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September 2012

The Judgment of Political Corruption

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The Judgment of Political Corruption

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ABSTRACT: Criminal justice systems sometimes treat public officials who commit political crimes (like bribery) more leniently than private citizens who commit street crimes (like burglary)—even when the harms of the former crimes and criminals are greater than the harms of the latter. The misdeeds of politicians, in fact, are often not labeled as crimes or addressed by the criminal law, but are often addressed by administrative law or administrative bodies run by fellow members of those who've committed such misdeeds. This article examines these possible double standards by providing an analysis of political corruption from a critical legal perspective: in section I, it provides conceptual guidelines to show how corrupt politicians and policies should be judged (detected and recognized) more clearly, in accordance with their harmfulness and wrongfulness; and in section II, it provides practical and jurisprudential guidelines to show how political corruption should be adjudicated (enforced and punished) more firmly, in proportion to the benefits and burdens that corrupt officials wrongly garner for themselves and foist upon others, respectively. After considering the "disrupted balance of benefits and burdens" model of punishment, I conclude by arguing that, if this model is valid, it should be applied to political offenders no less than street offenders.

INTRODUCTION: THE PROBLEM OF POLITICAL CORRUPTION

In recent decades, various critical legal theorists and radical criminologists have offered critiques of the existing legal-political order, including critiques of the mechanisms whereby errant public officials and power holders are not adequately held accountable by their fellows.[1] In this paper, I hope to lay a more solid foundation to this critical tradition, by analyzing the problem of political corruption and, in particular, by showing how certain conservative premises (involving John Stuart Mill's Harm Principle and retributive claims about deserved punishment for wrongful harm) can, if traced out logically, lead to some radical conclusions and solutions to this problem.[2] To see how these premises may offer robust help against this problem, we will start by formulating it more precisely, in terms of a set of claims that may be designated as the Fox Guarding the Henhouse (FGH) thesis:

> **FGH:** The ruling ideas and institutions of each age are often those of its ruling class. As a manifestation of this pattern, consider the ideas and institutions that are prevalent in states like early industrial England and America (during, say, the U.S. Reagan and Bush administrations)—in relation to crime. The criminal justice systems of such capitalist states are governed by laws and institutions that support the self-serving interests of the ruling economic, legal, and political elites. Like foxes guarding henhouses, these elites do not allow themselves to be handcuffed by laws or measures that would limit their own unfair advantages and excesses. Rather, they enact criminal laws and policies that deal quite firmly with the crimes of the poor and powerless, while enacting fewer and more lenient laws and policies that address their own misdeeds. Through such emphases, crackdowns, and outcries against street crimes (expressed through the legal and penal systems and the media), attention is thereby diverted away from their own suite crimes and away from deeper structural inequities.

Insofar as this thesis is Marxist in origin, it occupies some ambiguous middle ground between social scientific analysis (as diagnosis) and suspect social prediction (as prognosis). As a social diagnosis of the past couple centuries of penal history, it has largely proven correct—in relation to ruling institutions of the powers that be, if not also

in relation to their ruling ideas. In his *Crime and Punishment in American History*, for instance, Lawrence Friedman has verified these types of historical trends: how growth and innovation in the criminal justice system from mid-19th to early 20th century America was directed mainly against crimes and criminals of the lower class; how much of the anti-trust legislation and anti-corruption policies spawned from the late 19th century Robber Baron era through to Roosevelt's New Deal society often ended up being either toothless tigers or tools used against unions and workers' collectives; how, throughout these periods, wealthy suspects were consistently better able to avoid arrest, and to mount more effective legal defenses if arrested, than poorer suspects; etc.[3] Scholars like Jeffrey Reiman have also shown how these historical trends have continued up to the present**:** how, for the same criminal behavior, the poor are still more likely to be arrested; if arrested, more likely to be charged; if charged, more likely to be convicted; if convicted, more likely to be sentenced to prison; and if sentenced to prison, the poor are more likely to be given longer prison terms than members of the middle and upper classes who have committed the same crimes.[4] Reiman documents how

> for the same crime, the system is more likely to investigate and detect, arrest and charge, convict and sentence, sentence to prison and for a longer time, a lower-class individual than a middle- or upper-class individual. [And] between crimes that are characteristically committed by poor people (street crimes) and those characteristically committed by the well-off (white-collar and corporate crimes), the system treats the former much more harshly than the latter, even when the crimes of the well off take more money from the public or cause more death and injury than the crimes of the poor. To support this, we compared the sentences meted out for robbery with those for embezzlement, for grand theft, and Medicaid provider fraud, and we looked at the treatment of those responsible for death and destruction in the workplace as well as those responsible for the savings and loan scandal and the Watergate crimes.[5]

Of course, even if such trends show that the Fox Guarding the Henhouse thesis (FGH) has given accurate diagnoses of past developments, this does not imply that FGH will give an accurate prognosis of future developments. The future might improve, even in

states characterized by robust levels of deregulation, privatization of (previously public) services, and unfettered business activity. Even in such states, the powerless and disenfranchised might come to receive just as effective counsel as the powerful and well-connected; poor offenders might come to be punished no more firmly than wealthy offenders; minorities might no longer be overrepresented in juvenile courts, prisons, and death row; and FGH and its leftist doomsayers might thus still be proven wrong; etc.

Although such optimistic forecasts are possible, they do not seem very likely, at least in the near future and in very free market environments. But rather than focusing on contingent questions about what the future holds or about whether FGH will prove false, we will focus on this more constructive question: *If* FGH becomes false, and so *if* true progress and even-handed justice are attained in these criminal justice systems (so that powerful and well-connected criminals do not end up escaping detection and punishment any more than poor criminals), then *what form must this progress necessarily take*? Before answering, a little more should be said to frame the question.

Consider these three historical assumptions. Assume that: **1)** for the last couple centuries, criminal justice systems in most laissez-faire states have primarily targeted poor criminals and devoted most of their resources to fighting individual *street crimes* (like murder, assault, robbery and burglary, etc.); **2)** these systems have only more recently begun to cultivate strategies and resources to fight major *white collar crimes* (like securities and exchange fraud, illegal competition, insurance fraud, deceptive practices, false statements, etc.); and **3)** these systems have hardly begun to clearly recognize, much less effectively fight, systemic *political corruption* (including bribery, campaign contribution injustices, quid pro quo improprieties, government revenue fraud,

etc.). Combining these claims, we can say that the war on crime has been waged more against poor criminals, less against white collar criminals, and that it has only recently begun to be waged against corrupt politicians, in any effective or systematic way (except perhaps sporadically, following public scandals like Tammany Hall, Teapot Dome, the Profumo affair, Watergate, etc.).[6]

Part of the explanation for these assumptions (and especially for the third, which will hereafter be the focus) seems to lie in the fact that the specific nature, content and wrongness of political corruption remains elusive to most citizens if not to most lawmakers or jurists. To illustrate: how many know how much damage political and white collar crime causes, in comparison to street crime? How might we distinguish truly corrupt or illicit policies from public policies that are well-intended, but merely fail to serve a wider range of public interests? What exactly do recent laws stipulate about illegal (versus legal) campaign contributions, and where should the line of such (il-) legality be drawn? Are conflict of interest laws as clear or as clearly inviolable as, say, laws against robbery? How do the harms caused by, say, environmental infractions and workplace safety violations compare in magnitude with the collective harms of assault and battery? What are "impeachable offences" and what constitute "high crimes and misdemeanors"?[7] etc.

The main point here is that, not only are answers to such questions hard to come by, but the underlying legal and normative principles that should ground these questions and laws are themselves murky and ill-defined. If progress is going to be made with effective measures against political criminals and corruption, and so if the Fox Guarding the Henhouse Thesis (FGH) is going to be falsified, then our conceptual legal orientation

towards political corruption needs to be sharpened—so that its wrongful nature, extent and harmfulness all become clearer. Accordingly, the next section is devoted to clearer recognition of political corruption and of the ways that it can be just as pernicious as street and organized crime.

I
JUDGMENT AS ASSESSMENT: RECOGNIZING CORRUPT POLICIES AND POLITICIANS

It will not suffice to point out, as in some legal positivist vein, that political corruption is simply lawbreaking committed by public officials. This simplistic approach obscures the essential content and wrongness of political crime, since its nature and influences are in many ways distinct from other types of crime, and since many corrupt acts are not prohibited or labeled as criminal until much later after they are routinely committed, and when their harmful, criminal nature then becomes only too apparent. (Consider how long it took to abolish slavery and various Jim Crow and sexist practices. And in many regions, various forms of bribery, political patronage, nepotism, etc., are still routinely condoned rather than prohibited.) Going beyond this vacuous point about lawbreaking by officials, then, we might commence by examining two possibly essential components of corruption, namely, its harmfulness and wrongfulness. As will be shown, both of these components are necessary to properly recognize certain public behavior as being truly criminal, and for the following reasons.

Even if some public behavior or policy is harmful, but does not contain an element of wrongfulness, these harms might result merely from an error in judgment, or from a distorting political ideology, or from a misfortunate turn of events, or essentially from some type of political tort—that lacks any *mens rea* element of culpability that is really

criminal in nature. Take the case of ideology, for example. Many American politicians are laissez faire ideologues, who believe that the best government is the smallest possible government (except allowing for security and keeping of the peace), and that most public interests are best served by the benign, invisible hand of market mechanisms. So even when policies driven by such ideologies turn out to be far from benign and harmful (as when our economy became nearly depressed through letting the housing and banking industries govern themselves so much, instead of overseeing them with more stringent government regulations), arguably this might be due to ideological blindness rather than to greed or corruption. Let me further concede the challenge that policy forecasting presents, to politicians who might genuinely be interested in achieving benign policy outcomes and avoiding harmful outcomes. As Martin Wachs explains, policy makers can utilize the most recent, extensive data and the most competent social scientists, they can be innocent of any willful or ideological bias, recklessness, or intentional negligence of risk factors—and yet they can still end up promoting policies that cause a fair amount of public harm.[8] At least where such exculpatory factors can be established, I concur that it might be wrong and might damage the political process too much to try these well-meaning but unfortunate policy makers as criminals. But keeping these provisos in mind should still not blind us to all the cases wherein harmful public policies *do* issue from wrongful, criminal motives, from policy makers who are driven by greed and corruption as much as by anything else. So even if harmfulness without wrongfulness is not sufficient for political corruption, wrongfulness is certainly a sign, or necessary condition, of corruption.

Now consider the other possibility: even if public behavior or policy decisions contain an element of wrongfulness or criminal intent, but are not harmful, this might not qualify them as being truly criminal or punishable either, but instead might involve trivial instances of immorality or civil liability. So as not to be naively unconcerned about the dangers of legislating morality, or of imposing punishments for harmless wrongdoing or victimless crimes, then, we should acknowledge that some public behaviors might be immoral and yet non-harmful, and thus not suitable for applying the strictures of the criminal law against.[9] The following historical point serves to illustrate this possibility. Theorists of public administration in the 1950s and 1960s sometimes argued that, when low level officials accept minor bribes for public services rendered, this might have engendered some benefits, rather than harms, to those involved. Such "bribes may give an incentive to low level officials to do their job more effectively"; such under-the-table gifts may even enhance efficiency by providing quicker or better services to clients who value them most; etc.[10] The benefits of such behavior might exceed the costs, it was argued, especially in the context of states with very inefficient administrations, or of cultures whose social mores include extensive and deeply embedded systems of harmless, reciprocal gift-giving. (These arguments are challenged below.)

Perhaps only moral dogmatists would deny the possibility of such benign outcomes. If so, it might represent mere prudishness to label such behavior as criminal and to insist on penalizing officials who engaged in it. Since these benign outcomes (of at least such low level corruption) seem possible, this suggests that it might be simplistic or imprecise to accept wrongness by itself—without an accompanying condition of harmfulness—as a sufficient condition for the charge of political criminality. This means that that

wrongfulness without harmfulness does not necessarily imply political crime or corruption, either. Putting these twin insights together, we might conclude that both these elements—harmfulness *and* wrongness—are individually necessary but jointly sufficient conditions of political crime. To consider this, these two elements will now be examined in closer detail.

IA. *The Harmfulness of Political Corruption*

In opposition to aforementioned arguments from the 1950s and 1960s, most recent theorists of law and public administration see even minor/low level corruption as being not so minor or benign, as entailing more net long term costs (despite possible short term benefits), and as often causing *extensive* harm. In her systematic study of "When is Corruption Harmful?", e.g., Susan Rose-Ackerman provides an extensive list of the harms and costs of political crime.[11] For instance, she explains how: corrupt bureaucracies foster a more uncertain business climate, and more unpredictable outcomes, than legal ones; those who seek to obtain services have no recourse to recoup losses when corrupt officials do not live up to their side of the bargain (357); this uncertain climate discourages local investment and encourages capital flight and foreign investment (366); "bribery is clearly not an efficient way to allocate benefits, even to the qualified" (358); corrupt markets do not work as efficiently or competitively as legal markets (357); criminal officials often introduce bloated transaction costs and sunk costs into government (358, 362); scarce benefits that should go to qualified recipients are detoured by corrupt officials to unqualified recipients (359); initial crimes frequently do not occur by themselves, but metamorphose into other crimes and costs as officials engage in extortion, theft, document destruction, deception, etc. in order to prevent

disclosure of the original crimes (359) and, similarly, corruption routinely spreads out and metastasizes into other areas and activities (360); corrupt public systems often give officials incentives to create onerous back-ground conditions that they then take payments to correct (360); "the overall legitimacy of the government suffers" (361); "disadvantaged citizens and taxpayers feel [and are] unfairly treated" (361); ingrained corruption regularly holds back needed state reform, which would otherwise make the bureaucracy more efficient and the economy more open and competitive (361); "firms that benefit from payoffs resist efforts to increase the clarity of rules and laws" (361); systemic corruption limits the numbers of bidders, favoring those with inside connections and those who will hide the crooked deals, over candidates that might prove more competent, productive and honest (362-3); in criminal administrations, even talented officials may concentrate their efforts on rent seeking rather than on productive activities (365); and so on. A consensus is emerging among theorists, then, about the myriad ways: that political corruption has deleterious effects on the economy; that its long term costs far exceed its short term gains; and that these costs to the many far outweigh profits that may flow to a few corrupt beneficiaries.[12]

Furthermore, most of these costs considered have not included the *moral and social* costs that result from political crime. What is at stake here is not only the way that corruption entails greater material loss; what should also be emphasized (as part of the moral and social costs) are the unjust maldistributions of public resources that eventually result, along with extensive damage to public institutions and to public trust in these institutions. As Amartya Sen has pointed out, even if a state ends up achieving a higher GDP because of certain policies, this does not automatically mean that these policies are

legitimate—especially if, say, only a narrow 1% of the population comes to enjoy this heightened GDP, while a burgeoning majority comes to experience greater poverty, starvation, and misery as a result of these policies.[13] If the policy makers, along with their friends, families, (ex-)colleagues and business partners, just happen to be part of the "lucky 1%" that profit from this growth, then we should suspect that the policies are not the product of concern for national economic growth as much as for illicit self-enrichment.

These kinds of grossly inequitable outcomes illuminate one of the main ways to distinguish illegitimate policies and politicians from truly public ones: if the policies have the effect of enriching a narrow range of vested interests in conflict with the public interest, or if they benefit only a narrow interest group or constituency at the expense of the broader constituency (who elected the politician and whose interests s/he is supposed to represent), and furthermore if this politician has suspicious connections with the narrow profiteers, then this should send out flashing warning signals that they might constitute criminal policies more than public policies, pushed by corrupt servants of private interests rather than by true public servants.

James Sterba has offered a similar framework that might help to reveal criminal (versus truly public) policies and policy makers.[14] Sterba makes a distinction between people's basic needs (including needs for nutrition, healthcare, shelter, education, and economic survival) and their luxury, or non-basic, needs. And in assessing the moral legitimacy or illegitimacy of policies that have differential impacts upon competing groups and their needs, he derives the following scenarios and conclusions (assuming that these groups have otherwise equal entitlements to the resources necessary to meet their

needs): **a)** policies that sacrifice the luxury "needs" of $group_1$ to meet the basic needs of $group_2$, he reasons, will normally be legitimate (again, as long as $group_1$ does not have greater entitlement to the relevant resources than $group_2$). **b)** policies that sacrifice the luxury needs of $group_1$ to meet the luxury needs of $group_2$ will normally be legitimate; **c)** policies that sacrifice the basic needs of $group_1$ for the basic needs of $group_2$ will be legitimate *only if* $group_2$ has a greater entitlement to the relevant resources than $group_1$; and **d)** policies that sacrifice the basic needs of $group_1$ for the luxury needs of $group_2$ will normally be illegitimate.

Without getting sidetracked by contingencies that could arise in various situations here, let me apply these conclusions directly to our assessment of criminal policies. Assume that policy makers have the discretion to use some set of resources as they see best—as long as it serves the public good in their jurisdiction. Let us assume, too, for the sake of simplicity, that the two groups that comprise "the public" here are of roughly equal size. Under these conditions, it seems that any policies that would be chosen by our policy makers under scenarios *a, b and c* all comprise the so-called hard choices or tragic choices of public administrators. And as such (assuming that other conflicts of interest, which I discuss below, are not present), I freely admit that whatever policies or policy makers emerge here are *not* necessarily criminal in nature.[15]

For instance, if Representative Connie can offer a contract to Mary Kay Cosmetics to build a factory in $group_1$'s neighborhood, or can offer a contract to Marvel Comics to build a factory in $group_2$'s neighborhood, but Connie cannot do both (to illustrate scenario b, and assuming that these two businesses would generate roughly equal jobs and benefits to their respective neighborhoods), then either decision would not represent

criminal behavior on Connie's part. Or again, if Connie discovers a new possibility, and chooses to offer a contract to a Friendly Homes to build a stretch of affordable houses in $group_2$'s neighborhood (which, we may imagine, has a fair number of homeless people and low income residents), instead of offering the contract to Mary Kay (to illustrate scenario a), then again, this would not represent a criminal policy choice. For it would seem clearly permissible, if not morally obligatory, for Connie to choose the policy that helps meet $group_2$'s basic needs (not only for jobs but also shelter), rather than choosing a policy that would meet $group_1$'s non-basic needs (for jobs and cosmetics). But let us now focus on scenario d. Imagine that Connie offers the contract to Mary Kay *instead* of Friendly Homes (thus essentially sacrificing $group_2$'s needs for jobs and shelter for $group_1$'s needs for jobs and cosmetics). Or imagine that $group_2$ has a population a thousand times greater than that of $group_1$. In this case, it would seem irrational or at least strangely inexplicable for Connie to support the Mary Kay policy. What were the reasons for Representative Connie's policy choice? At this point, especially if he was not forthcoming about these reasons, or his reasoning did not seem to be transparent or make sense, then we should suspect irrationality in his policy choice, if not blatantly criminal bias in his motives. For as Sterba would point out, sacrificing the basic needs of one constituency for the non-basic needs of another (roughly equal) constituency would normally be illegitimate. Or as consequentialists would insist, sacrificing the needs of the many for the needs of the few would also be plainly illegitimate (again, especially if the few were no more entitled to the resources involved than the many). So if some official or supposed representative pushes policies that (would) lead to very narrow or sub-optimal

need satisfaction, or a clear net balance of deprivation or harm, then we have every right to suspect him of criminal negligence or incompetence, if not of criminal intent or malice.

If the following types of conditions hold, then we would be even more justified in suspecting him of blatantly criminal behavior and intent. Imagine, in addition to the previous conditions, that Connie used to be a board member of Mary Kay, or that Connie's spouse holds major stock options in Mary Kay, or that Mary Kay has given sizable contributions to Connie's re-election campaign. Under these circumstances, Connie's behavior seems to have clearly crossed a line of criminality, since the harmfulness or sub-optimality of his policies are plainly conjoined with an element of wrongness, viz., the moral stain of *conflicts of interest*. So both of our aforementioned elements (harm and *mens rea* wrongfulness) of political crime are now present; and as such, they become jointly sufficient to judge him and his policies as criminal, rather than merely as unfortunate or sub-optimal.

Some comments about assessment of the harms that result from public policies are warranted here. Being able to more accurately quantify harms (to better specify both the effects that follow from various public policies and the populations that are so affected) is one of the greatest current challenges for the social sciences. Public administrators and the public at large have suffered too long from clouds of mystery that surround public policy, in terms of the expected outcomes and also stated goals of these policies. Some of the problem here is that even apparently straight-forward policies have numerous variables and effects, so that the social sciences need more time to learn how to trace different pathways of causation and to establish which causes, and which combinations of causes, produce which social outcomes.[16] But much of the problem here lies with

politicians, who are not more transparent about their policy objectives. (For example, did the Bush Jr. administration wage war in Iraq in response to 9/11, to fight terrorism and root out weapons of mass destruction? to liberate the Iraqis from a repressive dictator? to support the spread of democracy in the Middle East? to establish a military foothold in the area? to stabilize or entrench U.S. control of oil and energy markets? to enrich cronies in the oil, defense, and infrastructure-building industries? or some combination of these? The *real* policy objectives here were never made clear, and seemed to keep shifting.) If politicians were more open and honest, then they would often be forced to modify their original objectives (considering how biased, harmful, or wasteful these can be) and adopt alternate means and policies far better suited to achieve legitimate objectives.

Again, illegitimate public policies and political crime can be every bit as harmful as street crime. In fact, various evidence documents that--whether measured in loss of life, limb, or property--white collar crime is more harmful than *all* street crime put together.[17] How exactly is this relevant to political corruption? Well, not only is political corruption a major species of white collar crime, but much of the latter would not exist except for the aiding, abetting, and/or allowing of the former. Much white collar crime is due to the calculated absence of legislation that would rein it in, and to biased or grossly inadequate regulation, with regulators not merely missing problems and abuses, but often turning a blind eye to them or actively supporting them. (E.g., Enron's escapades could not have occurred without public complicity from agents or agencies within the Californian, U.S. federal, and Nigerian governments; Jack Abramoff's swindling of Indian tribes, and other swindles of his lobbying compatriots on K Street, could not have occurred without knowing support from Congressmen like Tom DeLay just down the street, on Capitol

Hill; etc.) So if political corruption facilitates much white collar crime, and white collar crime is more harmful than all street crime combined, then what does this imply about the scope and harmfulness of corruption?

This is not to imply, of course, that political criminals are responsible for all the other crimes and ills of society. But they may be more responsible, and responsible for more harm, than is commonly thought. As the facts bear out, e.g., the middle class are threatened far more by those *above* them on the socioeconomic scale than by those below them.[17] Politicians may not them-selves pull the trigger on any downtown hold-up or Columbine or Virginia Tech shooting, but they are responsible for the loose gun policies that allow so many streets and schools to resemble firing ranges. Politicians may not themselves sell heroin or crack to junkies who use, but they are responsible for the heavy-handed policies that devote millions of dollars to the punishment of non-violent users and relative thousands of dollars to drug prevention, research, treatment, and training programs for these (potential) users—in essence enacting policies that perpetuate or exacerbate the drug problem rather than ameliorating it. Politicians may not themselves dump tons of toxic waste into our waterways and atmosphere, or injure so many employees in the workplace, but they are responsible for the lax environmental and workplace regulations that allow companies to do so with relative impunity. Etc. Certainly these killers, addicts, polluters, et al., are largely responsible for the crimes they commit; but they are not *solely* responsible for them. Politicians also bear significant responsibility for these crimes and problems, insofar as they have the power and duty to reduce them, through the implementation of policies and programs that even many graduate students know would be more effective (including policies supportive of stricter

licensing and regulation, of more support for struggling but hard-working parents and families, of better daycare, education, and job training; and programs such as Multi-Systemic Therapy, Cognitive Behavioral Therapy, Functional Family Therapy, etc.).[18]

But whether in simple ignorance or willful ignorance, officials too often spurn such basic graduate school knowledge and insist on directing their powers and policies in more narrow, self-serving directions. These points illustrate Sterba's scenario **d**, then, whereby officials implement illegitimate policies that sacrifice some groups' basic needs for the sake of their own groups' luxury needs. But these are not merely hypothetical scenarios: as happens all too often, the groups whose basic needs are neglected consist of wider constituencies of minorities, the poor, and those who exercise little political clout, while the groups whose non-basic needs are served often consist of rich and powerful elites who happen to have substantial ties to the policy makers.

IB. *The Wrongfulness of Political Corruption*

Describing the harmfulness of political crime in these ways—in terms of "public" policies that allow so many social benefits to continue flowing to the well-connected while so many social burdens continue to pool among the poor and politically disconnected—makes us ponder the immorality of such policies and policy makers. So that our judgments will not be too hasty or class-colored, though, we should not immediately assume that such inequitable policies are necessarily immoral or illegitimate. As admitted earlier, officials may sometimes implement harmful, lopsided, or suboptimal policies through ideology, ignorance, or miscalculation, or despite their good intentions. While this may explain some of these policies, it does not explain enough of them. For many of our current public policies, upon closer examination, turn out to follow

Representative Connie's pattern. In other words, recall that Connie's public behavior and policy choices were morally impugned by the stain of conflicts of interest. If Connie *was not* formerly a board member of Mary Kay, or if Connie's spouse *did not* hold major stock in Mary Kay, or if that company *had not* given sizable contributions to Connie's campaign, then perhaps we would not be justified in judging his conduct to be criminal. But under these circumstances, we *would* be warranted and even rationally obliged to judge him so. For to not judge him so would be fatally naïve, akin to chickens that could not bring themselves to think so suspiciously of their foxy guardians. In such circumstances, then—when politicians support harmful and narrowly tailored policies *and* reveal biased motivations for these policies—we are certainly warranted in judging them as corrupt. The presence of wrongful bias or conflicted interest here seals the deal; that is, it takes their public behavior and policies out of the realm of being merely miscalculated or misdirected or misfortunate and into the realm of being criminal. But rather than characterizing this important element of political wrongness in these general terms, let us scrutinize it more closely.

What is essentially wrong about the conduct of corrupt officials is that they (ab-)use their public offices and powers for private gain. While private gain may accrue to public officials as unintended or fortunate consequences of their policies, the public good should provide the driving focus or primary impetus to their decisions and policies. If not (if private gain is their overwhelming concern), then they are not true public servants or representatives of the people, but are actually parasites or wolves in sheep's clothing—private profiteers merely dressed up as public servants who use their public roles and accoutrements as part of their disguise. Of course, a more cynical view is possible here:

we may assume that officials will always pursue their own interests, at least in part, so that our challenge will be to set up the system so that it will be in their self-interests to serve the public good. Even on this view, however, the underlying points remain: that public interests must be prioritized so that private or petty interests come into line, or are made consistent, with these public interests, and not vice-versa. The cart must not lead the horse. Along these lines, *conflicts of interest* and conflicts of duties lie at the heart of most political corruption. For in committing their misdeeds, they are violating their fiduciary duties toward their constituents. As part of these duties and the assumption of public office, they are supposed to commit themselves to serve the public good, to lay aside their own interests (if or when these conflict with the public good) and to try to enact policies that support the interests of their constituents—not only of those who contribute to their campaigns, but of all those who live in jurisdictions that they are supposed to represent.

This marks one of the moral differences between the crimes of petty criminals and those of political criminals: when petty criminals victimize us, they are doing it merely as in a state of nature, *mano y mano*, individual against individual, in the sense that, other than being our fellow citizens, they made no special oaths to us and owed us no special treatment (besides that of being moral fellows and good neighbors). But when political criminals victimize us, they are doing it in the state of civil society, as hypocritical and contradictory emblems of the trust and order of society, as backbiters and oath-breakers, in the sense that they *have* made special oaths to us—to be our public servants—and so owe us special treatment as fiduciaries, as our elected representatives. This latter victimization bears the taint of Judas' kiss, then, insofar as it marks the difference

between a *stranger* stabbing us in the back, versus (someone who is supposed to be) our *trusted servant*, who has publicly pledged his loyalty to us, stabbing us in the back.

There is a similar moral difference between the crimes of petty criminals and those of political criminals that is worth noticing. Whereas the vast majority of petty criminals have grown up poor and disadvantaged, without the benefit of good schools or childcare or healthcare, the majority of politicians and political criminals have grown up privileged, enjoying all the advantages and benefits that civil society has to offer. Whereas petty crimes are more often the fruit of desperation and frustration, then, political crimes are more often the fruit of being greedy or spoiled. In pointing this out, I do not mean to insinuate that street crimes are excusable: street criminals are largely (but often not solely) responsible for their misdeeds and so should be held accountable for them. What I do want to suggest is that political crimes may be even more blameworthy, insofar as most political criminals spurn the blessings and opportunities given to them, by treacherously exploiting the society that made them who they are. Political criminals seem *more* responsible for their misdeeds, then, insofar as they have less blame to cast elsewhere and more obligations of reciprocity toward society. For who is more indebted to society and who is guiltier if he becomes a menace to society: the pauper who is essentially cast out and abandoned by society from birth onwards? or the prince who is pampered and tutored and treated like a darling of society from birth onwards? In this light, the misdeeds of the scoundrel prince contain a stain of wrongness that is missing from misdeeds of the scoundrel pauper, just as the scoundrel prince is blameworthy for reasons that the scoundrel pauper is not.

But what of the misdeeds of these scoundrel princes, or political criminals. Conflicts of interest, I have suggested, lie at the heart of what is wrong with their deeds. These conflicts lull the officials away from their duties to the public and from concerns with the public good, and towards self-serving goods and goals and behavior. Even if these conflicts comprise the essence of political corruption, though, they still do not pick out just one type of behavior or transaction, as this corruption manifests itself in a variety of forms. In summary, Terry Cooper has outlined eight types of political corruption, i.e., eight of the main ways that these corrupt conflicts of interest manifest themselves, as: **1)** *bribery*; **2)** *influence peddling* (whereby an official tries to influence a public decision in favor of a third party to which s/he has a vested interest); **3)** *information peddling* (whereby officials with privileged information try to use it to their own advantage); **4)** *financial transactions* (whereby the official has personal investments or stock in some financial aspect of a possible public deal, and where s/he stands to make significant personal gains from the deal); **5)** *gifts and entertainment* (these differ from or expand the case of bribery in that non-monetary commodities serve as the inducements, and "are given with no specific favors requested, but are intended to create a generally positive predisposition toward the donor"[19]; **6)** *outside employment* (which inordinately drains needed time, energy, concern, or resources away from officials' public duties); **7)** *past or future employment* (whereby the officials give preferential treatment to some company they have worked or might work for, in the hopes that some benefit or job offer will redound to them); and **8)** *dealings with relatives, or nepotism*.[19]

On a broader motivational level, other scholars like Sally Simpson, Michael Benson, and Neal Shover have recently categorized these types of corruption and white collar

crime along the four axes of: acts done for one's private gain versus those done for the gain or reputation of one's organization, and acts done from personal initiative versus those done in response to deviant organizational pressures or subcultures.[20] Regardless of what specific form they take, these comprise the main forms or channels through which officials abandon their proper concerns and duties toward the public, and instead try to use their powers and offices to benefit themselves or their cronies.

II
JUDGMENT AS ADJUDICATION: ENFORCING CORRUPTION AND PUNISHING CORRUPT OFFICIALS

Hopefully, all these points (about these wrongly conflicted interests, the official's dereliction of duty, the narrow bias and virulence of their policies, etc.) serve to focus and clarify the nature, extent and character of political corruption. But even if citizens and jurists learn these things and more clearly recognize it in these ways, thereby casting off some of the ideological blinders that have veiled it from view, society will still be only halfway closer to checking and stopping political corruption. To gain real hopes of putting corrupt officials in their place, of achieving *true* criminal justice, and in turn of the Foxes Guarding the Henhouse thesis (FGH) becoming false, society will need to take these steps also: legally, more robust codes of public ethics and anti-corruption legislation will need to be developed, to clearly flag impermissible forms of public behavior. Administratively, more effective offices for detecting, policing, enforcing, and punish-ing infractions of these codes and laws will need to be developed. And these offices will need to become more independent, and supported with more adequate staffing, training, and resources, to be truly effective and avoid becoming just more toothless tigers. Elaborating these necessary avenues of progress, and especially the underlying normative basis for

these systems of account-ability and punishment of political criminals, is the subject of the remainder of this paper.

IIA. *Enforcement against Political Corruption*

As mentioned earlier, some of this problem (of not adequately addressing or redressing the harms that flow from illegitimate public policies) lies with politicians, who are too seldom open and honest about their policy objectives. But much of this problem lies also with grossly inadequate systems of accountability, whereby politicians who do support harmful or narrowly biased policies are not held accountable for them. They are too often and too easily allowed to achieve none of their stated objectives or to achieve objectives (as personal or peer agendas) that contradict their stated ones. But considering how lopsided, wasteful, or damaging some public policies can be, the discipline of the voting booth, of not getting re-elected, is far too light a discipline here. (To take just one example, American taxpayers have spent many years paying off the $500 billion tab for political mismanagement of the Savings and Loan debacle. Accordingly, one might ask, is it fair that some shoplifters and petty thieves like Leandro Andrade are doing more time in prison than many of the culprits responsible for this public S&L looting?[21]) Especially when term limits operate, some politicians apparently expect to use policies for their own enrichment and the enrichment of their benefactors and cronies, as much as they can within their allotted term of "public" service. These expectations, cycles and public lootings represent normal operating procedure within some crony states. But if prospective policy forecasts, and also retrospective cost-benefit analyses of policies—that showed exactly what groups most benefited and what groups most suffered from certain policies—were more integrally woven into these legal and political systems, and if

remedial and punitive measures were developed for politicians who push essentially criminal public policies, then this might represent real progress towards truly just and effective public governance.

This is not to suggest that a good first step in fighting political crime *now* would be to hold a kind of policy court, that judged policy makers for the benefits and burdens that their policies engendered. Something like this might be a good idea in the future, but only to the extent that our social sciences become better able to precisely quantify the costs and benefits of, along with the specific groups that suffer and benefit from, various policies. Rather than taking this step now, a better or necessary first step, according to Mark Davies (the longstanding Executive Director and Counsel of the New York City Conflicts of Interest Board), would be to develop clear and comprehensive codes of ethics for all public servants, that are "simple, sensible, straightforward, short, [applicable to, and] understandable by, every official and employee—without a lawyer."[22] Such codes would spell out prohibitions against the eight kinds of corrupt activities and conflicts of interest mentioned above (p. 16) by Terry Cooper. These codes would have the effect of officially spelling out the exact kinds of political behavior that should be prohibited. As a crucial second step, Davies recommends a rigorous disclosure program, whereby officials would be periodically required to disclose the details of financial and occupational transactions that might pose violations of the previous ethics codes. And as Davies' third pillar of effective governance, he recommends

> an administrative structure that is both independent and workable and that provides, in roughly equal parts, training and education, quick and confidential advice (with waivers, when needed), regulation of disclosure, and enforcement, including investigation of potential violations, hearings, and [punishments].[23]

If each of these three pillars (suitable codes of ethics, periodic mechanisms for disclosure, and these administrative structures) were put in place, Davies reasons that their combined effect would be to substantially curtail government malfeasance, *before* it occurs. In turn, such largely proactive measures would substantially reduce the need for reactive, punitive measures. We can only say "substantially" rather than "totally"—since conflicts of interest and political opportunism and corruption can never be totally eliminated from the political realm, which will always remain the seat of power and thus the seat of temptation for abuse of power. This will remain true even within ideal governments and systems of law which, Kant famously noted, would keep even "a race of devils" mostly in line.[24] Even ideally here, there will always be some officials who try to evade detection, skirt the laws, exploit loopholes, fail to disclose, etc. Even if the earlier parts of Davies' recommendations were in place, then, but yet lacked this final part (pertaining to the proper punishment of officials who stubbornly insist on misbehaving even in otherwise ideal states), then political corruption might still remain a stubborn problem.

IIB. *Punishment and Sentencing of Corrupt Officals*

What should "proper punishment" mean here? How and how severely should corrupt officials be punished? Are civil fines (which some states use nearly exclusively as means to punish white collar and political criminals) the most appropriate response to these criminals—even when their deeds cause widespread death and injury and other serious harms, and even when they can often pay these fines with relative ease essentially as business costs, and then go on committing the same offenses again? Should longer prisons terms including life sentences without parole be implemented more? And on a more fundamental level, what would be a fair rationale for the punishment of corrupt

politicians? If China offers any instruction, a deterrent rationale would *not* seem adequate here. For in China, even though public officials (like their recent Chairman of the Health Ministry) are not uncommonly executed for their corrupt acts, corruption still runs rife at many levels. Although this may be attributable to other institutional defects within their system, it shows that even the harshest deterrent approaches will not suffice. As has commonly been noted, harsh punishments can be ineffective at deterring offenders; and even if they do begin to effectively deter, they can become unfair by meting out penalties that disproportionately exceed what the offender deserves.

Without reviewing many other rationales for political punishment that seem inadequate to the task at hand, let us consider Herbert Morris' retributive account of punishment.[25] We should examine this account not because it is necessarily the most cogent account of punishment overall, but because, in the basic form presented here, it has been an influential paradigm of penal theory and practice, and seems to have at least a prima facie plausibility and relevance. (Its shortcomings, along with implications of its problems, will be briefly discussed toward the end.) So what is the gist of this just deserts account, and how would it apply to the punishment of political criminals? According to Morris, when persons commit criminal acts (including truly or morally criminal acts which have not yet been codified into the criminal law), they wrongly disrupt the balance of benefits and burdens that was in place before their actions—thereby accruing to themselves certain undeserved benefits and advantages. (Although Morris does not emphasize this other side of the coin) it bears pointing out that these undeserved burdens and disadvantages are often foisted upon the victims of these criminal acts. The criminal's punishment becomes justified, or even mandated by justice, then, insofar as it restores the ex ante balance of

benefits and burdens that was in place before his misdeeds[26]—by removing the benefit(s) he wrongly accrued and imposing on him the burdens he previously and wrongly imposed on others. The imposition of these burdens, in fact, is what suitably constitutes the punishment and helps to determine the proper scope or severity of punishment. For if only the wrongly attained benefits were removed, this would not constitute punishment but rather mere confiscation of the booty. For example, if I steal $100 and then later am forced to relinquish this amount, this would not constitute my being punished, but only my being forced to give this amount back. My punishment here would not begin, properly speaking, until I was forced to pay some amount or suffer some penalty *above* the $100. In this case, an additional $100 fine might be a fair and proportional penalty with which to punish me.

The application of this view to the case of the corrupt officials follows from this: in committing his crime(s), by definition, the corrupt official abuses his public office or powers for private ends, and so wrongly attains certain undeserved benefits for himself (or his cronies), and usually wrongly imposes certain undeserved burdens on the public. As a result, the situation has "grown out of joint" and will not be made right until this politician is punished—in proportion to the benefits he wrongly accrued and the burdens he wrongly imposed. And this marks the fittingness of Morris' approach: not only does it provide a plausible rationale for punishment of corrupt officials, but it facilitates determination of sentences and punishments that fit the crime, in accordance with these wrongly disrupted benefits and burdens. This holds true even while the punishment, of course, need not be in the same coin as the crime. Just because the politician's deeds or policies have caused, say, financial loss, or death due to workplace safety regulation

malfeasance, or injury or disease due to environmental mismanagement, this does not necessitate punishing the politician with fines, execution, or equal bodily injury, respectively. Even so, the severity of the official's punishment becomes warranted in proportion to the benefits he wrongly garnered and the burdens and harms he wrongly imposed on others. And this explains why, as mentioned earlier, a more rigorous analysis of the costs and benefits of various public action, including measures of both the immediate and long range harms engendered by various policies, becomes so important—to allow us to hold policy makers more accountable and, when necessary in the case of criminal public behavior, to determine the proper extent of punishment.

Moreover, when more serious costs and injuries including death are involved, it does not seem right that there be statutes of limitation on the investigation and conviction of political crimes, since there are no such limitations in cases, e.g., of homicide, war crimes, or crimes against humanity. And this implies that, even if evidence of such harms turns up years or decades later, the political criminals responsible may rightly be forced to yield up any financial gains they garnered as a result of their crimes, and that these may rightly be distributed to the victims who wrongly suffered as a result. (Although I cannot explore them here, this raises the possibility of certain libertarian premises actually having radical implications, in regard to what Nozick has labeled as "the rectification of unjust original acquisitions."[27])

Admittedly, this benefits and burdens account of punishment has been vulnerable to various criticisms. So let me briefly address a couple of these main criticisms, and then show how they do not invalidate, but perhaps even strengthen, the applicability of this account to the case of political criminals. Perhaps the main criticism has highlighted the

problem of trying to deliver "just deserts in an unjust society." Jeffrie Murphy has provided especially trenchant versions of this objection.[28] Murphy points out that Morris' view presupposes certain Classical School criminological and rational choice assumptions about the background motivations and opportunities of criminals. (If these assumptions are specious, then it potentially invalidates Morris' account, or at least the application of his account in contemporary America.) In particular, retributivists like Morris assume that, when criminals commit crimes, they do so freely, as the conscious end-result of a deliberative process involving the weighing of relative costs and benefits of obeying and disobeying the law, against the backdrop (as a further assumption) of clear abilities and opportunities to obey the law and lead decent, law-abiding, productive lives. For criminals who so freely choose to offend, their punishment becomes truly deserved. But as Murphy rightly points out, many criminals (especially lower-class street criminals) in America do not commit crimes like this, as the result of cool deliberation or free choice. Rather, many of them offend out of desperation, from a context of suffering through long histories of unmet developmental needs, abuse, and poverty. (While these things do not nullify blame for their crimes, at least they mitigate their blameworthiness and responsibility.) Notice that, while this problematizes the application or justification of Morris' account in regard to some street criminals who have suffered so, it leaves Morris' account largely unimpugned, or still applicable and justified, in regard to most corrupt politicians (especially high levels ones). For many if not most of these have not had to endure such suffering. On the contrary, many more of them have enjoyed marked advantages and opportunities growing up. This implies that the claims of Morris' theory (about deliberate decisions to break the law and the free abilities and opportunities to do

otherwise), despite such Murphy-like problems, *do* hold with most political criminals and that these criminals are (more) blameworthy so that, in turn, their recommended punishment would be fitting and deserved.

These points bear even stronger implications. To see how, consider how a Weberian ideal-type analysis might apply here. Compare two ideal types of criminals who committed equivalent levels of harm: street criminals (whom we may stipulate as having suffered through markedly worse upbringings and disadvantage, who then go on to commit crimes less freely and more out of desperation, and who thereby seem relatively less blameworthy) versus political criminals (whom we may stipulate as having enjoyed markedly better upbringings and advantage, who then go on to commit crimes more freely, and who thereby seem relatively more blameworthy). In comparison, it becomes plausible on Morris' account to conclude, given the greater relative blameworthiness of the latter to the former, that political criminals deserve relatively more or more firm punishment than street criminals, in cases where they commit equivalent levels of harm (of injury to life, limb, or property).

A similar line of reasoning holds with other leading criticisms of Morris' theory. According to Andrew von Hirsh, among others, this "disrupted benefits and burdens" theory (also known as the "unfair advantage theory") is inapplicable not only to many criminals, but also to many types of crime.[29] For example, with many crimes of passion and violent crimes like assault or rape, it does not seem that the perpetrator accrues any real advantage to himself (except perhaps of enjoying the satisfaction of seeing his victim bruised or subdued). Likewise, as von Hirsch argues, with many such crimes it does not seem that punishment will eliminate or redress the unfair advantage, or correct the

balance of benefits and burdens that was disrupted. Notice again, though, that while these objections might impugn Morris' theory in relation to some types of crimes, they still leave his theory intact and applicable to cases of political corruption—which are usually pecuniary in nature and thus subject to more precise assessment of the costs and benefits involved and of the benefits and burdens that have wrongly been disrupted. For example, even though the corruption and fallout from the S&L scandal was extensive, nevertheless we still have at least a rough estimate of the unfair financial benefits that the complicit agents garnered for themselves and of the unfair burdens that were foisted on others (including savings that were lost and extra taxes that innocent citizens have had to pay in response). And we could gain more reliable estimates with better accounting, investigatory, freedom of information, and regulatory measures in place. Furthermore, we might redress the upset balance of benefits and burdens better, in such cases of political corruption, if we gave more thought to alternative and intermediate types of punishment besides mere incarceration. Consider someone like Jack Abramoff who, despite arguably being a scoundrel, yet possesses a wide set of professional skills. Couldn't we give such political and white-collar criminals choices about their punishment, in terms of the types of deprivation of freedom that they were punitively burdened with? That is, assuming that part of their punishment would consist in the general forfeiture of their freedom, couldn't we give them the choice (or perhaps impose on them our choice) of *either* forfeiting it by spending so many years idling away behind bars *or* forfeiting it by working on the public's behalf, utilizing their skills for charities or public service agencies? Many political crooks would undoubtedly prefer this last option; and if so, we might thus allow them to salvage some of their previous social esteem (without relegating them, as we

currently do to so many current prisoners, to a life of near permanent social stigma and near total ostracism). As our justice system is increasingly finding forms of mandatory restitution and community service to be good solutions for remedial and juvenile offenders, it might find such forms of punishment to be good responses to political offenders as well. Consideration of such alternative punishments for political criminals might well yield fair and effective applications of Morris' theory, then, and might lend new meaning to the retributive goal of having such criminals "pay their debt to society."

Even so, one might object to the application of Morris' theory here on other, more pragmatic grounds. The concern might arise that such punishment for criminal public officials and policies might be used as a political tool and thereby make the political process even uglier and less productive; it could give squabbling or vindictive politicians another dirty tool to use against their opponents and so detract even more from the real business of government. Although this is a legitimate concern, it should be recalled that punishments would be applied here not merely against officials whose actions or policies were *only* harmful or *only* wrong (this could admittedly allow punishments against too wide a range of officials), but only against officials whose actions were demonstrably harmful *and* wrong. As such, the benefits (both practical and moral, in terms of the demands for real criminal justice) of holding such officials more accountable for their criminal actions could surely end up outweighing these risks of political bickering and in-fighting.

Similarly, the concern might arise that if public officials became more vulnerable to prosecution in these ways, especially where the government became liable to pay compensation to victims who suffered as a result of political crime, then this could result

in more frivolous lawsuits and cause even more harm overall, such as might flow from nearly insolvent fiscal budgets. Although these are also legitimate concerns, steps could be taken to ameliorate such dangers: e.g., more stringent standards of evidence could be mandated, states could take out insurance policies to stabilize their budgets, etc.[30] And the more that officials (along with any family members or partners who had profited from their wrongdoing) were held strictly accountable for their misdeeds, the more this could serve as incentive for other officials to refrain from such misdeeds and to play more effective roles as public servants, as watchdogs of the public good and public purse, and as whistleblowers and deterrents of their fellows' bad behavior. (In this new institutional environment, whistleblowers who exposed their fellows' misconduct and then averted public crises and fiscal loss could be *rewarded* for their help, instead of being punished or ostracized, as is too often the case now.) Here again, even if my proposals might introduce some short term risks and needs for institutional adjustments, things would likely end up better in the long run, after these adjustments were made.

A final concern is that this approach might allow sentences that are too harsh toward public officials. For instance, consider again the not uncommon case of lawmakers who indirectly cause workers' death and bodily injury, because of granting too lax workplace safety regulations to companies that generously support their campaigns. In such cases, one might argue that the legislators are only slightly responsible for whatever deaths or injuries ensue--along with many other agents such as complicit company executives, donors, managers and foremen, etc. And since we may assume that the lawmakers do not *intend* these injuries, but rather are guilty only of giving biased treatment to loyal supporters or campaign contributors, then arguably we should not let the lawmakers bear

the brunt of legal responsibility for them, which could here mean exposing them to life sentences for wrongful deaths. These concerns reveal that, were my proposals to become truly fair and feasible, the following kinds of tough questions would need to be answered: could the injurious consequences have been reasonably anticipated or prevented? Who else beside the politicians were causally responsible for these injuries and, considering their joint complicity, what relative weight of legal responsibility should each agent bear? Are reliable grounds available for establishing the lawmakers' real state of mind, intentions, and knowledge? etc.

Such questions are not unanswerable, though, and are already routinely raised in civil cases involving death, injury and property loss; so they do not seem to invalidate a more punitive approach being taken with political offenders. In other words, since they do not provide insuperable challenges to redressing street criminals who cause such harm (albeit often of a *lesser* magnitude), then they do not invalidate similar approaches toward political criminals. To illustrate, if someone robs a convenience store, even for less blameworthy motives like wanting to feed his or her baby, and in the course of the robbery the clerk inadvertently gets killed, then we do not thereby exempt the robber from charges of homicide.[31] Rather, we insist that the fruits of the initial crime (robbery) be considered, so that any subsequent crimes or harms (homicide) issuing even inadvertently from the initial events also be considered in judgment and sentencing of the offender. Even though the offender did not go into the store with the intention of killing the clerk, and may even have had rather benign motives (like Jean Valjean or some Katrina hurricane looters, who stole to stave off their family's starvation) for the robbery, nevertheless we hold him strictly accountable for the clerk's death. So what's good for the

goose should be good for the gander. That is, political criminals—whose misdeeds often lead to *more* deaths and *more* extensive injury and property loss than those of even violent petty criminals–should not continue to be judged less firmly than petty criminals. If we consider all the deaths and injuries, inequities and injustices, poverty and desperation, poor schooling, lost opportunities, unemployment, and even famines,[13] that ultimately result from the decisions and policies of corrupt politicians, there may be no good reason why these politicians should not be judged much more strictly and consistently than has heretofore been acknowledged.

CONCLUSION

Admittedly, these claims reveal the need for significant development of our legal framework in dealing with issues of causation and responsibility. In particular, our legal system needs to substantially evolve in its nascent ability to analyze and adjudicate the complex causal chains usually involved in so-called high crimes and misdemeanors.[32] Consider that it has only been in recent decades that judges and legal theorists have abandoned the traditional "proximal cause" principle, as offering too vague and imprecise guidelines with which to adjudicate cases hinging on questions of causal and collective responsibility. Consider the *lack* of help that this principle offers in the case, e.g., of the mob boss who suggests that his underling order a hit on someone in a distant locale. Even if the boss' words or actions are indirect or off-handed and do not seem that proximal, and even if a hitman's bullet causes the immediate death, courts still hold the mob boss responsible. In contrast to such outmoded legal principles that would likewise offer little help in the adjudication of party bosses or corrupt officials, the "sine qua non" (or "but for") principle has maintained more consensual acceptance from legal theorists, and sheds

a little more light on these political kinds of cases. We reason that, *but for* the mob boss' knowing suggestion (as necessary causal condition and crucial first link in the chain of events), the death would not have resulted; and we conclude that this boss should be held at least as responsible as the underling who arranged the hit, or the hit-man whose bullet was the "proximate cause" of death. In parallel fashion, this would provide the basic starting point for our inquiries into political crimes: but for the politician's decision or policy, would the harm have resulted, i.e., was the official's act (or omission) a necessary condition of the resulting harm? Did it function essentially as the first crucial domino in the subsequent chain of events? Or precisely what role did his/her act (or omission) play in the causal chain leading up to the harm? Did the lawmaker foresee, and could s/he have reasonably foreseen, the harmful effects of his or her policy? etc. In each case, of course, we would need to delve much deeper and utilize more sophisticated causal and legal principles, to determine if (or how much) a politician was in fact *causally responsible* (in relation to many other agents and conditions that are usually involved in these collective processes), and thus whether s/he should be held *legally responsible*, for the harms that followed.

It is of course beyond the scope of this article to clarify all these causal and legal principles here; these suggestions are meant merely to lay groundwork for the relevant principles of judgment. For if we do not explicitly formulate a more reasonable set of these principles, then we will continue to hold political officials to too low a level of accountability. And if citizens do not make them more accountable—by recognizing how virulent their crimes can be and by putting more effective preventative, enforcement and

punitive measures in place—then true criminal justice will remain limited. In turn, this means that the FGH thesis will largely remain true.

FOOTNOTES

1. For representative samples of these critiques, see Murphy, R.G. (1979). "Marxism and Retribution," in Murphy (Ed.), *Retribution, justice, and therapy*. Dordrecht, Holland: Reidel Publ., 91-115; Unger, R.M. (1986). *The critical legal studies movement*. Cambridge, Ma.: Harvard U. Press; Crenshaw, K., et al (Eds.), (1995). *Critical race theory: The key writings that have formed the movement*. N.Y.: The New Press; Quinney, R. (1974). *Critique of legal order: Crime control in capitalist society.* Boston: Little, Brown & Co.; and (1980). *Class, state, and crime*, 2nd Ed. N.Y.: Longman, Inc.; Krisberg, B. (1975). *Toward a new criminology*. Englewood Cliffs, N.J.: Prentice-Hall, Inc.; Hagan, J. (1989). *Structural criminology*. New Brunswick, N.J.: Rutgers Univ. Press; Chambliss, W. & Seidman, R. (1982). *Law, order, and power*, 2nd Ed. Reading, Ma.: Addison-Wesley Publ. Co.; Chambliss, W. & Zatz, M. (1993). (Eds.), *Making law: The state, the law, and structural contradictions*. Bloomington: Indiana Univ. Press; Chambliss, W. (1999). *Power, politics, and crime*. Boulder, CO.: Westview Press; Habermas, J. (1998). *Between facts and norms: Contributions to a discourse theory of law and democracy*. Boston: MIT Press; and Lynch, M. & Michalowski, R. (2006). *Primer in radical criminology: Critical perspectives on crime, power and identity*. N.Y.: Criminal Justice Press. In what follows, the focus will be on the problem of political corruption (defined as the abuse of public power or office for illegitimate private gain), as distinguished from other types of state crime such as genocide, crimes against humanity, denials of due process and civil liberties, unjust wars and illegitimate exercises of military power, of surveillance and intelligence powers, etc., cf. note 12.

2. I will especially utilize Joel Feinberg's conception of Mill's Harm Principle, which essentially holds that the state may rightfully restrict a person's liberty—by prohibiting certain harmful behavior and then punishing him if he engages in it—in order to prevent him from wrongfully harming others. Cf. Feinberg, J. (1984). *Harm to others: The moral limits of the criminal law*, Vol. 1. New York: Oxford Univ. Press.

3. Friedman, L. (1993). *Crime and punishment in American history.* New York: Basic Books, chs. 4,5, 13.

4. Reiman, J. (2007). *The rich get richer and the poor get prison: Ideology, class, and criminal justice*, 8th Ed. Boston, MA.: Allyn & Bacon, p. 110.
5. Ibid., p. 145.

6. Long, K. (2007). *The almanac of political corruption, scandals, and dirty politics.* N.Y.: Bantam Dell. And in an international context, claim #3 seems true at least in states that have not introduced much global business regulation or market checks and balances in their midst; cf. Braithwaite, J. and Drahos, P. (2000). *Global business regulation.* Cambridge, U.K.: Cambridge Univ. Press.

7. Good starting points to answer such questions are provided by Green, M. (2002). *Selling out: How big corporate money buys elections, rams through legislation, and betrays our democracy.* N.Y.: Harper Collins Publ.; and Black, C.L. (1974). *Impeachment*. New Haven: Yale University Press.

8. Wachs, M. (2001). Ethical dilemmas in forecasting for public policy, in Willa, B. (Ed.), *Classics of administrative ethics*. Boulder, CO.: Westview Press, 102-114. And for an account of the relationship that ideology bears with corruption, see Hagan, F. (1997). *Political crime: Ideology and criminality*. Boston: Allyn & Bacon.
9. For a thoroughgoing account of arguments for and against the establishment of criminal sanctions for such victimless crimes and harmless wrongdoing, see Joel Feinberg's *Harmless wrongdoing: The moral limits of the criminal law*, Vol. 4 (1990). New York: Oxford Univ. Press.

10. Rose-Ackerman, S. (2005). When is corruption harmful? In *Political corruption: concepts and contexts,* 3rd Ed., Heidenheimer, A.J. & Johnston, M. eds. New Brunswick: Transaction Publ., p. 359.

11. Ibid., pp. 353-71.

12. Although this account mainly delineates the types of harm that flow from political corruption occurring domestically in capitalist democratic states, I should also point out the war crimes, crimes against humanity, and extensive colonial harms that political criminals can cause in foreign lands, and that political criminals in more autocratic, less democratic states often cause in their own land. But analysis of these types of regimes and political crimes, as important as they are, are outside the scope of this paper. For more comprehensive accounts of these broader political crimes, and the development of international institutions dealing with them, see Ross, J.I. *Varieties of state crime and its control* (2000). Monsey, N.Y.: Criminal Justice Press; and *The dynamics of political crime* (2003). Thousand Oaks, CA.: Sage Publ.; and Robertson, G. (2005). *Crimes against humanity: The struggle for global justice*. New York: Oxford University Press.

13. Sen, A. (1999). *Development as freedom*. New York: Alfred A. Knopf. In addition, part of Sen's earlier work, which contributed to his reception of the Nobel Prize in Economics, showed how famines, which earlier were assumed to arise mostly from a combination of natural misfortune and mismanagement, actually arise much more from corruption and illicit government policies.

14. Sterba, J. (2001). Environmental justice, in *Morality in practice*, Sterba, ed. Stamford, Conn.: Wadsworth, pp. 504-510. Although Sterba offered this paradigm originally in the context of environmental justice and adjudication between animal rights and human rights, modifications can be made so as to safely apply it to relevant cases of policy analysis here.

15. For helpful analyses of these *non*-criminal types of public dilemmas, see Yates, D.T. (1992). "Hard choices: Justifying bureaucratic decisions. In *Essentials of government ethics*, Madsen, P. & Shafritz, J. (Eds.), New York: Meridian Books; and Peters, G. (1993). "Tragic choices: Administrative rule making and policy choice," in Chapman, R. ed., *Ethics in public service*. Ottawa: Carleton Univ. Press, pp. 43-58.

16. A promising methodological strategy here is for the social sciences to work *backwards*, that is, to specify which groups and regions have suffered from the most harm, e.g., as with residents and ex-residents of New Orleans or Baghdad, and then backtracking to try to determine which public actions seemed to cause these harms and devastations? As Sterba and critical theorists of the Frankfurt School would argue, this could also help to establish morally defensible *policy priorities*: by specifying populations that are suffering most or having their basic needs denied, and then prioritizing policies geared to help them and avoid or redress policies that hurt them. For wouldn't it be criminal to use public resources to essentially help one well-off group sip a smoother Merlot while a neighboring group was dying of thirst (through no fault of their own)?

17. See Reiman (op. cit. 4, esp. ch. 2), and Donziger, S. (1996). (Ed.), *The Real war on crime: The report of the National Criminal Commission*. New York: Harper Perennial, for documentation of the ways and avenues through which this is true.
18. For recent accounts and references of the evidence-based effectiveness of such programs, even for justice-involved youth with co-occurring substance abuse and mental health problems, see Skowyra, K. & Cocozza, J. (2007). *Blueprint for change: A Comprehensive model for the identification and treatment of youth with mental health needs in contact with the juvenile justice system*. National Center for Mental Health and Juvenile Justice, Policy Research Associates, Inc.

19. Cooper, T. (2006). *The Responsible administrator: An Approach to ethics for the administrative role* San Francisco: Jossey-Bass Publishers. See also Frederickson. G.H. & Ghere, R. (Eds.), (2005). *Ethics in public management*. Armonk, N.Y.: M.E. Sharpe Publ., p. 116.

20. Benson, M. & Simpson, S. (2009). *White Collar Crime: An Opportunity Perspective*. N.Y.: Routledge, ch. 4; Shover, N. & Hochstetler, A. (2006). *Choosing white-collar crime*. N.Y.: Cambridge U. Press, chs. 3 and 5.

21. Cf. Black, W. (2005). *The Best way to rob a bank is to own one: How corporate executives and politicians looted the S&L industry*. Austin, TX: UT Press; Green (op. cit. 7), pp. 65-67.

22. Davies, M. (2000). "Ethics in government and the issue of conflicts of interest," in *Government ethics and law enforcement: Toward global guidelines*. El-Ayouty, Y., Ford, K. & Davies, M. (Eds.), Westport, Conn.: Praeger, p. 101.

23. Ibid., p. 118. In addition to these pillars, other theorists insist that basic incentive structures need to be realigned, so that fears of getting caught, stigmatized, and punished by public malfeasance outweigh the temptations to illicit gain that might come through such malfeasance. Cf. Rose-Ackerman, S. (1999). *Corruption and government: Causes, consequences, and reform*. N.Y.: Oxford University Press, esp. chs. 4 and 5. As one more practical suggestion, the following might also prove helpful: why not implement "political crime bounty hunters and -detective agencies," who would be paid to unearth evidence of political malfeasance, and whose pay would be in accordance with some percentage of later settlements, class action suits, or damage costs for political criminals who were convicted of significant "public theft"?

24. Kant, I. (1970). "Perpetual peace: A philosophical sketch," in Reiss, H. (Ed.), *Kant's political writings*. London: Cambridge U. Press, p. 112.

25. Morris, H. (1976). "Persons and Punishment," in Morris (Ed.), *On Guilt and Innocence*. Berkeley: Univ. of California Press; and "A Retributive theory of punishment," in Sher, G. & Brody, B. (Eds.), (1999). *Social and political philosophy*. Ft. Worth, TX.: Harcourt & Brace. And for other applications of retributivism more broadly towards white-collar offenders, see Schlegel, K. (1990). *Just deserts for corporate criminals*. Boston: Northeastern University Press.

26. A concern may arise here that the criminal action might actually bring about a *better* or more just or equitable distribution of benefits and burdens, and, in turn, justify the criminal's action. But for rebuttal of this concern, see Sher, G. (1987). "Deserved punishment," in *Desert*. Princeton, NJ.: Princeton University Press, pp. 82-90.

27. One might argue that, even if the original politicians and victimized family members have died, but these "wrongly disrupted balances of benefits and burdens" could be financially traced

and legally established, there would be no good reasons why the holdings of those who have *later* wrongly benefited and been burdened by the original crimes—such as cronies or family members or descendents related to the original actors—should not be redistributed accordingly. This bears radical implications for even libertarian theories of justice, like Nozick's, that have not been adequately explored. See Nozick, R. (1975). *Anarchy, state and utopia*. Basic Books: New York, especially his critical but all-too-brief comments on the "original acquisition of holdings and the rectification of unjust holdings" in Part II. This no-limitation approach will also be appealing to advocates of "restorative justice approaches" to crime and political malfeasance (which have as of late been used more and more effectively in places like New Zealand, South Africa, Canada, etc.), whereby resolution of such misdeeds is not just left to the courts to adjudicate, but to *all* those who have been substantially affected. For enlightening consideration of such possibilities, see Braithwaite, J. (2006). "Accountability and responsibility through restorative justice," in Dowdle, M. (Ed.), *Public accountability: Designs, dilemmas and experiences*. New York: Cambridge U. Press, pp. 33-51; Sher, G. (Winter, 1981). "Ancient wrongs and modern rights," *Philosophy & Public Affairs* 10(1): 3-17; and Bittiker, B. (2003). *The case for black reparations*, 2nd Ed. Boston: Beacon Press.

28. See Murphy, J.G. (Spring, 1973). Marxism and retribution. *Philosophy & Public Affairs* 2(3): 217-243; also Murphy (1979). *Retribution, justice, and therapy: Essays in the philosophy of law*. Dordrecht, Netherlands: D. Reidel Publ. Co. esp. 77-127; and Murphy (1985). "Retributivism, moral education, and the liberal state, *Criminal Justice Ethics* 4:1: 3-11.

29. Especially in Hirsch, A.V. (1993). *Censure and punishment*. New York: Oxford U. Press, ch. 1; cf. also his "Proportionality in the philosophy of punishment: From 'Why Punish?' to 'How Much?'," *Criminal Law Forum* 1 (1990): 259-290; and (1985). *Deservingness and dangerousness in the sentencing of criminals.* New Brunswick: Rutgers U. Press.

30. For insights related to these concerns, I am indebted to Law Professor Marilyn Phelan and her comments and lecture entitled "Effect of Government Immunity on Declining Ethics in Governmental Actions," during the 2007 Oxford Round Table on "Ethical sentiments: The waning of trust in government."

31. This example is more common and less hypothetical than one might initially assume. But I do not mean to suggest by it that political criminals who cause deaths should automatically be sentenced to death. Whether or not capital punishment is justified is a separate question, and obviously outside the scope of what I'm considering here. Something that seems reasonable to conclude, though, is that *if* the execution of a petty robber--who unintentionally kills one person in the course of his robbery--is justified, *then*, on pain of inconsistency, the execution of a political criminal who kills one person, and especially many other persons, is also justified. And if the latter is unjustified, the former would seem to be unjustified, too. On a last and similar note, I should point out that if this strict retributive model is unjustified to apply to political criminals, then, at least to prevent apparent bias, it would also seem unjustified to apply to street criminals.

32. For initial help in wading through the vast literature dealing with these issues of legal, individual and collective responsibility and causation, especially for political crimes, see Black, C.L. (1974). *Impeachment*. New Haven.: Yale U. Press; Husak, D. (Oct. 1980). Omissions, causation, and liability, in *Philosophical quarterly* 30: 318-326; Hart, H.L.A. & Honoré, T. (1985). *Causation in the law*, 2nd Ed. Oxford: Clarendon Press; Alexander, L. (Ap. 1987). Causation and corrective justice: Does tort law make sense?" *Law and philosophy* 6: 1-23; May, L. & Hoffman, S. (1991). (Eds.), *Collective responsibility: Five decades of debate in theoretical and applied ethics*. Lanham, Md.: Rowman & Littlefield Publ.; Brudner, A. (Jan. 1998). Owning

outcomes: On intervening causes, thin skulls, and fault-undifferentiated crimes, in *Canadian journal of law and jurisprudence* 11(1): 89-114; Ross, J.I. (2000). (Ed.), *Controlling state crime*. New Brunswick, N.J.: Transaction Publ.; Sunstein, C., Hastie, R., Payne, J., Schkade, D., & Viscusi, W.K. (2002). *Punitive damages*. Chicago: U. of Chicago Press; Frederickson, G. & Ghere, R. (eds.), (2005). *Ethics in public management*. Armonk, N.Y.: M.E. Sharpe Publ.; French, P. & Wettstein, H. (2006). *Shared intentions and collective responsibility.* Midwest Studies in Philosophy: Vol. No. XXX, Boston: Blackwell Publ. and Wolff, J. (Nov. 2006). Risk, fear, blame, shame and the regulation of public safety," *Economics and philosophy* 22(3): 409-427.

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