What’s Wrong With Bribery

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In 1998, attorney John V Wachtel, of Wichita, Kansas, had a provocative idea. He was representing the appeal of a defendant named Sonya Singleton, who had been convicted of money laundering and conspiracy to distribute cocaine. At trial, the government’s case had rested largely on the strength of testimony offered by Singleton’s alleged co-conspirator, Napoleon Douglas, who, under a standard plea agreement, had agreed to testify in return for the government’s promise of leniency. Watchtel’s idea was as follows: By offering Douglas ‘something of value’ in return for his testimony, the government had violated the gratuities provision of 18 U.S.C. § 201, the federal bribery statute; and for this reason, he argued, Douglas’s testimony should have been suppressed. Surprisingly, a three-judge panel of the U.S. Tenth Circuit Court of Appeals agreed with his argument and reversed Singleton’s conviction. ‘If justice is perverted when a criminal defendant seeks to buy testimony from a witness’, Judge Paul J Kelly, Jr. wrote for the panel, ‘it is no less perverted when the government does so.’

Almost overnight, the decision caused a storm of controversy. Prosecutors, for their part, warned that categorically excluding testimony obtained in exchange for promises of leniency would undermine the system of plea bargaining in use throughout the United States. Defense attorneys, on the other hand, took pleasure in noting that they had always known that there was something fishy about testimony obtained under such circumstances. The case also generated a flood of scholarly commentary, most of it focused

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1 U.S. v Singleton, 144 F.3d 1343 (10th Cir. 1998), rev’d by 165 F.3d 1297 (10th Cir. 1999) (en banc), cert. denied, 527 U.S. 1024 (1999). The story of Wachtel’s representation of Singleton is told in Mark Hansen, ‘Shot Down in Mid-Theory’ 85 ABA Journal 46 (May 1999).

2 Section 201 contains two distinct, but closely related, offenses. The first offense, bribery, makes it a crime to ‘corruptly’ give or receive ‘anything of value’ in return for influence of an official act. The second offense, giving or receiving gratuities, makes it a crime to give or receive anything of value ‘for or because of’ an official act. For purposes of the discussion here, I will focus on the question whether the government in Singleton committed bribery. If it can be shown that it did, then a fortiori it would also have committed gratuities.

3 Singleton, 144 F.3d at 1346.
on the issue of prosecutorial ethics. As a practical matter, however, the controversy did not last long. Six months after the panel issued its decision, the Tenth Circuit, sitting en banc, reversed, reinstating Singleton’s conviction and holding that Section 201 did not apply to prosecutors in such circumstances. All of the other circuits that have considered the issue have more or less agreed, and, for the moment at least, the issue seems settled. Despite its lapse in topicality, however, the Singleton case continues to pose important questions about the deeper nature of bribery. In this chapter, I want to use the facts of Singleton as a reference point for my broader analysis of bribery—what its limits are, and why it’s morally wrong.

In §§ 1–2, bribery is conceived as an agreement in which a briber promises to give a bribee something of value in return for the bribee’s promise to act in furtherance of some interest of the briber’s. The focus here is on questions such as who can be a bribee, who can be a briber, what the bribee must give, and what she must receive in return. Sections 3–6 then seek to get at the underlying moral content of bribery, by distinguishing between taking a bribe and offering a bribe. The former act, I suggest, involves a breach of loyalty owed by the bribee arising out of her office, position, or involvement in some practice, while the latter involves inducing another to breach such a duty. Throughout my analysis, I return to the facts of Singleton as posing a particularly problematic case for the theory of bribery, inasmuch as the putative bribee, by agreeing to offer true testimony as a fact witness in a criminal trial, does what is, in effect, the ‘right thing’.

1. Bribers and Bribees

Before we can consider why bribery is wrong, we need to have a preliminary idea of what bribery is. But there is an inevitable potential for circularity here: ultimately, a determination of its precise contours will turn on an understanding of why bribery is wrong.

One problem is that there are hundreds of bribery and corruption provisions in force throughout the United States, the United Kingdom, and in

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5 165 F.3d 1297 (10th Cir. 1999). The court’s reasoning is described below, text accompanying n. 20.

6 E.g. U.S. v Jenkins 178 F.3d 1287 (4th Cir. 1999); U.S. v Pullins 238 F.3d 425 (6th Cir. 2000); U.S. v Murphy, 193 F.3d 1 (1st Cir. 1999); U.S. v Hunte, 193 F.3d 173, 174 (3rd Cir. 1999).

7 For a helpful overview of the American law of bribery, see Sarah N Welling, et al., Federal Criminal Law and Related Actions: Crimes, Forfeiture, the False Claims Act and RICO (St. Paul, Minn: West Group, 1998), vol. 1, ch. 7.

8 In England and Wales, the leading bribery statutes are the Public Bodies Corrupt Practices Act 1889 and the Prevention of Corruption Acts 1906 and 1916. There are also a number of
What's Wrong With Bribery

virtually every other legal system around the world—and there is a good deal of variation among them. Although I will be giving special consideration to several of the most interesting and problematic aspects of the leading American bribery statute, 18 U.S.C. § 201, my overarching interest here will be in articulating a deeper, more universal conception of bribery, one which is correlated only imperfectly with the concept of bribery that can be found in any specific statute.

As a framework for analysis, then, I propose the following working definition of bribery: X (a bribee) is bribed by Y (a briber) if and only if: (1) X accepts, or agrees to accept, something of value from Y; (2) in exchange for X’s acting, or agreeing to act, in furtherance of some interest of Y’s; (3) by violating some duty of loyalty owed by X arising out of X’s office, position, or involvement in some practice. This section focuses on the questions of who can be a bribee and a briber. The next section focuses on bribery as an agreement.

Like offenses such as conspiracy and dueling, a completed act of bribery requires the voluntary concerted criminal participation of two parties. In order for there to be a bribe, there must be both a briber and a bribee (or at least an intended briber and bribee).

Who Can Be a Bribee?

For most of the history of bribery, the only kind of person who could be a bribee was a public official. And, indeed, the only kind of public official that could be bribed for much of that history has been a judge—a fact that is illustrated by references to bribery in both the Hebrew Bible and early special offenses covering matters such as bribery in elections. The English law of corruption is described in David Lanham, ‘Bribery and Corruption’, in Peter Smith (ed.), Criminal Law: Essays in Honor of J C Smith (London: Butterworths, 1987), 92; Peter Aldridge, ‘Reforming the Criminal Law of Corruption’ (2000) 11 Criminal Law Forum 287; G R Sullivan, ‘Reformulating the Corruption Laws: The Law Commission Proposals’ (1997) Criminal Law Review 730. In Scotland, bribery is both a common law and statutory offense, the former apparently being limited to the bribery of judicial officials. Gerald H Gordon, The Criminal Law of Scotland (3rd ed., Michael Christie; Edinburgh: W. Green, 2001), vol. 2, 692–3.

9 See Hearings Before the Committee on Banking, Housing and Urban Affairs, U.S. Senate, 94th Congress, Second Session, April 5, 1976 (research by the Securities and Exchange Commission failed to identify a single country in which it was not a crime to pay a government official money to induce him to enter into a contract with a private firm).

10 See above n. 2.


13 See, e.g., Exodus 23:9 (‘Do not take bribes, for bribes blind the clear-sighted and upset the pleas of those who are in the right’); Deuteronomy 16:19 (similar). It is worth noting that, under the original Israeli law of bribery, bribe-taking by judges was considered a more serious offense than bribe-taking by other kinds of government officials. Cf. Penal Law Revision (Bribery and Rewards) Law, 1950 § 1(a) with § 2.
English common law.\textsuperscript{14} Over time, however, the universe of people considered capable of being bribees has grown considerably, in two ways: First, the class of people who are considered ‘public officials’ has grown. For example, under Section 201(a), the term ‘public official’ is now broadly defined to include members of Congress, virtually all officers and employees of all three branches of government, jurors, and persons who act ‘for or on behalf of’ the federal government, such as private employees who receive federally administered funds.\textsuperscript{15} Second, despite the non-applicability of Section 201 itself to private party bribees, the law is increasingly moving in the direction of criminalizing commercial bribery. For example, other provisions of federal law now make it a crime for investment advisers, contestants in broadcast quiz shows, bank employees, sellers of alcoholic beverages, labor union officials, railroad employees, and radio disc jockeys to receive bribes of various sorts.\textsuperscript{16} There are also numerous other provisions, in the United States and elsewhere, that make it a crime to bribe employees of private firms.\textsuperscript{17} In short, although, historically, bribery could be committed only by public officials, and many leading statutes continue to be restricted in this way, cases in which payments are received by department store buyers, contest judges, athletes, and other private sector actors are now, arguably, as central to the concept of bribery as those involving more traditional bribees such as judges and legislators.

So should witnesses qualify as potential bribees? Under Section 201(b)(4), bribery is explicitly defined to include cases in which a person corruptly receives something of value ‘in return for being influenced in testimony


\textsuperscript{15} 18 U.S.C. § 201(a); \textit{Dixon v U.S.}, 465 U.S. 482 (1984) (applying statute to employee of private nonprofit corporation that administered subgrant from municipality’s federal block grant). One of the most notable aspects of Section 201(b) is that it prohibits bribery of officials who work for the federal government, but not those who work for state and local governments.

\textsuperscript{16} When the federal government wants to prosecute state and local government officials for bribery and other forms of corruption, it frequently charges them, under the Hobbs Act, 18 U.S.C. § 1951, with the offense of extortion ‘under color of official right’. It can also use 18 U.S.C. § 666, which prohibits bribery of state and local officials of entities that receive at least $10,000 in federal funds. See also \textit{Krichman v U.S.}, 256 U.S. 363, 366–68 (1921) (concluding that earlier federal bribery statute did not reach federal employees such as ‘window cleaners, scrubwomen, elevator boys, doormen, and baggage porters’). Although the Court has not had occasion to revisit the question, the prevailing view in the lower courts is that the current bribery statute is not limited in the same way as the earlier statute, and that every federal employee should be regarded as a ‘public official’ for purposes of Section 201. Welling, et al., above n. 7, vol. 1, at 201 and n. 3.

\textsuperscript{17} E.g. 18 U.S.C. § 215 (bribery of bank employees); 27 U.S.C. § 205(c) (bribery in alcoholic beverage industry); 29 U.S.C. § 186 (bribery of labor representatives); 49 U.S.C. § 11907 (bribery of railroad employees). Commercial bribery can also serve as a predicate offense under the mail fraud, wire fraud, RICO, and Travel Act statutes.

under oath or affirmation as a witness’. Clearly, then, the statute would apply to a witness who agreed to give perjured testimony in return for payment. But would it apply to a witness who agreed to give truthful testimony? Such a witness might have an argument that, rather than receiving something of value in return for being influenced in his role as a witness, he was actually receiving something of value in return for his being influenced to become a witness. As such, there was (as we shall see below) no positional duty for him to violate. His act would thus be analogous to a private person’s accepting payment in return for deciding not to run for some political office—an act that would not on its face appear to constitute receiving a bribe.

Who Can be a Briber?

Having considered who can be a bribe, we can now look at who (or what) can be a briber. Section 201 says simply that bribery is committed by ‘whoever’ gives or receives something of value in return for influence over an official act. The term ‘whoever’, in turn, is defined (along with ‘persons’) in Title 1, Section 1 of the U.S. Code, the ‘Dictionary Act’, to include ‘corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals’.

Given the breadth of this definition and the all-encompassing manner in which the term ‘whoever’ has been interpreted in other federal criminal statutes, it is hard to see how any person or legal entity could be held incapable of being a briber. Nevertheless, this is exactly what the Tenth Circuit en banc opinion held in Singleton. Indeed, the court was so anxious to avoid the conclusion that a promise of leniency in return for testimony might constitute a crime that it gave a wholly implausible answer to the ‘who can be a briber’ question (or, more precisely, the ‘who can be a gratuity-giver’ question).

The court’s argument, as best it can be summarized, was as follows: The prosecutor in federal criminal cases works not on behalf of herself, but rather on behalf of the U.S. Government. The Government cannot prosecute ‘itself’. Therefore, a federal prosecutor, acting in her capacity as a representative of the ‘sovereign’, cannot be prosecuted for a crime that is committed in the course of her regular duties. And, because a prosecutor who promises leniency in return for true (as opposed to false) testimony is functioning within ‘the limits of his or her office’, she cannot be prosecuted under Section 201.

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20 Singleton, 165 F.3d at 1302 and n. 2.
This argument reflects at least four major flaws. First, it is simply wrong that a government-initiated prosecution against a federal prosecutor acting in her official capacity would constitute a prosecution by the government of ‘itself’;21 the government and its representatives are, and always have been, viewed as distinct. Secondly, it obviously begs the question to say that a prosecutor who offers leniency in return for testimony is functioning within the limits of her office; whether a prosecutor who offers such a deal is acting illegally is precisely the issue the court was called upon to answer. Thirdly, the court offers no explanation for why a government prosecutor is incapable of bribing a witness to tell the truth, but fully capable of bribing a witness to lie. Fourthly, the decision fails entirely to address the deeper question of whether and how such conduct can be distinguished from conduct that should properly be regarded as bribery. This is a question that will be addressed below.

2. Bribery as an Agreement

In this section we consider two related issues: (1) how bribes differ from gifts, tips, and campaign contributions; and (2) what it means for the briber to give the bribee ‘something of value’ in return for the bribee’s acting on the briber’s behalf.

Bribes vs. Gifts, Tips, and Campaign Contributions

The supposed difficulty of distinguishing bribes from gifts, tips, rewards, and campaign contributions has frequently been noted.22 Although it may well be difficult to make the distinction in practice, in theory it is clear: Bribes involve an agreement to exchange something of value in return for influence, while gifts, tips, and campaign contributions involve no such agreement.23

A bribe involves a bilateral agreement between two parties in which something of value is given or promised in exchange for the bribee’s acting on the briber’s behalf. There can be no completed bribe without a meeting of minds. Thus, as in the case of conspiracy,24 if the briber or bribee is intoxicated or is mistaken, or is an undercover agent feigning agreement (as

21 I have previously dealt with the supposed problem of self-prosecution in Green, above n. 19, at 1209–10.
23 A similar distinction is made in Susan Rose-Ackerman, Corruption and Government: Causes, Consequences, and Reform (Cambridge: Cambridge University Press, 1999), 93; and Philips, above n. 11, at 632.
24 At common law, the traditional rule was that there was no conspiracy unless the plurality requirement was satisfied—i.e. unless at least two persons possessed the requisite intent to conspire. See Morrison v California, 291 U.S. 82, 92 (1934) (Cardozo, J.).
in the notorious Abscam case), the bribe would be incomplete. Therefore, assuming for purposes of discussion that Singleton is right, and that government attorneys acting within the scope of their office are incapable of committing bribery, it would seem to follow that, if a witness who accepts consideration from such a person in return for testifying is a bribee at all, he is party to an incomplete bribe (though it should be noted that, for all practical purposes, Section 201 makes no real distinction between ‘choate’ and ‘inchoate’ bribes).

In contrast to bribes, gifts, tips, rewards, and donations are unilateral; they are given without any agreement to reciprocate. This is not to deny, of course, that gifts are often given either in return for some service that has already been rendered (as in the case of tips or rewards), or in expectation of receiving something in return (as in the ‘exchange’ of family gifts at holiday time). We have all encountered circumstances in which such ambiguity is manifest. Nevertheless, there is, at least as a conceptual matter, a significant difference between ‘exchanging’ goods or services through an agreement and doing so gratuitously. Similarly, there is a significant conceptual difference between completed bribes and gifts.

What the Briber Gives: ‘Something of Value’

Bribery statutes typically say that a bribee must accept, or agree to accept, ‘something of value’ in return for some service rendered to the briber. Although the idea of bribery typically conjures up images of fat envelopes stuffed with hundred dollar bills, the thing of value given by the briber to the bribee need not, of course, be money. Bribes have been premised on a wide range of things of value, such as offers of future employment, unsecured short-term (and subsequently repaid) loans, restaurant meals and tickets for athletic events, ostensibly valuable (but actually worthless) stock certificates, and even sexual favors. Indeed, in the Talmudic tradition, bribes could be effected even by means of ‘pleasant words’ of flattery.

On the other hand, as I have discussed elsewhere in the context of theft law, the term ‘thing of value’ cannot always be taken literally. We need to

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26 See, e.g., The Simpsons: Lisa’s Substitute (Fox television broadcast, April 25, 1991) (Homer is bemused to learn that while local art museum does not charge ‘admission’ per se, patrons are expected to give a ‘donation’ upon entering).
27 See, respectively, Bagge, 909 F.2d 662, 684–5 (2d Cir. 1990); U.S. v Gorman, 807 F.2d 1299, 1304–5 (6th Cir. 1986); U.S. v Sun Diamond Grocers 526 U.S. 398, 401–2 (1999); U.S. v Williams, 705 F.2d 603 (2d Cir. 1983), 623; Scott v State, 141 N.E. 19, 23 (Ohio 1923).
think about the term in relation to the underlying purposes and policy concerns of the relevant statute. In the case of bribery, we would need to inquire into the extent to which an expansive interpretation of ‘things of value’ might create a chilling effect in the context of, for example, dealings between department store buyers and suppliers, political fundraising activities, and the social lives of government officials.

An interesting context in which the ‘thing of value’ question arises is provided, yet again, by a case in which a prosecutor made a deal with a witness to give something in return for testimony. In United States v Medina, the defendant, charged with drug trafficking, sought to exclude testimony given by a cooperating government witness who had, in exchange for his agreement to testify on behalf of the government, received not only a promise of leniency but also cash payments of over $105,000.30 In ruling on the motion, the court seemed reluctant to follow the approach used by the Tenth Circuit in Singleton, and refused to hold that prosecutors acting within the scope of their duties could never violate Section 201. Instead, the Medina court distinguished between prosecutorial promises of leniency and payments of cash, arguing that while there was a long ‘tradition’ of giving witnesses the former, the ethical issues raised by the latter were ‘troubling’.31 In essence, the court said, while cash is a ‘thing of value’ for purposes of the bribery statute, prosecutorial leniency is not.

What the Bribee Gives Back: Influence

Section 201(b)(2) requires that the bribee agree to accept something of value ‘in return for... being influenced in the performance of any official act’. As we shall see below, it is this ‘being influenced’ requirement on which the moral wrongfulness of bribery largely depends, and in which the moral ambiguity inherent in some cases of bribery chiefly resides.

For the moment, we can simply observe that the federal courts have interpreted the ‘being influenced’ requirement quite broadly, upholding convictions despite the fact that the act had already been contemplated before the bribe was solicited.32 The courts have also read broadly the requirement that the bribe relate to acts that are ‘official’, rejecting, for example, the claim by a defendant congressman that such acts must occur exclusively within the legislative process itself.33

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31 Nevertheless, the court ultimately denied the motion on the grounds that the witness was being paid not for his testimony as a witness but rather for his help as an informant. 41 F. Supp. 2d at 48–53. See also U.S. v Murphy, 193 F.3d 1, 9 (1st Cir. 1999) (recognizing distinction between offering witnesses leniency and ‘just pay[ing] witnesses money for their testimony’); U.S. v Condon, 170 F.3d 687, 689 (7th Cir. 1999), cert. denied, 526 U.S. 1126; U.S. v Hunte, 193 F.3d 173, 176 note 4 (3d Cir. 1999).
32 U.S. v Quinn, 359 F.3d 666, 675 (4th Cir. 2004).
What's Wrong With Bribery

In this context, it is worth asking whether a witness who receives consideration in return for agreeing to testify truthfully as a fact witness in a criminal trial would satisfy the 'being influenced' requirement of the statute. Such a witness would presumably want to argue that she was not being influenced in her act, since she would have given the same true testimony regardless of whether she received consideration for doing so. Moreover, it could be argued that the service the witness was providing was not giving true testimony per se but, rather, waiving her right not to testify in the first place. In any event, to really understand what it is the bribee must give back to the briber, we need to look more deeply at why bribery is a morally wrongful act.

3. The Moral Content of Bribery

As I have described elsewhere, the moral content of any given criminal offense can be divided into three basic kinds of (often overlapping) elements. Culpability reflects the mental element with which an offense is committed, such as intent, knowledge, or belief. Harmfulness reflects the degree to which a criminal act causes, or risks causing, harm to others or self. And moral wrongfulness reflects the way in which the criminal act involves a violation of a specific moral norm or set of norms, such as deception, cheating, coercion, exploitation, stealing, promise-breaking, disobeying, or disloyalty. I will here follow this basic tri-partite division.\(^34\)

Culpability

Under Section 201, a thing of value must be given or received 'corruptly' in order for such act to constitute bribery. Indeed, the requirement of 'corruptness' is often said to be the principal factor that distinguishes bribery from the lesser offense of giving or receiving gratuities.\(^35\) In reality, corruptness is as much a form of moral wrongfulness as it is of culpability. But because the courts tend to regard it as a form of mens rea, and it appears in the leading statute as such, I will treat it as a form of culpability here. The question is, what exactly does 'corrupt' mean in the context of bribery?

Under American law, the term 'corruptly' has been interpreted to mean that the defendant desires that, in exchange for something of value, the public official will perform some act.\(^36\) Thus, the briber must presumably intend that the bribee be influenced, while the bribee must intend that she herself be influenced.

\(^34\) For a discussion of its rationale, see Stuart P Green, 'Why It's a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses' (1997) 46 Emory Law Journal 1533, at 1547–52.


\(^36\) Welling et al., above n. 7, at § 7.4, at 210–11.
An interesting question arises in cases in which the bribee takes money from a briber with no intention of allowing herself to be influenced. For example, in the Abscam case, the defendant, Congressman Michael Myers, argued that although he had been captured on videotape ostensibly agreeing to introduce a private immigration bill in return for a payment of fifty thousand dollars, in fact he had merely been ‘playacting’, and had never actually intended to follow through on his promise. In rejecting what it characterized as a ‘bizarre defense’, the court said simply that it understood the agreeing to ‘be influenced’ language of the statute to refer not to the bribe taker’s ‘true intent’, but rather to ‘the intention he conveys to the briber in exchange for the bribe’.

The court’s reasoning in Myers is surely wrong. One who accepts money ostensibly in return for performing an official act has no intention of performing has no more accepted a bribe than one who accepts money ostensibly in return for committing a killing he has no intention of carrying out has conspired to commit murder. An official who takes money in exchange for a service he does not intend to carry out has presumably committed not bribery, but fraud. On the other hand, an official who accepts money to perform an official act that she does intend to perform, but is unable to do so, either because she lacks authority, or because the act has already been performed, could properly be held to have accepted a bribe.

Harmfulness

Much of the literature on bribery and other forms of corruption focuses on the numerous ways in which such acts are believed to be harmful to society. Bribery ‘corrupts’ political and commercial life by inviting inappropriate grounds for decision-making. It creates political instability, distorts markets, undermines legitimacy, retards development, wastes resources, undercuts confidence in decision-making institutions, and leads to injustice, unfairness, and inefficiency. In the Talmudic view, even a wise person who accepts a gift but otherwise intends to maintain objectivity in the case before him will find that his judgement is distorted.

The precise nature of the harm that a given act of bribery causes will vary depending on the nature of the official act that is compromised, whether by judge, legislator, administrator, juror, witness, executive, or other official. Consider, for example, the difference in harm between cases in which, in

38 See, e.g., U.S. v Carson, 464 F.2d 424, 433 (2d Cir 1972) (bribe taker had no authority to take the requested action), cert. denied, 409 U.S. 949 (1972); U.S. v Heffler 402 F.2d 924 (3d Cir. 1968) (similar), cert. denied, 394 U.S. 946 (1969).
39 See, e.g., Rose-Ackerman, above n. 23; and sources cited below n. 69.
40 See Noonan, above n. 12, at 3.
41 See sources cited n. 28 above.
return for payment: (1) a military officer agrees to share secrets that could result in loss of life, and (2) a waiter agrees to give a patron a better table in his restaurant (if in fact the latter case involves a bribe at all).\textsuperscript{43}

Of course, none of this is to say that every act of bribery will necessarily lead to any actual bad decisions. As we shall see below, a legislator or judge can be bribed into making the same correct decision she would have made absent the bribe. All that is required is that the decision-making process itself be corrupted by the payment of the bribe.

**Moral Wrongfulness**

So far, we have been talking about ‘bribes’ as if they were single, unidirectional transactions. In fact, however, bribes involve two distinct parts: a bribe must be given (or at least offered) by a briber; and it must be received (or at least solicited) by a bribee. Although the modern American statutory approach is to impose the same penalty for bribe-taking and bribe-giving, there is some evidence that the general public regards bribe-taking as the more serious offense,\textsuperscript{44} and it is in fact treated as such in some foreign statutes.\textsuperscript{45} In terms of understanding why bribery is morally wrongful, the distinction is crucial. In the analysis that follows, I focus first on the moral wrongfulness of receiving a bribe, and then on the moral wrongfulness of giving a bribe.

4. Loyalty and Disloyalty

In this section and the next, I consider the idea that the bribee, by taking something of value in return for doing an act on the briber’s behalf, violates a duty of loyalty arising out of the bribee’s office, position, or involvement in some practice. It is important to recognize, however, that the moral wrongfulness entailed by receiving a bribe, though consisting in large part of disloyalty, is not limited to disloyalty, and should also be understood to include elements of deception, cheating, stealing (in the sense that the bribee sells something he has no right to sell),\textsuperscript{46} and the wrongful commodification

\textsuperscript{43} See discussion in text preceding n. 69.

\textsuperscript{44} In a recent study, respondents were asked which they regarded as more serious: a public official accepting a bribe, or a private citizen giving a bribe to a public official. Seventy-four percent said they regarded the former as more serious; 12 percent said the latter was more serious; 14 percent said they were equal in seriousness. Training and Research Institute, National White Collar Crime Center, *The National Public Survey on White Collar Crime* (2000), available at <http://www.nw3c.org/research_topics.html>. Of course, it should be pointed out that such data could also be consistent with the view that what respondents thought was more serious was corrupt action by officials (whether offering or taking bribes) as opposed to corrupt action by private individuals.

\textsuperscript{45} E.g. Israel Penal Law Revision (Bribery and Rewards) Law, 1950 § 3 (person giving bribe is liable for only half the penalty applicable to person accepting bribe).

\textsuperscript{46} Cf. *A-G for Hong Kong v Reid* [1994] 1 AC 324 (because proceeds of bribe given to agent of principal are property of principal, failure to turn over such proceeds constitutes theft).
of government—concepts that I have discussed elsewhere in other contexts and will not repeat here. 47

The Duty of Loyalty

Before we can consider what it means to violate a duty of loyalty, we first need to consider what it means to have a duty of loyalty. To be loyal involves being true or faithful to someone or something—having a 'persevering commitment to some associational object', as John Kleinig has put it. 48 But what kind of object? Some commentators, such as Marcia Baron and John Ladd, have argued that loyalty must be interpersonal—that is, that one can be loyal only to an individual, or group, or institution. 49 Under this view, loyalty is founded on a specific kind of relationship or tie defined by membership in a group and differentiation within that group. 50 It is typically defined by social roles, rather than any particular characteristics of individuals: Thus, I am loyal to my family, my friends, and my colleagues because of their relationship to me, rather than because of any particular qualities they might possess.

Other commentators, including, most prominently, Josiah Royce, have suggested that the proper objects of loyalty are ideals, causes, and practices, rather than individual people or institutions. Thus, for Royce, loyalty consists in the ‘devotion of a patriot to his country’, ‘the devotion of a martyr to his religion’, and ‘the devotion of a ship’s captain to the requirements of his office’. 51

The best view, it seems to me, is that one can be loyal to both people and causes or ideals (or, to put it homophonically, to both principals and principles). 52 Loyalty creates in one a prima facie obligation to act in the best interests of a particular person or cause, even when doing so would be against one’s own self-interest. It helps define many of our most important human relationships, and indeed our very identities as persons. To be loyal is to be guided by such concerns for the relevant others in our dealings with family, friends, colleagues, communities, and nations, and in the pursuit of


48 This phrase appears in an in-progress draft of a book of Kleinig’s entitled Loyalty and Loyalties, of which I am grateful to have had the opportunity to read a chapter.


50 Ladd, ibid., at 97.


52 Whether one can also properly be said to be loyal to a product or brand, and whether dogs and other animals can truly be said to be loyal, are questions which, for present purposes, need not be answered. See generally Kleinig, above n. 48.
our most important projects. As Andrew Oldenquist has suggested, ‘it is likely that loyalties ground more of the principled, self-sacrificing, and other kinds of nonselfish behavior in which people engage than do [other kinds of] moral principles and ideals’.53 Take away loyalty and our lives would be empty indeed.

In some cases, we choose our own loyalties. When I decide to marry a particular person, work for a particular employer, or join a particular club, I knowingly and voluntarily assume the moral obligations that go with such relationships. In other cases, loyalties arise involuntarily: We are all born into a web of familial, social, national, ethnic, cultural, religious, ideological, and political relationships. As adults, we may be theoretically free to reject those ties and choose others in their place, but such early bonds are usually strong ones.

Loyalty and Moral Conflict

Sometimes, a person ostensibly subject to a duty of loyalty is forced to choose between acting in a way that is consistent with such duty and complying with some competing moral obligation. In sorting out such conflicts, it will be helpful, first, to distinguish between what we can refer to as (1) loyalty in the factual (or descriptive or empirical) sense, and (2) loyalty in the normative (or moral) sense.54 Loyalty in the factual sense consists in a certain mental attitude that X has towards the object of his loyalty: it requires that X view himself as obligated to act, and in fact be inclined to act, in the best interests of his principal; and that he be willing to persevere in such an attachment despite the difficulties that might be involved. Loyalty in this sense does not require that the object of one’s loyalty be a good person or right cause.

By contrast, to think of loyalty in the normative or moral sense is to think of loyalty as a virtue; it requires not only that X work in the best interests of his principal, but also that such principal in fact be a good person or right cause, or at least not a thoroughly bad person or wrong cause. Thus, whereas one could be loyal in the empirical sense to a Hitler or to the ideology of Nazism, one could not be loyal to such objects in the normative sense.55 In such cases, we say that one’s loyalties are misplaced.

Loyalties, in either form, are not absolute. Loyalty is only one of a series of competing factors, a prima facie consideration, which people take into account in making moral decisions.56 Sometimes our loyalty to one person

or cause conflicts with our loyalty to another person or cause. The obligations of loyalty can also come into conflict with other kinds of moral obligations. For example, if one were questioned by the police about what one knew of criminal wrongdoing by one’s spouse or child, the demands of loyalty might well require that one violate one’s competing moral (and legal) obligation to tell the truth.

Inasmuch as it is potentially at odds with liberalism, loyalty can seem a disfavored or outmoded virtue. Liberalism in its various forms assumes that all people should be regarded as equal, that they should be treated with like concern and respect, and that moral judgments should be impartial. The ethic of loyalty, by contrast, involves a preference for people in my family or my group over those who are outside it. In some cases, the conflict between the two approaches can be acute. Adherence to the ethic of loyalty has the potential to negate our critical edge, cause complacency, lead us to accept what our political leaders do unquestioningly, and to be intolerant of those who are not part of our group. In its most perverse forms, loyalty can lead to bigotry and xenophobia.

Indeed, there are cases in which individuals are encouraged, or even required, to place adherence to some supposedly higher principle (one might even say ‘loyalty’ to some higher principle) over loyalty to a friend or employer. For example, rules against nepotism require hiring decisions to be made on the basis of what is in the best interest of an institution, rather than according to personal loyalties. Similarly, the Code of Ethics for federal government employees states that such employees should ‘expose corruption wherever uncovered’, ‘pay loyalty to the highest moral principles’, and ‘put country above loyalty to persons, party, or Government department’. And the qui tam provisions of the U.S. Federal Civil False Claims Act create significant financial incentives that encourage ‘whistle-blowing’ employees to betray the interests of their employees, when such betrayal would serve the larger interests of the public.

57 Compare Forster’s famous remark that, ‘If I had to choose between betraying my country and betraying my friend, I hope I should have the guts to betray my country’. E.M Forster, ‘What I Believe’, in Two Cheers for Democracy (Harmondsworth: Penguin, 1965), 75 at 76.
60 See, e.g., 5 U.S.C. § 3110(b) (barring officials from appointing relatives to positions in agencies over which the public official exercises jurisdiction or control).
Disloyalty

Disloyalty consists of more than merely the absence of loyalty. Just as promise-breaking requires that X be bound by a promise, disloyalty presupposes that X be bound by some duty of loyalty. George Fletcher has described loyalty as a rejection of alternatives that undermine the principal bond: ‘A loyal lover is someone who will not be seduced by another. A loyal citizen is someone who will not go over to the enemy in a time of conflict. A loyal political adherent will not ‘sell out’ to the opposition.’ Disloyalty, then, can be defined as the pursuit of alternatives that undermine the principal bond.

Disloyalty comes in various gradations. Imagine that third parties are speaking negatively about someone to whom one has an obligation of loyalty. Failing to say anything in the face of such criticism may be seen as disloyal. Adding one’s own negative comments seems even more so. And if others are working actively to harm the object of one’s loyalty, then it may be disloyal to fail to work against their doing so, and even more disloyal to assist them. In its most virulent form, disloyalty becomes betrayal.

The extent to which one can be said to be disloyal turns on context-specific determinations. Some conservatives seem to think that it is disloyal to criticize one’s government, its leaders, or its policies, especially in times of war. In contrast, liberals believe that one can be highly critical of one’s country without being disloyal. Indeed, the liberal view is that true loyalty obligates one to criticize one’s country when it is in the wrong.

Context may also determine the difference between disloyalty and a mere shift in loyalties. For example, while X is working for company C, it would presumably be disloyal for him to work simultaneously for its chief rival, R. On the other hand, once X leaves his job at C and goes to work for R, he is free (and, indeed, morally and legally required) to shift his loyalties to R (even though he continues to be ethically and legally constrained from divulging trade secrets learned while working for C). What is less clear, however, is whether and when it would be disloyal for X to leave C and go to work for R in the first place.

Disloyalty vs. Promise-Breaking and Breach of Fiduciary Duty

In what respects is the concept of disloyalty I have described distinguishable from other forms of moral wrongfulness, such as promise-breaking and breach of fiduciary duty? Disloyalty is both broader and narrower than promise-breaking. If I enter into a contract in which I promise to sell my butterfly collection to a stranger over eBay, and then renege on that promise, I have not been disloyal. Loyalty involves a complex web of obligations and duties arising out of certain kinds of identifiable social relations: friend-to-friend, sibling-to-sibling, employee-to-employer, and so forth.

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63 Fletcher, above n. 59, at 8.
Such relations are not easily reducible to an identifiable promise or set of promises. Moreover, although one who is disloyal will often have made a promise to be loyal, this is not always the case. For example, people are generally thought to have a duty of loyalty to their families even though they will not normally have made any specific promise as such.

The concept of disloyalty is also both broader and narrower than that of breach of fiduciary duty. Unlike loyalty, which is primarily a concept of morality, fiduciary duty is primarily a concept of law; it refers to a set of obligations that the law imposes on parties who stand in a position of trust in relation to other parties, such as agents to principals, lawyers to clients, and doctors to patients. There are obviously cases in which one can have a duty of loyalty without a corresponding duty to a fiduciary. For example, while I certainly have a duty of loyalty to friends and relatives outside my immediate family, I generally owe them no legally enforceable fiduciary duty.

The harder question is whether fiduciary duties are always reducible to duties of loyalty. There is a great deal of debate in the literature about exactly what lies at the core of fiduciary duty. Courts and scholars have variously described fiduciary duty as (1) involving a ‘duty of care’, (2) fundamentally contractual in nature, and (3) nothing more than a collection of specific, narrower duties, such as avoidance of conflicts, and the obligation to treat beneficiaries of the same class equally and beneficiaries of different classes fairly. There is also an interesting strand of thought that does in fact view loyalty as the foundation of fiduciary duty. While it is beyond the scope of this study to resolve this issue in the law of agency, for the moment it is enough simply to raise the possibility of a connection between a loyalty-based theory of fiduciary duty and a (dis)loyalty-based theory of bribery.

5. Disloyalty and Bribery

In this section, I want to show how the concept of disloyalty just sketched might inform our understanding of the offense of receiving a bribe.

Receiving a Bribe as a Form of Disloyalty

In thinking about receiving or soliciting a bribe as a form of disloyalty, let us begin with what is presumably a paradigm case: $L$ is a legislator who has...

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66 The connection between fiduciary duty theory and the law of corruption is made explicit in Kathleen Clark, ‘Do We Have Enough Ethics in Government Yet?: An Answer from Fiduciary Theory’ (1996) University of Illinois Law Review 57.
been elected or appointed to represent a particular constituency. L is offered a substantial sum of money by X in return for L’s agreeing to vote for some piece of legislation that X favors, but which is directly contrary to the interests of L’s constituents. L accepts the payment and votes in favor of X’s favored legislation. In this case, we can clearly see that L has been disloyal to his constituents and to the ideals of his job. Loyal public officials are expected to resist the temptations that may come their way. They are expected to work in the best interests of their constituents or institutions, rather than in the interests of third parties who tempt them. Loyalty faces its most important test when temptation is strongest. To accept a bribe is to give in to such temptation, and therefore be disloyal.

Now let us change the facts a bit and see how far the idea of disloyalty will take us. Suppose that J is a judge presiding over a case involving X and Y, and that J accepts money from X in return for deciding the case in X’s favor, rather than on the merits (which would have favored Y). Clearly, J has violated her duty to decide cases impartially. She has misused her office. But has she been disloyal, and, if so, to whom or to what? The first thing to note is that, although J surely wrongs or harms Y by denying him the decision he deserves, J has not been disloyal to Y, since J never had a duty of loyalty to Y to begin with. Instead, we should say that J has been disloyal to her judicial office, to the ideal of impartial justice, or to the public. But in order to accept this characterization of the case, we need to believe that one can be loyal not just to other people but also to principles or ideals—an issue that has generated some controversy, as we saw above.

Next, let us imagine that B is a boxer who accepts a payment to throw a fight to his opponent. Unlike L and J, B holds no official office. But, as Michael Philips has put it in analyzing such a case, what B is ‘paid to do is act in a manner dictated by some person or organization rather than to act according to the understandings constitutive of his practice.” In this sense, we can say that B has been disloyal to the practice of boxing or to the ideals of athletic competition. But once again, this move is available only if we believe that it makes sense to talk about loyalty to ideals or principles, and not just to persons or groups of persons.

Distinguishing Between Breaches of Loyalty and Other Kinds of Breach

The kind of wrongfulness associated with accepting a bribe needs to be distinguished from two other kinds of moral wrongfulness with which it might be confused. First, it is not disloyal to accept payment to violate a ‘non-positional’ moral duty. That is, the act that is committed must involve a breach of duty arising out of some office or position or involvement in

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67 Philips, above n. 11, at 623.
some practice. Thus, it is not bribery for a hired killer to accept payment in return for violating her duty not to kill, since the duty not to kill does not arise out of a position or practice.68

Secondly, not even every breach of positional duty involves disloyalty. Judges, legislators, and other office-holders clearly breach positional duties when they abandon impartiality or make decisions on the basis of frivolous or selfish reasons. Witnesses also breach a positional duty when they lie on the witness stand. All of these acts are wrongful in their own way, but none of them involves disloyalty per se. Disloyalty requires that the agent charged with being loyal ‘go over’ to the other side: that is, act in a way that is intended to further the interests of someone or something other than the party or cause to which he is charged with being loyal. Where the official or witness is merely being lazy or malicious, and no third party is involved, there is no disloyalty.

Disloyalty Defined in Reference to Scope of Positional Duty

In determining whether someone has committed bribery, it is necessary to determine whether he has in fact violated a positional or practice-related duty. For example, if W, a waiter in a restaurant, accepts money from C, a customer, in return for giving C a better table than he otherwise would have received, we cannot know whether W has accepted a bribe unless we know exactly what W’s position entails, including whether he is under any duty to assign tables ‘impartially’. It may be that W’s duty is merely to provide adequate service to some designated group of customers. On the other hand, if W accepted money from C in return for ignoring all of the other customers and attending exclusively to C, then it seems that W would have breached a positional duty.

Focusing on the scope of the alleged bribee’s positional duty is also helpful in understanding what appears at first glance to be a kind of cultural variation in attitudes towards bribery. It is often assumed that bribery is less tolerated in modern Western democracies than, say, in Russia or certain countries in the Third World.69 And, indeed, one of the goals of legislation such as the U.S. Foreign Corrupt Practice Act and the OECD Anti-Bribery Convention is to encourage the proliferation of anti-bribery norms that will apply universally.

So, are people in such societies really more inclined to commit bribery, or more tolerant of the act, than people in the West? At the risk of armchair

68 This point is also made by Philips, above n. 11, at 622.
anthropologizing, let me suggest that the cultural differences here may have less to do with the degree to which bribery and disloyalty are tolerated than with the different ways in which positional duties are defined in various systems. For example, if a customs agent at the border crossing between (let us say) Nigeria and Cameroon is more likely than her counterpart at LAX to ‘look the other way’ in return for a cash payment, it may be simply because the two agents have different understandings of the duties their respective positions entail, rather than because they have different views about the wrongfulness of bribery (or disloyalty) itself.

Accepting a Bribe to Do the ‘Right Thing’

In this section, I want to consider several additional cases that may at first seem problematic for my (dis)loyalty-based theory of bribery. First, imagine that L, a legislator, accepts a payment to do precisely what is in the best interests of her constituents and, in fact, in the best interests of the polity as a whole. Secondly, imagine that G, a prison guard at Auschwitz, accepts payment in return for agreeing to allow a prisoner to escape. Thirdly, consider the Singleton scenario itself, in which the witness Douglas was given something of value in return for a promise to offer (true) testimony in a criminal trial. In all three cases, it might be argued, the bribee has taken money to do ‘the right thing’. Which, if any, of these cases can properly be said to involve taking a bribe?

In the first case, does it make sense to say that L, who was doing what was in fact in the interests of his constituents, was disloyal? In arguing that bribery involves a form of disloyalty, I have adopted a view that is similar to that adopted by the English Law Commission’s 1997 Consultation Paper on Corruption. According to that paper, the paradigm of bribery involves three parties: A, the briber; B, the recipient of the bribe (‘the bribee’); and C, B’s principal. The purpose of A’s bribing B is to cause B to act in A’s interest, which in turn is likely to involve B’s acting against the interests of C, to whom B, as C’s agent, owes a duty of loyalty.

Curiously, however, the Consultation Paper’s characterization of the ‘essential character of corruption’ was rejected by its successor, the Commission’s 1998 Report on Corruption. According to the latter, ‘an agent can act corruptly by doing something which is not, and which the agent knows is not, contrary to the principal’s interest’. One example is where the agent ‘demand[s] a bribe for doing what the agent’s duty to the principal already requires the agent to do’. Another is when ‘of a range of choices open to the agent, two or more appear equally advantageous to the

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70 A similar argument is offered in Danley, above n. 11, at 22.
principal, and the agent is bribed to choose one of these acceptable options rather than another. Indeed, the Report views these hypotheticals as so problematic that it ‘concl[u]es that a definition [of corruption] couched in terms of breach of duty, or even in terms of the principal’s best interest as the agent perceives them, would be too narrow’.

In my view, the Report is wrong to suggest that these hypotheticals undermine a loyalty-based theory of bribery. The Report’s understanding of what loyalty entails is overly narrow. In cases such as those hypothesized, the wrongfulness of L’s conduct comes not from the actual decision that L makes, but rather from the fact that L makes her decision based on the wrong sorts of reasons. The duty of loyalty that L owes to her principal is not to make one particular decision or another, but to make decisions because they are in her principals’ interest. If L accepts money from a briber to do an act that is in the briber’s interest, but which also happens, fortuitously, to be in the interest of her principal, it is hard to see how we can say that she has been true to her principal. Accordingly, I would conclude that L would be liable for bribery under a loyalty-based theory, notwithstanding the fact that she voted ‘correctly’.

In the second case, G, the prison guard, accepts money to allow a prisoner to escape from Auschwitz. Can we say that G has been disloyal and that he has therefore taken a bribe? Recall the two senses in which ‘loyalty’ and ‘disloyalty’ are used: to the extent that G has taken money to work against the interests of the Nazis, he is being disloyal in the descriptive or empirical sense of the term, but not in its moral or normative sense, since one cannot be loyal in the moral sense to a thoroughly evil principal. Thus, in determining whether G has taken a bribe, we need to know which kind of disloyalty bribery entails—descriptive or normative. I suggest that the offense of bribery should be understood as entailing disloyalty in the normative sense, since it would be a perverse use of the criminal sanction to prosecute someone for betraying a

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74 Cf. R A Duff, ‘The Limits of Virtue Jurisprudence’ (2003) 34 Metaphilosophy 214 (‘A judge’s duty is to decide the cases that come before her through a process that accords with the requirements of justice… [A] judge who decides in favour of the party who is legally entitled to win only because she was bribed to do so has failed to observe a basic requirement of natural justice, that she attend only to legally relevant considerations in making her decision’ at 219).

75 I say fortuitously, although one could imagine a legislator or judge who would accept a bribe only in circumstances in which he was able to vote the ‘correct’ way.

76 Maimonides, the great twelfth century Talmudic commentator, makes a similar point: bribery involves an intention to pervert justice, and such intention exists even when the judge is bribed to acquit the innocent or convict the guilty. Maimonides, Mishnah Torah, Sanhedrin 23:1 (described in Menachem Elon, A Jewish Law: History, Sources, Principles 1640 (trans. Bernard Auerbach and Melvin J. Sykes; Philadelphia: Jewish Publication Society, 1994), 1641). Thus, it is not surprising that modern Israeli bribery law makes explicit ‘that the crime of bribery takes place not only when the purpose of the bribe is to induce an unlawful act or to pervert justice, but also when the object is to obtain performance of a lawful act which it is the duty of the recipient to perform in any case.’ Israeli Penal Law, Art. 5, § 293(7).
What’s Wrong With Bribery

loyalty that was so misplaced from the start. To be sure, G, by doing the right thing for the wrong reasons—that is, allowing the prisoner to escape because he was paid to do so, rather than out of any genuine moral commitment—acts in a manner that is formally similar to the way in which L acted in the previous hypothetical. But if I am right that bribery requires disloyalty in the moral sense, then we should say that G has not accepted a bribe.

Finally, let us consider the case in which a witness such as Douglas agrees to offer (truthful) testimony in return for a promise of leniency. Like L (the legislator who accepted money from a third party to do an act which, fortuitously, was in the best interest of his constituents), Douglas seems to have done the right act for the wrong reason. Witnesses are supposed to offer true testimony in order to aid the truth-finding function of the trial, not because they are paid to do so. But to recognize this, is different from saying that Douglas has been disloyal. The problem is that, unlike L, who violated a well-defined duty to act in the interest of his constituents, a witness’s duties are much less clear. Douglas, a private citizen with knowledge of a crime, agrees to waive his right to silence and testify in return for something of value. At a stretch, we could perhaps say that Douglas has somehow been disloyal to himself. But if this really is disloyalty, it is of the most elusive kind, and not the sort of disloyalty that is, or should be, the concern of bribery law.

Coerced and Coercive Acceptance of Bribes

There are two final situations I want to consider in which the moral status of receiving a bribe may deviate from the norm. The first occurs when the putative bribee is also the victim of the brieber’s coercion. The second occurs when the bribee herself uses coercion against the brieber. (Cases in which the putative brieber is the victim or user of coercion are considered below.)

Consider the case of retiring Congressman Nick Smith, whose son, Brad, was running to take his father’s seat. In the midst of an intense lobbying effort by the Bush administration to pass its Medicare bill, Nick was allegedly told that certain “business interests” would give Brad $100,000 in return for his father’s vote. When Nick declined, he was allegedly told that fellow Republican House members would make sure that Brad would never win his race for Congress. Thus, in addition to being offered something attractive if he cooperated, Nick was also threatened with something unattractive if he did

77 Of course, as the existence of expert witnesses suggests, one can presumably testify both for money and in order to promote truth-finding.

78 Cf. my brief discussion of the extent to which moral duties to self are comparable to moral duties to others, in ‘Cheating’, above n. 47, at 154 and n. 31.


not. Had he accepted the alleged bribe, would the fact that he was pressured into taking it give him a defense? The case is a complex one. Recall that the real test of loyalty is temptation. Had Nick given in to temptation and agreed to vote against the best interests of his constituents under such circumstances, he would surely have been disloyal to those constituents. On the other hand, it seems that Nick’s loyalty to his constituents was in competition with the loyalty he presumably owed to his son. Moreover, had the threat been more dire—say, if his colleagues had threatened to kill Brad unless Nick voted their way—then we might well conclude that such coercion should relieve him of whatever competing moral or legal duties he might have.

Now let us turn the tables and imagine a case in which a police officer, $P$, offers, in return for a payment, to forgo arresting $D$ for a crime that $D$ has committed.\(^{81}\) (Another way to put it is that $P$ threatens to arrest $D$ for a crime that $D$ has committed unless $D$ pays $P$.) Here, $P$, the would-be bribee, is using coercion to obtain a bribe. As such, $P$ has simultaneously committed bribery and some additional offense, such as extortion, criminal coercion, or blackmail.\(^{82}\)

### 6. What’s Wrong with Offering or Giving a Bribe?

So far, we have been focusing on the moral wrongfulness of accepting a bribe. At this point, we need to change gears and inquire into the moral wrongfulness of offering a bribe, which under modern law merits an equivalent punishment. Because the briber typically breaches no duty of loyalty,\(^{83}\) our analysis of moral wrongfulness will have to follow a different course. The question I want to ask is: what exactly is wrong with offering or giving a bribe? In this section, my focus is on the idea that offering a bribe involves inducing another to do a wrongful act.\(^{84}\)

**Inducing Another to Be Disloyal**

Most of the theoretical literature on the wrongfulness of inducing another to do wrong focuses on the wrongfulness of doing so by means of coercion or exploitation. But while there certainly are bribes that involve coercion and

\(^{81}\) The hypothetical is James Lindgren’s, above n. 22.


\(^{83}\) I say ‘typically’ because there could be cases in which a briber’s offer of a bribe violates a duty of loyalty to the briber’s principal—for example, if the briber were subject to ethical guidelines that forbade the offering of bribes.

\(^{84}\) For other possible theories of why accepting or giving a bribe is morally wrong, see text accompanying nn. 46–7 above.
What’s Wrong With Bribery

exploitation, neither device is necessary. Thus, for the moment I want to ask two less frequently asked questions. First, why is it wrong to induce another to do wrong, or attempt to induce another to do wrong, even when one does so without engaging in coercion or exploitation? Secondly, is there something in particular wrong about inducing another to do wrong by offering such person something of value in return?

As a start, it seems obvious that the wrongfulness of inducing another to do wrong is in some way derivative of the wrongfulness of the act being induced. Thus, it is clearly worse to induce X to commit murder than to induce her to park in a no-parking zone. On the other hand, we should not assume that inducing another to do a wrongful act and doing the act are necessarily morally equivalent. As bad as it is to induce another to kill, it is likely that we would reserve our most serious condemnation for the actual killer, since it was she who made the ultimate decision to pull the trigger. In comparing the wrongfulness of inducing a wrongful act and doing the act, we will certainly want to assess the circumstances of the relationship between inducer and doer, particularly the balance of power between the parties, and the extent to which one party can be viewed as the moving force behind the wrongdoing. (In the case of bribery itself, such nuances are captured in part by the particular choice of words we make in describing a bribe as having been ‘solicited’ ‘taken’, ‘sought’, ‘demanded’, ‘accepted’, or ‘received’.)

The criminal law must often confront questions about how to treat parties who influence, solicit, provoke, incite, advise, counsel, command, encourage, procure, instigate, or persuade others to commit a crime. It is not possible here to sort out all of the complex differences among solicitation, attempt, conspiracy, and accomplice liability, except to say that inducers are sometimes treated as seriously as those they induce to engage in wrongdoing, and sometimes not.

In the case of bribery, assessment of the briber’s wrongfulness is, in theory at least, fairly straightforward. If X offers Y money in the belief that doing so will induce Y to breach a duty of loyalty, then X has done a morally wrongful act. But if X does not believe that his offering Y money will induce Y to breach a duty of loyalty, then it would seem to follow that X has not done a wrongful act. Of course, in practice, determining whether X has such an intention in a case in which, for example, he has made a large contribution to the re-election campaign of a judge before whom he often appears, is likely to be difficult.

85 Presumably, this intuition is reflected in laws that prohibit the application of the death penalty to non-trigger persons. See generally Tison v Arizona, 481 U.S. 137 (1987).
86 This list of terms is derived from Sanford H Kadish, ‘Complicity, Cause and Blame: A Study in the Interpretation of Doctrine’ (1985) 73 California Law Review 323, 343.
88 See generally Daniel H Lowenstein, ‘When is a Campaign Contribution a Bribe?’ in William C Heffernan and John Kleinin (eds), Private and Public Corruption (Lanham,
Thus, returning to an earlier hypothetical in which the duties of a customs official in Cameroon were assumed to be different from the duties of her counterpart in Los Angeles, I would argue that a Western business person who gives a ‘grease payment’ to a Cameroonian customs officer in such circumstances has not induced a breach of loyalty, and therefore should not be viewed as having committed bribery either.

Coerced and Coercive Giving of Bribes

In the discussion of why it is wrong to accept a bribe, I considered one case in which a putative bribee was coerced and another case in which a bribee did the coercing. Now, in the interest of completeness, I want to consider those circumstances in which being coerced and coercing are relevant to the moral status of the briber.

First, let us return to the case in which a police officer, P, offers not to arrest (or threatens to arrest) D for a crime that D has committed if (or unless) D pays P some amount of money. In the event that D agrees to pay P the money demanded, it would appear that D has satisfied the formal requirements of being a briber. But, from a moral perspective, it may seem harsh to hold D to account, given that he has been the victim of coercion.

Secondly, there are also cases in which bribers themselves use coercion. In the Nick Smith case described above, it is arguable that his fellow congressmen committed not only the morally wrongful act of inducing him to breach his duty of loyalty to his constituents, but also the morally wrongful act of using coercion to get him to do so. Once again, in such cases there should be no theoretical bar to charging the briber with both bribery and extortion.\(^89\)

7. Conclusion

In the foregoing discussion, I have sought to describe some of the moral complexity that surrounds our conception of bribery. One of the keys to understanding, I have argued, is to recognize the distinction between

Mod: Rowman & Littlefield, 2004), 127. For a discussion of a recent case that presents this ambiguity in dramatic fashion, see Andrew Longstreth, ‘Mississippi Maehstrom’ American Lawyer, August 2004, 76 (concerning controversial bribery prosecution of Paul Minor, a prominent Mississippi lawyer who gave campaign contributions to local judges). See also U.S. v Brewster, 506 F.2d 61 (D.C. Cir. 1974) (discussing application of bribery statute in context of putative campaign contributions); U.S. v Biaggi, 909 F.2d 662, 695 (2d Cir. 1990), cert. denied, 499 U.S. 904 (1991) (distinguishing between campaign contributions and illegal transactions by considering evidentiary factors such as ‘whether the contribution was reported, whether it was unusually large compared to the contributor’s normal donations, whether the official threatened adverse action if the contribution was not made, and how directly the official or those soliciting for him linked the contribution to specific official action’).

\(^89\) The extortion aspects of the Nick Smith case are dealt with in my article, ‘Theft by Coercion’, above n. 82.
bribe-taking (which involves a breach of loyalty) and bribe-giving (which involves inducing another to breach such a duty). Such distinctions, I believe, are of more than merely academic interest. As the analysis of the Singleton case illustrates, there are very real issues of doctrine that turn on fairly fine features of moral analysis, such as whether a witness should be viewed as having taken a bribe if he accepts something of value in return for doing what is arguably 'the right thing'. As I hope to have shown, only if we are clear about exactly why it's wrong to commit bribery can we be clear about exactly where the outer limits of the offense should lie.