the public a fiduciary duty to provide honest services. Note that this duty is not statutorily based, but simply noted in case law, and seems broadly sensible.[73] When a public official commits a corrupt act – be it bribery, unlawful gratuity, misappropriation, embezzlement, nepotism, etc. – the official violates this duty. The deceitful element necessary for fraud comes when the official – invariably, for obvious reasons – fails to disclose this violation to the public. In this way, so the doctrine goes, the official fraudulently deprives the public of their intangible right to honest services.[74]

In the 1987 case of *McNally v. United States*, the Supreme Court rejected this theory of fraud liability based on deprivation of an intangible right to have

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[72] *United States v. States*, 488 F.2d 761, 766 (8th Cir. 1973).

[73] *See United States v. Mandel*, 591 F.2d 1347, 1363 ("The court [in an earlier case] analogized to the private sector in finding a 'public official-public body' relationship, establishing a general duty to disclose material facts to the public, and holding that '[a government official's] duty to disclose need not be based upon the existence of some statute prescribing such a duty.'"); Geraldine Szott Moohr, *Mail Fraud Meets Criminal Theory*, 67 U. Cin. L. Rev. 1, n. 38-39 (1998) ("Despite the absence of any statutory law defining [relationships between officials and the public], courts held that elected and appointed public officials owe fiduciary duties to the state and its citizens.").

[74] *See* Alex Hortis, Note, *Valuing Honest Services: The Common Law Evolution of Section 1346*, 74 N.Y.U. L. Rev. 1099, 1116 (1999) ("undisclosed, biased decision making for personal gain, whether or not tangible loss to the public is shown, constitutes a deprivation of honest services.").

public officials perform their duties honestly.[75] The Court held that the mail fraud statute is limited to deprivations of "money or property";[76] Congress responded immediately by amending the mail and wire fraud statutes to specifically include deprivations of the intangible right to honest services of public officials:

> For the purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services.[77]

Prosecutions under this theory of liability generally involve serious corruption, such as bribery, kickbacks, embezzlement of public funds, and the like. While the scope of the statute is very wide, it does not encompass every instance of official misconduct that results in the official's personal gain.[78] The government has to show not only that the public official engaged in wrongdoing, but that the specific wrongdoing was intended to prevent the impartial performance of her official duties.[79]

While the principles enunciated above constrain the use of the statute somewhat, the obvious difficulty with the statute is its vagueness and potentially very wide application. Indeed, the vagueness of an "intangible right of honest services" has generated criticism that it gives prosecutors too much discretion, gives too little direction to judges, fails to give proper notice of what is criminal behavior, and results in inconsistent application.[80]

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[75] *McNally v. United States*, 483 U.S. 350 (1987) [hereinafter *McNally*].
[76] *Id.* at 359-60.
[77] 18 U.S.C. § 1346.
[78] *United States v. Sawyer*, 85 F.3d 713, 725 (1st Cir. 1996).
[79] *Id.*.
[80] *See, e.g.*, Gregory Howard Williams, *Good Government by Prosecutorial Decree: The Use and Abuse of Mail Fraud,* 32 Ariz. L. Rev. 137, 170 (1990); Geraldine Szott Moohr,

Indeed, it is this very vagueness that gives the statute its strength as a useful tool for prosecutors to prosecute acts of corruption that do not meet the strict requirements of *quid pro quo* and links to specific official acts necessary for charging acts of corruption under other statutes.[81] Some view this flexibility as a strength of the statute; indeed, Chief Justice Burger viewed its use as a legitimate "stopgap device to deal on a temporary basis with a new phenomenon [of crime], until particularized legislation can be developed and passed to deal directly with the evil."[82] The fact that the government need not prove a *quid pro quo* or even that a payment was "for or because of" an official act allows the government to go after actions that fit our intuitive notion of what is "corrupt":

Mail Fraud and the Intangible Rights Doctrine: Someone to Watch Over Us, 31 Harv. J. on Legis. 153, 196 (1994) (Section 1346 "is facially vague because it fails to provide standards to guide police and prosecutors in the exercise of their discretion."); Moohr, *supra* note 73, at 2; John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 Va. L. Rev. 189 (1983); Dan M. Kahan, *Three Conceptions of Federal Criminal-Lawmaking*, 1 Buff. Crim. L. Rev. 5, 12 (1997) (calling § 1346 an "empty standard that depends on judge-made implementing doctrines"); Ellen S. Podgor, *Mail Fraud: Redefining the Boundaries*, 10 St. Thomas L. Rev. 557, 562 (1998); Daniel C. Cleveland, Note, *Once Again, It Is Time to "Speak More Clearly" About § 1346 and the Intangible Rights of Honest Services Doctrine in Mail and Wire Fraud*, 34 N. Ky. L. Rev. 117, 117 (2007) (noting lack of uniformity in application of § 1346); Edward J. Loya, Jr., *Upholding "Honest Services" While Abandoning Interpretive Principles: United States v. Rybicki*, 10 Stan. J.L. Bus. & Fin. 138 (2004) (same – "Circuits are split over what *mens rea* must be proved, whether the defendant must have caused tangible harm, what duty must have been breached and the source of such duty."); *see also* Carrie A. Tendler, Note, *An Indictment of Bright Line Tests for Honest Services Mail Fraud*, 72 Fordham L. Rev. 2729, 2733-34 (2004).

[81] Peter J. Henning, *Maybe It Should Just Be Called Federal Fraud: The Changing Nature of the Mail Fraud* Statute, 36 B.C. L. Rev. 435, 464-65 (1995) ("The appeal of the mail fraud statute is that the prosecution must only prove a scheme to defraud that involves some degree of dishonesty and a use of the mails related to the scheme, but not specific intent to receive or demand an item of value…The right of honest services does not require specific proof of the relationship of the acts to the defendant's duties, i.e. a quid pro quo, but only that the activity was dishonest.").

[82] *United States v. Maze*, 414 U.S. 395, 405-06 (1974) (Burger, C.J., dissenting).

> In most of these [honest services fraud] cases, the officials have secretly made governmental decisions with the objective of benefiting themselves or promoting their own interests, instead of fulfilling their legal commitment to provide the citizens of the State or local government with their loyal service and honest government.[83]

One commentator supports the statute's flexibility by arguing, *inter alia*, that standards rather than bright-line rules are better for reducing corruption, noting that corruption itself is a crime that involves "standards of government conduct."[84] Another commentator argues that the doctrine is coherent and theoretically sound, according to general principles of criminal law requiring an act, intent, and harm.[85]

Thus, the open question is whether § 1346's criminalization of a public official's deprivation of the public's right to honest services is too vague. The comparative question is whether the UK has similar catch-all, omnibus provisions that capture acts of corruption that may not be provable otherwise under stricter *quid pro quo* requirements of bribery statutes.

Part Two. The Legal Regime Criminalizing Public Corruption in the United Kingdom

The British legal regime criminalizing public corruption, like the American one, has suffered from incoherence, piecemeal development, and a lack of an

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[83] *McNally*, *supra* note 75, at 362-63 (Stevens, J., dissenting).
[84] Hortis, *supra* note 74, at 1112. Hortis also argues that standards are better in this area because of their value for spreading information, and because they are cheaper and more efficient for the legal system than requiring the legislature to continuously redraft statutes to meet new forms of corruption. *Id.* at 1113-14.
[85] Moohr, *supra* note 73.

overall structure.[86] There are three main statutes dating from 1889 to 1916 that criminalize corruption. They accompany a common law bribery offense and a number of other statutory crimes that tangentially criminalize public corruption.[87] Some have suggested passing a general offense of corruption,[88] but the most comprehensive suggestions have come from the British Law Commission in 1998 and 2008.

In this section I will review the current law of the UK, which contains much that is relevant for distinguishing bribery, unlawful gratuities, and lawful gratuities, as considered above in the American context. Then I consider the suggestions for reform provided by the British Law Commission in 1998 and 2008, mainly insofar as they are relevant for and similar to the American doctrine of fraudulent deprivation of the public's intangible right to an official's "honest services".

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[86] John C. Smith, *Corruption: A Law Commission Consultation Paper*, Arch. News 1997, 4, 4-5 (1997) ("No one is likely to disagree with the conclusion that the law is in an unsatisfactory state. It has grown in a haphazard way, courts and Parliament dealing piecemeal with particular problems as they arise.") [hereinafter Smith]. *See also* Peter Alldridge, *Reforming the Criminal Law of Corruption*, 11 Crim. L.F. 287, 287 (2000) (saying this area of law is "riddled by logical inconsistency and historical hangovers") [hereinafter Alldridge]; Reforming Bribery, The Law Commission, Law Com No 313, HC 928, *Laid before Parliament by the Lord Chancellor and Secretary of State for Justice pursuant to section 3(2) of the Law Commissions Act 1965*, 19 November 2008, 10 ("The motley of common law and statutory offenses, each with their own scope, has left the law in need of rationalization and simplification.") [hereinafter Reforming].

[87] *See* Smith, *id*, at 4-5 ("Corruption offences are found in at least 11 statutes including the Public Bodies Corrupt Practices Act 1889 and the Prevention of Corruption Acts 1906 and 1916. There are also various overlapping and ill-defined common law offences.").

[88] G. Scanlan, *The Control of Corruption*, 11(4) Journal of Financial Crime 316, 317 (2004) (Parliament should "draft a general offence of corruption").

I. The current law in the UK

A. The 1889 Act and the 1906 Act: Bribery versus unlawful gratuities

The common law offense of bribery is the receiving or offering or any "undue reward" by a public official "in order to influence his behavior in office, and incline him to act contrary to the known rules of honesty and integrity".[89] Key to this definition is the intent *to influence* the behavior of the public official; case law provides that it is sufficient that the defendant had intended to produce any effect at all on the official's decision.[90]

The 1889 Public Bodies Corrupt Practices Act criminalizes bribery and unlawful gratuities – in American law terms – *together*. For the receiver of a payment, it provides:

> Every person who shall… corruptly solicit or receive, or agree to receive … any gift, loan, fee, reward, or advantage whatever *as an inducement to, or reward for* … doing or forbearing to do anything… in which [a]… public body is concerned shall be guilty of an offense.[91]

There is an equivalent, mirror image provision for the giver of a payment. "Corruptly" is not defined in the statute. As evident from the language italicized above, the statute criminalizes bribery and unlawful gratuities together, unlike in 18 U.S.C. § 201, which separately criminalizes those two acts and provides for vastly different penalties for the separate crimes.

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[89] *Russell on Crime*, J.W. Cecil Turner. London, Stevens, 381 (12th ed 1964); *see also Halsbury's Laws of England*, Lord MacKay of Clashfern. London, Lexis-Nexis, v. 11, 509-510 (5th ed., 2008).
[90] *Gurney* (1867) 10 Cox CC 550.
[91] Public Bodies Corrupt Practices Act 1889, 52 and 53 Vict. C.69, 30th August 1889, Sweet and Maxwell (emphasis added) [hereinafter 1889 Act].

The Prevention of Corruption Act 1906 extended the law of corruption to the private sector, but more importantly (for this paper), introduced an agent-centered definition of corruption, providing:

> If any agent corruptly accepts or obtains, or agrees to accept… any gift or consideration as an inducement or reward for doing or forbearing to do… any act in relation to his principal's affairs or business… he shall be guilty [of an offense].[92]

Again, there is a mirror image offense for the giver of a payment. Also, again acts of what would be separately bribery and unlawful gratuities in the United States are lumped together in one offense, as in the 1889 Act. "Corruptly" is again not defined.

The Law Commission proposed a definition for "corrupt" in its 1998 report:

> An advantage is a corrupt inducement if it is intended to influence an agent in the performance of his or her functions as an agent.[93]

In the American system, this "intent to influence" is what differentiates a bribe from an unlawful gratuity.[94] However, in the British system, where a bribe and unlawful gratuity are run together, this "intent to influence" is still relevant. But instead of using it to distinguish a bribe from an unlawful gratuity, the British use it to distinguish a lawful gratuity from an unlawful gratuity / bribe. Indeed, the Law Commission recognized that inducements – "bribes" – are somehow more culpable than rewards – "unlawful gratuities" – but concluded that the "crucial

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[92] Prevention of Corruption Act 1906, 6 Edw. 7 C.34, 4th August 1906, Sweet and Maxwell [hereinafter 1906 Act].
[93] Legislating the Criminal Code: Corruption, The Law Commission, ¶ 5.102 (1998) [hereinafter Legislating], available at http://www.lawcom.gov.uk/docs/lc248(1).pdf.
[94] *See supra* note 25 and accompanying text.

distinction" is not that between rewards and inducements, but between actions which do and do not tend to influence official conduct.[95]

B. The 1916 Act's presumption: bribery (and unlawful gratuities) versus lawful gratuities

The Prevention of Corruption Act 1916, among other things, introduced a presumption of corruption. The presumption operates to distinguish between unlawful conduct on the one hand and lawful conduct on the other hand. This requires a slightly different conception than in the American system, where we distinguished between bribery and unlawful gratuities, and then separately distinguished between unlawful gratuities and lawful gratuities. Here, since in the 1889 and 1906 Acts the British have run together the idea of bribery and unlawful gratuities, we are only concerned with differentiating between bribery and unlawful gratuities on the one hand and lawful gratuities on the other hand. The relevant language of the 1916 Act laying out the presumption of corruption provides:

> Where in any proceedings against a person for an offense under the [1906 Act] or the [1889 Act], it is proved that any money, gift or other consideration has been paid or given to or received by a person [employed by a public body]… from a person… holding or seeking to obtain a contract from [the public body]… the money, gift, or consideration *shall be deemed to have been paid or given or*

[95] Legislating, *supra* note 93, at ¶ 5.101 (acknowledging strength of idea that inducements are more self-evidently corruptive than rewards, but pointing to artificiality of permitting the gift to official of a bottle of whisky at Christmas in recognition of official's past assistance, but to prohibit such a gift if made in the hope of a mutually profitable relationship in the following year). *See also* G.R. Sullivan, *Reformulating the Corruption Laws – the Law Commission Proposals*, Crim. L.R. 1997, OCT, 730, 733 (1997).

> *received corruptly as such inducement or reward* as is mentioned in such Act unless the contrary is proved.[96]

The rationale for such a presumption was apparently something that has also long concerned American lawyers: corruption is more difficult to prove than other offenses because of its inherent secrecy and lack of an obvious victim.[97] Other typical criminal offenses where the offender enriches herself, such as ordinary larceny or robbery, involve a specific victim who finds that she has lost something, and reports it. But corruption, in many of its forms, has no obvious victim in the sense of someone who has lost something. Because of this, it tends to be a uniquely "secret" crime – not only because it is attempted and carried out covertly, like any theft, but because there isn't a clear victim who is able to uncover and report the crime.

To fix this problem, the 1916 Act provides essentially that if an official receives a payment from someone who has an issue – specifically a contract bid – before that official,[98] then that payment is presumed corrupt absent some affirmative showing that it is not corrupt. In other words, for the presumption to come into effect, the prosecution need only show (1) something of value was

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[96] Prevention of Corruption Act 1916, 6 and 7 Geo. 5 C. 64, 22nd December 1916, Sweet and Maxwell (emphasis added) [hereinafter 1916 Act].

[97] Legislating, *supra* note 93, at ¶ 4.1 ("Corruption is a difficult crime to prove: it tends by its very nature to be carried out in secret, and its 'victims' may never be aware of it."). The Salmon Commission, a prestigious legal body, concluded that without the presumption of corruption, corruption would be very difficult to prove. *See also* Legislating, at ¶ 4.12 (describing the immediate source of the legislation as a judge's criticism after presiding over two cases of corruption in which he considered it impossible to prosecute a civil servant who possessed banknotes traced to a contractor with whom the civil servant had had official dealings, because the prosecution was unable to prove *why* the money was paid).

[98] In the text of the statute, the issue before the official is limited to a contract bidding process. However, this detail need not overly concern us for this paper.

given to a public official, and (2) the person providing it was holding or seeking to obtain a contract from the public official's department.[99]

Interestingly, this was almost exactly the position that the prosecution argued for in the American case of *Sun-Diamond*. There, as noted above,[100] the government took the position that a payment made solely on behalf of an official's position, by a party who would be likely to have some business before that official, should be regarded as "for or because of" some official act. It is easy to see why the government argued this position: if they have to prove a specific link between the payment and an official act, they will be much less likely to have a case, given the inherent secrecy of corruption described above.[101]

Indeed, when the Law Commission considered the value of the presumption in 1998, they recommended an interpretation of the presumption in perfect accordance with the government's position in *Sun-Diamond*. In other words, the Law Commission recommended the exact opposite of *Sun-Diamond's* holding; they recommended that a payment should *not* have to be linked to a specific official act to be regarded as corrupt. To regard a payment as corrupt, the government need only show that the payor's intention was to influence the agent's conduct "at some indeterminate future time, even if neither party can yet foresee the exact circumstances in which the agent's conduct may be influenced."[102]

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[99] *See also* Legislating, *supra* note 93, at ¶ 4.6.
[100] *See supra* note 47 and accompanying text.
[101] *See supra* page 8.
[102] Legislating, *supra* note 93, at ¶ 5.83.

They made it clear that in this way, paying for *access* to officials, as opposed to paying for specific acts, could be criminalized. Wealthy individuals could not, under this interpretation, keep officials "on retainer," as the American legislators sponsoring the public corruption reform bill have feared.[103] The Law Commission rejected the *Sun-Diamond* holding that payments must be linked to specific official acts:

> … we describe the conduct desired of the agent not as the performance of his or her functions as agent *in a particular way* (which might imply, contrary to our intention, that the briber must have in mind the *details* of the desired conduct) but as *doing an act or making an omission* in performing his or her functions as agent.[104]

The Commission went on to say that "the nature of the intended act or omission… need not be known when the … agreement is made."[105] In other words, if a payor pays an official who is in a position to bestow some advantage on the payor, even without any specific official act in mind, the payment is corrupt – the exact opposite position of the holding in *Sun-Diamond*.[106]

It is important to note the areas where the analysis differs between the two jurisdictions. First, on the face of the 1916 Act, the presumption is limited in application to situations where a contract was is involved, whereas in the *Sun-Diamond* scenario, the government was presumably arguing for corruption to be

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[103] *See supra*, note 46 and accompanying text.
[104] Legislating, *supra* note 93, at ¶ 5.84.
[105] *Id*.
[106] *See also* Alldridge, *supra* note 86, at 301 (noting that there for some officials, "such people do wrong simply to acquire property or advantage *at all* in virtue of those positions").

deduced in any situation where the public official is exercising discretion.[107] Second, and more importantly, the argument in the United States could never use the language of a "presumption" of an element of a crime – that would transgress the government's burden to establish all elements of the crime beyond a reasonable doubt. However, the government in *Sun-Diamond* essentially imports the British procedural approach – the presumption – into the substantive definition of the crime of unlawful gratuity. Whereas in the UK "[p]roof of the basic facts is not *in itself* proof that the transaction involved a corrupt inducement or reward",[108] this is exactly the position of the government in *Sun-Diamond* – i.e. under the government's view, proof of the basic facts *is* proof that the transaction was corrupt. Third and finally, the common arguments against the presumption in the UK seem not to apply to the American scenario. Some argue that the enactment of the Criminal Justice and Public Order Act of 1994, which allows inferences to be drawn from a defendant's silence at trial, allows an adequate safeguard to counteract the difficulty of proving corruption.[109] Further, it has been argued that the UK's signing of the European Convention of Human Rights, which guarantees a right to a fair trial, requires abolishing the presumption. Neither of these arguments apply in the United States.

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[107] However, the Redcliffe-Maud Committee (appointed in 1973 to examine standards of conduct in local government in Britain) recommended extending the presumption to include other exercises of discretion. *See* Legislating, *supra* note 93, at ¶ 4.7.
[108] Legislating, *supra* note 93, at ¶ 4.40 (emphasis original).
[109] *Id.* at ¶ 4.68.

II. The UK proposals for reform and the American doctrine of fraudulent deprivation of public's right to honest services

The 1998 Law Commission report proposed a new definition of corruption centered on the tendency of corrupt conduct to encourage a *breach of duty* by agents.[110] The Commission recommended replacing the 1889-1916 statutes and common law of bribery with a modern statute creating four offenses centered on an agent's breach of duty. The agency framework has natural roots in the 1906 Act,[111] and also has roots in the common law.[112] But it is also immediately reminiscent of the American doctrine of intangible rights fraud. The Law Commission laid out the paradigm of a corrupt act as requiring three parties: A, the briber; B, the recipient of the bribe; and C, B's principal. A bribes B to get B to act in A's interest, which in turn probably gets B to act against the interests of C, to whom B owes a duty of loyalty as C's agent.[113] The law of corruption, the Commission said, should criminalize both the fundamental offense of B's breach of duty and A's temptation of B to breach her duty by offering her a bribe.[114]

Indeed, the problem of the limitless application of the nebulous term "breach of duty" has been addressed in a similar manner as in the United States. In the United States, several Courts of Appeals have restricted the definition of

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[110] *Id*. at ¶¶ 5.4-5.5. *See also* Sullivan, *supra* note 95, at 732; John C. Smith, *Corruption: A Law Commission Report*, Arch. News 1998, 3, 3-4.
[111] *See supra*, note 92 and accompanying text.
[112] Where a person holds a position of trustee to perform a public duty, and takes a bribe to act corruptly in discharging that duty, an offense is committed by both the payor and payee. *R v. Whitaker* [1914] 3 KB 1283, 10 Cr. App. R 245. *See also* Scanlan, *supra* note 88, at 317.
[113] Legislating, *supra* note 93, at ¶¶ 5.4-5.5.
[114] *Id.*

duties owed by public officials whose breach can give rise to criminal liability, in at least the following ways:

(1) the breach has to be a violation of state law[115]

(2) the defendant must have gained something[116]

(3) the public must have been harmed[117]

One British commentator suggested limiting the official duty to one "whose ambit is fixed by common law or, more frequently in the modern world, by legislation,"[118] echoing *Brumley's* limits on liability.

The 1998 Law Commission Report was heavily criticized, particularly along three lines. First, trying to figure out whether a public official actually owes a civil law duty is not easy. Second, sometimes the "breach of duty" test for corruption does not capture all the conduct intuitively thought to be corrupt.[119] An agent can act corruptly by doing something that is not contrary to the principal's interests. For example, Justice Thomas's false-pretenses offence in *Evans* – demanding a bribe for doing what the agent's duty to the principal already requires her to do – is corrupt conduct but does not fall within this definition of corruption because the agent doesn't actually breach her duty to the principal.

But the most powerful criticism was that the whole framework was wrong: identifying the harm of corruption as the harm suffered by an agent's principal

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[115] *See United States v. Brumley*, 116 F.3d 728, 734 (5th Cir. 1997) (*en banc*).
[116] *See United States v. Czubinski*, 106 F.3d 1069, 1074-75 (1st Cir. 1997).
[117] *See United States v. Thompson*, 484 F.3d 877, 884 (7th Cir. 2007).
[118] G. Scanlan, *supra* note 88, at 317.
[119] *See*, *e.g.*, Alldridge, *supra* note 86, at 291.

"obscures what is really wrong with it."[120] What's really wrong with it is its negative effects on the market as a whole, with the losers – the victims – being competitors of the briber or the consumer, to whom is passed any extra costs.[121] This "market approach" to corruption – as opposed to the "duty approach" of the 1998 report – depends on locating the harm of corruption in its systemic negative effects.[122]

This approach has much in common with the American doctrine of fraudulent deprivation of the public's intangible right to honest services. Essentially, the market approach finds the harm in corruption in its "interfere[nce] with the right of everybody that [public services like those of police, judges, jurors, etc.] should not be bought and sold."[123] The American doctrine, of course, depends on a similar idea of a "right of everybody" to honest services – i.e., services that aren't bought and sold.

Because of the heavy criticism of the 1998 Report, the Law Commission released another report in 2008. In this report, the Commission recommended replacing the 1889-1916 statutes and the common law offense of bribery with two general offenses of bribery, one concerned with giving bribes and one concerned with taking them. The central concept of the recommended offenses, instead of

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[120] *Id.* at 298.
[121] *Id*.
[122] *See* Paolo Mauro, Why Worry About Corruption. Washington D.C., International Monetary Fund (1997); Vito Tanzi and Hamdi Davoodi, Roads to Nowhere: How Corruption in Public Investment Hurts Growth. Washington D.C., International Monetary Fund (1998); Paolo Mauro, *Corruption and Growth*, 110 Quarterly J. Economics 681 (1995).
[123] Alldridge, *supra* note 86, at 302.

a "breach of duty" – was something even less specific: "improper behavior."[124] Under the Commission's suggestions, payors would be guilty of bribery if they pay a public official and intend to induce her to act "improperly", or intend to reward such behavior.[125] Recipients of payments would be guilty of bribery if they request or accept an advantage intending that she, or another, should in consequence behave improperly.[126]

The Commission came to this formulation by analogizing corruption to fraud. This is notable given the migration of American corruption prosecutions from bribery to (intangible rights) fraud. Indeed, the Commission found significant overlap between fraud offenses and its new offense of bribery. If someone abuses a position in which they are expected to safeguard someone else's interests, in exchange for an advantage conferred, they have committed both bribery and fraud in the UK.[127] Under the American regime, bribery and fraud overlap, too. Virtually every bribery could be charged as fraud, but very few frauds – a much wider, vaguer category – could reach the strict *quid pro quo* standard required for bribery conviction in the U.S. Oddly, the reverse is true in the UK: fraud has an additional element that bribery does not have – namely, dishonesty. Per the statutory language, fraud requires dishonesty; if that is

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[124] Reforming, *supra* note 86. *See also* Jeremy Summers, *Clamping Down on Corruption*, The Law Gazette, 10/12/2008, available at http://www.lawgazette.co.uk/opinion/comment/clamping-down-corruption.
[125] Reforming, *supra* note 86, at 15-17.
[126] *Id*.
[127] *Id*. at ¶¶ 3.120 ff. Example: P pays R a secret commission to accept P's bid for a contract, when it would have been in R's employer's financial interests that someone else be awarded the contract. R's employer is the victim of fraud, but the payment in exchange for the favor is also bribery.

lacking, no fraud can be committed. However, additionally, bribery contains an element that fraud doesn't contain – namely, abuse of position in making the gain. Without abuse of position, no bribery can be committed; but fraud does not require abuse of position.[128]

The Commission believed that a great advantage of this formulation is its ease of communication to would-be perpetrators, and hence deterrent value. The Commission found itself able to give what it regarded as straightforward advice for public officials who might be in a position to receive payments:

- Do not **misuse your position** in connection with payments (or other favors) for yourself or others.

And for those who might be in a position to give payments:

- Do not make payments to someone (or favor them in any other way) if you know that this will involve someone in **misuse of their position.**

Indeed, the clarity and intuitiveness of such guidance is appealing. But the question becomes whether the concept of "improper behavior" yields any substantive, sufficiently definite standard that is not just an empty concept malleable to any prosecutor's will. To this end, the Commission provided a fairly specific definition of improper behavior, identifying improper behavior as violating one or more of the three expectations of "a person of moral integrity", namely:[129]

> (1) an expectation that someone will perform a function or activity **in good faith**[130]

[128] *Id.* at ¶ 3.131.
[129] *Id.* at 15-17 (all emphasis original).
[130] E.g., R, an employee, invites bids for a contract, but makes it clear to the wealthiest bidder privately that he will look favorably upon their bid if he – R – is rewarded

(2) an expectation that someone will perform a function or activity **impartially**[131]
(3) an expectation created by the fact that someone is in **a position of trust**[132]

The second expectation – of impartial performance of public functions – has been explicitly considered by American courts as a requirement of violating the public's right to the intangible right of honest services.[133] Note the difference in that in the Commission's eyes, only one of these expectations need be violated for behavior to be improper (and thus corrupt) – i.e., each violation would be sufficient for a corruption charge – whereas in the American doctrine, violation of the second requirement is necessary for the behavior to constitute fraudulent deprivation of honest services.

The Commission suggested that all the hand-wringing about the vagueness of such wide standards is not necessary due to a simple solution: leave it to the jury. The terms "good faith", "impartiality," and "position of trust" can be applied by juries to facts using their ordinary meanings.[134] Indeed, this is

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personally. This expectation could potentially be important even where impartiality and a position of trust are not.

[131] E.g. R is a trustee who makes grants to a company's needy former employees. R agrees to consider making grants to a needy former employee – X – who is also a member of his own family, when X says he has made R a beneficiary under X's will.

[132] E.g. in exchange for payment, R, a security guard, agrees to allow P on to company premises at night so that P – a director of a rival company – can go through confidential papers.

[133] *Sawyer*, *supra* note 78.

[134] Reforming, *supra* note 86, at ¶¶ 3.170-3.171.

the only feasible way to structure the law, given that juries have to be able to understand it.[135]

III. UK law and extortion under color of official right

A. The 1998 Commission and extortion under color of official right

The Commission in 1998 also briefly considered the issue of official extortion. The UK used to have a separate false-pretenses offense – the one that Justice Thomas wanted in *Evans* and that Justice Scalia wanted in *McCormick*. This is the offense by which a public official will only perform her duties upon payment of a bribe.[136] There was a common law crime known as the offence of "extortion by colour of office or franchise", which squarely covered this situation. That crime, however, was abolished in 1968. The Commission argued in 1998 that such an offence at that time would fall under the offence of blackmail. But the harm in blackmail – the fear caused – is very different from the harm in official extortion, which – like in bribery – is creating a market in services for which there should be no market.[137] Alldridge argues that the common law offence of extortion under color of official right should be brought back; he no doubt would find he had much in common with Justices Scalia and Thomas.

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[135] *Id.*, at ¶ 3.189 ("… at some point the law must rely on the common sense of juries. If it does not, the irony is that the law may become too complex for juries to understand and apply.").
[136] *See* Alldridge, *supra* note 86, at 317.
[137] *Id.* at 317.

B. The standard for the *quid pro quo* agreement

The Law Commission in 2008 also addressed the issue asked after *Evans* and *McCormick* laid out different standards of specificity and explicitness for the *quid pro quo* required for criminal liability.[138] The Law Commission suggested that an agreement can be implied, and need not be express, saying it "can be inferred from conduct."[139] They say that such an issue is really for the trier of fact, and not a legal question at all, adverting to the example of an interview in front of an open briefcase full of money, in which the trier of fact could clearly reasonably infer that the payor was impliedly offering an advantage to the receiver.[140]

Part Three. Conclusion

While most of the comparative analysis lies in the last section, I would like to briefly review some of open questions in the American doctrinal regime in light of the UK regime just laid out.

The first question was when an act is a bribe and when it is an unlawful gratuity. In the American regime, remember, these are criminalized in different statutory provisions, and allow vastly different penalties. However, because of the *Sun-Diamond* requirement that an unlawful gratuity be linked to a specific official act, they are now essentially the same. For better or worse, something less than a bribe that is probably still corrupt – e.g., paying for *access* to a public

[138] *See supra*, notes 64-70 and accompanying text.
[139] Reforming, *supra* note 86, at ¶ 3.46.
[140] *Id*.

official – cannot be prosecuted as either a bribe or as an unlawful gratuity in the United States.

In the UK, bribery and unlawful gratuities are treated together, but at the level of *statute.* This is different from the American regime, where they are statutorily different but get lumped together by case law doctrine. However, perhaps surprisingly, the British regime does not eliminate the possibility of prosecuting something less than a *quid pro quo* bribe like paying for access; the presumption of corruption allows the prosecuting government to hurdle the usual evidentiary problems attendant to the ordinary corruption prosecution. This answers the comparative question asked above: under UK law, are payments that are not linked to any specific official act but motivated only by the official's position criminal acts or lawful acts? The answer: criminal – the exact opposite of the holding in *Sun-Diamond*.

The comparative project in the context of bribery and extortion was less fruitful; its miscellaneous – while useful – results described above[141] need no review.

However, on the question of the vagueness of § 1346's criminalization of deprivation of honest services, the UK regime has much to suggest. I asked above whether the UK has a similar catch-all provision that could be used to prove corrupt acts that otherwise might not fall under crimes that require a strict *quid pro quo*. The answer currently is no. However, the British Law Commission's two most recent efforts to re-codify this area of law in 1998 and

[141] *See supra*, notes 136-140 and accompanying text.

2008 both recommended extremely broad, vague statutes defining corruption as, respectively, a “breach of duty” and a “misuse of office.” The Commission cited the same problems American prosecutors cite in needing § 1346’s broad language – secrecy, doctrinal limits on other crimes, and the idea that a standard rather than a rule should govern the attempt to criminalize corruption, a concept only understandable via standards of behavior rather than bright-line rules.