

2015

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Recommended Citation

Zephyr Teachout, *Love, Equality, and Corruption*, 84 Fordham L. Rev. 453 (2015).

Available at: <https://ir.lawnet.fordham.edu/flr/vol84/iss2/5>

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LOVE, EQUALITY, AND CORRUPTION

*Zephyr Teachout**

INTRODUCTION

What is corruption? Unless one takes an absolute (and hard to defend) view of words' meanings—*there is a fixed meaning, it cannot differ*—this question can mean different things. What has it meant in the past? What has it meant to judges? What social function does the word play? Does it have any meaning at all, or is it just another word for a different idea? Does the meaning it had historically have any coherence? Does the meaning it has now have any coherence? What do most people think it means? What do most scholars think, or most lawyers, or most U.S. Supreme Court Justices?

When we debate the meaning of corruption, these different questions often overlap with each other and get confused. In my book, *Corruption in America*, I primarily focus on the question, *what has “corruption” meant in the past in America?* and, relatedly, *why did that meaning change in the U.S. Supreme Court’s jurisprudence, if not elsewhere?*¹ In this Article, I focus on corruption’s social function, a social function that I think is positive and helpful in American political life.

My essential argument—where I disagree with both Professors Richard Hasen and Lawrence Lessig²—is that the word “corruption” retains a moral sense, an accusatory sense, and that this is a good thing. I believe the deep core of corruption involves personal, moral failure.

I. DEFINING CORRUPTION

Let me start by stating my key definitions:

- An *act* is corrupt if it is done for narrow, selfish interests and not corrupt if it is done for the public good.

* Zephyr Teachout, Associate Professor, Fordham University School of Law. Thanks to my constant colleagues in understanding democracy, Lawrence Lessig and Richard Hasen. This Article is part of a symposium entitled *Fighting Corruption in America and Abroad* held at Fordham University School of Law. For an overview of the symposium, see Jed Handelsman Shugerman, *Foreword: Fighting Corruption in America and Abroad*, 84 FORDHAM L. REV. 407 (2015).

1. ZEPHYR TEACHOUT, *CORRUPTION IN AMERICA: FROM BENJAMIN FRANKLIN’S SNUFF BOX TO CITIZENS UNITED* (2014).

2. See generally Richard L. Hasen, *Why Isn’t Congress More Corrupt?: A Preliminary Inquiry*, 84 FORDHAM L. REV. 429 (2015); Lawrence Lessig, *Corrupt and Unequal, Both*, 84 FORDHAM L. REV. 445 (2015).

- A *person* is corrupt if she routinely orients her acts in the public sphere toward narrow, selfish interests and not for the public good.
- An *institution* is corrupt if it is designed to serve the public good and instead serves narrow public interests.

As these definitions show, I believe that corruption requires talking about questions of motive, intent, feeling, and passion. It requires, in essence, us to pull back the hood of the external person and directly engage in what she wants—not just what she is doing, but why she is doing it. I argue that this is what corruption has always meant; that it is a language that comes from Aristotle, who understood corruption in these terms, and that modern efforts to strip this fundamental psychological and internal understanding of corruption has political effects.

According to Professor Hasen, corruption is really another word for political inequality.³ According to Professor Lessig, corruption in our democracy exists when there is a dependency that makes institutions serve purposes different from that which they were designed to serve.⁴ They have notably, repeatedly, and fruitfully tussled in several forums, disagreeing about whether the language of corruption is appropriate.

Both of them veer away from sentences like “Bank of America is corrupt for donating money to get a private tax benefit” or “Senator _____ is corrupt for accepting the donation and putting Bank of America’s interest over that of the general public.”

In short, the biggest difference between my own definition and that of most of my colleagues is that I believe that questions of corruption necessarily implicate the self, the essence of the person or institution—its soul, if you will. Sometimes you can better understand the disagreement by comparing the opposites of each definition of corruption. For me, the opposite of corruption is love for the public; for Professor Hasen, the opposite of corruption is political equality; and for Professor Lessig, the opposite of corruption is independence.

Of course, there is substantial overlap between these views. One could even argue that they come to the same thing, but I disagree. The argument that they are essentially the same goes something like this: if you believe that rulers ought to love the public, you believe they ought to love them equally, and a gross love for one member of the public over all other members would not only be a betrayal of the love principle, but also a betrayal of the equality principle. Equality is embedded in the principle of love for the public; therefore, equality is the same as love for the public.

But this ignores actual human nature, which I believe we cannot ignore in political design, let alone political philosophy. I believe that it matters what

3. See generally Hasen, *supra* note 2.

4. See generally Lessig, *supra* note 2.

someone actually, not tactically, orients themselves toward. Take, for instance, a congressman who goes into office in order to become rich. In order to become rich, he must first become popular. In order to become popular, he chooses the strategy of appearing to care about all equally and in fact makes equality his campaign theme and his political platform. But deep in his heart, every morning, he wakes up thinking about how wealthy he will become when he retires and gets a job as a lobbyist. Compare this congressman to a different congressman who makes the exact same strategic choice to make equality a campaign theme, but does so because she deeply cares about the constituents and strives to love and care for them equally because of that love. In Hasen's or Lessig's view, these two are interchangeable. In my view, they are fundamentally different creatures, and a leadership constituted of the first kind is deeply unstable and likely to collapse at any moment.

There are two primary reasons I disagree with my colleagues. The first is the deep history of the word in political theory. The second is social function. I briefly touch on Aristotle and then turn to the social function of the word.

Aristotle is the essential source of the concept of corruption in modern political theory. Aristotle created the six types of government, a typology whose shadow we still live under.⁵ According to Aristotle, the difference between a corrupt government and its noncorrupt counterpart is the orientation of the love and attention of the holder, or holders, of power.⁶

Recall that the corrupt monarch in Aristotle's typology is the tyrant, and the corrupt aristocracy is the oligarchy.⁷ The difference between tyranny and monarchy lies in the soul of the monarch and who the monarch feels and believes he (then it was largely he) is trying to serve. The difference between the aristocracy and the oligarchy is not whether there is a formal mechanical difference in voting styles, but whether the elite club in power attempts at every turn to serve themselves or attempts to serve others. Corruption is selfishness in the public sphere, egotism, and a misplaced sense that because one has formal power, one can use that formal power for private ends. The phrase "might makes right" itself exudes a corrupt ideology, because it suggests that rightness flows from power, not from whether one serves the public.

Monarchy and aristocracy aside, the two types of government Aristotle referenced that make clearest my difference with both Professor Lessig and Professor Hasen are the polity and the democracy. The polity is the noncorrupt, virtuous form; the polity is when there is rule by the public, and that mass rule is defined by the use of power in service of the love of the public. The democracy is the corrupt form, according to Aristotle, where demagogues rule using collective power for private ends.⁸

5. ARISTOTLE, *POLITICS* bk. III, at 179–83 (Longman, Green, and Co. ed., W.E. Bolland trans., 1877) (c. 350 B.C.E.).

6. *See id.* at 179.

7. *See id.* at 180–81.

8. *See id.*

Aristotle, then, in his formulation, burrowed right into our souls, delving into what the rulers actually believe—addressing, at heart, who they love. This does not strike me as far from where most people who participate in American political society find themselves.

Now let us look at the social role of corruption: how it feels to use the word and how it relates to our sense of character. To say someone is “corrupt” is different than saying that they are “tall,” although both are adjectives. “Corruption” is a different kind of word than “soccer,” though both are nouns. It necessarily invokes morality, judgment, and disapproval. The word implicitly expresses a vision of undesirable human behavior and also creates a space for imagining desirable, possible, and good human political behavior.

Corruption, in this way, is an essential part of political grammar in a democracy. Corruption helps describe the bounds of what a faithful public servant or citizen will do. When applied to people in the political context, the use of the word “corrupt” suggests some range of appropriate political behavior. When applied to governments or institutions, it suggests a range of appropriate ways that those governments or institutions should function. Even if there is no exact agreement about its bounds—and the disputes at the borders are fascinating—the word “corrupt,” unlike, say, the word “unequal,” suggests a range of appropriate political behavior with bad actors and good actors, as well as a range of appropriate power structures, both moral and immoral. When the inappropriate behavior, person, or power structure is given the adjective “corrupt,” it is not merely clumsy or awkward—it is soiled. If something is outside that appropriate range, civic condemnation follows. For example, while the difference between a “gift” and a “bribe” may depend upon a theory about the appropriate kinds of relationships between those in power and those out of power, the difference between calling something a “gift” and a “bribe” is the difference between calling someone morally good (or neutral) and morally bad. That means that corruption enables shunning. The corrupt person might not be invited to a dinner party; the corrupt government might not be invited to engage in an international treaty.

Labeling someone or something as corrupt plays a distinct social function. Let us say, for instance, we are persuaded by Professor Hasen that corruption is really a subset of concerns about political equality,⁹ and we try to shift our language to his language. Try to replace the adjective “corrupt” with an adjectival string using the word “political inequality”—it becomes clumsy and loses some moral force. “The Senator is corrupt” sounds different than “[t]he Senator failed to consider every constituent’s interest with equal weight.” Both are serious charges, but I would argue that the corruption language is more personally damning than the inequality language. Something happens around corruption and the language of corruption that is worth paying attention to. Consider the activist sphere: a

9. See Hasen, *supra* note 2, at 441.

chant to “throw the corrupt bums out!” has the power of accusation and morality within it in a different way than “throw the preferential bums out!”

When one talks about the scope of obligations and the failure to act for those obligations without the language of corruption, the conversation becomes different and, I would argue, more emotionally dry.

Another way to illustrate this is to borrow the language of fiduciary obligation and replace “corruption” with the fiduciary language. The public condemnatory language used in association with corruption theory is simply stronger. It is easy to say, “I hope my friend stops seeing that person; she’s corrupt” and slightly less powerful to say, “I hope my friend stops seeing that person; she fails to live up to her fiduciary duties to her constituents.”

Naming a potentially socially acceptable act as “corrupt” has a moral force separate from the legal force and brings the kind of shame closer to that associated with treason, sexual promiscuity (historically), or racism (in the contemporary culture). Regardless of whether a particular activity is against the law, to call something corrupt is to call it a moral crime, and the accusation carries with it a special kind of blame—a blame of the actor, not just the act. The naming of something as corrupt asks for a kind of social abandonment of the person or the institution associated with the word. It is different, in all these ways, than a word like “idiotic” or “irrational.” The word “irrational” is also negative, also an insult, but no matter how often it is used, it is not integral to political grammar in the way “corruption” is. And, even when it is an insult, it is not a moral insult and does not call into question the character of the person or institution called irrational. Relatedly, there is a cathartic effect of using the term “corruption”—the accusation of corruption gives some power to the accuser. As I argued in *Corruption in America*, the ability to call a public official corrupt arguably reveals an authority of the citizen.

II. HOW TO DEAL WITH SYSTEMIC CORRUPTION

But, you might say, corruption also always has encompassed systemic flaws or process flaws that threaten to undermine the system by allowing private interests to extract subsidies from the public. How do you deal with that? Professor Lessig’s dependence model of corruption focuses largely on institutional failures¹⁰ in institutions constituted by “good souls.” Dependence corruption exists when elements inside a political institution become dependent upon a powerful interest outside a political institution that was not designed to have control over that institution.

Professor Lessig does not entirely reject the individual crime. He argues that “[e]veryone agrees [corruption] means at least quid pro quo bribery, or influence peddling. . . . [C]orruption is influence exchanged for reward; public office traded for private gain. To the modern American mind, no crime could be clearer.”¹¹ However, he does not study those kinds of

10. See Lessig, *supra* note 2, at 446–47 (describing his dependence model of corruption).

11. Lawrence Lessig, *A Reply to Professor Hasen*, 126 HARV. L. REV. F. 61, 61 (2013).

corruption. Instead, he focuses on what he calls dependence corruption: “the state of an institution or an individual that has developed a dependence different from a, or the, dependence intended or desired.”¹²

According to Professor Lessig, an institution becomes corrupt when there are parties outside it that create dependence.¹³ Dependence can be personal or institutional; all the persons inside an institution may become dependent, or the entire institution may be dependent. This dependency makes it impossible for the individuals or institutions to act in the best interests of the institution, whatever those interests may be. In politics, a dependence outside of the public creates a conflict in the loyalties of a politician. A candidate may be completely dependent upon donors to get elected. That dependence compromises and corrupts her ability to represent her community.

Professor Lessig uses the example of the judge whose campaign was supported by a \$3 million independent expenditure while the judge was considering a case that impacted the spending party. He argues:

Justice Benjamin was formally independent of Blankenship. Blankenship didn't hire him. He had no power to fire him. Benjamin received his salary from the state. Nothing Blankenship could do would change the size of that salary, or the speed with which it grew. In a strictly formal sense, Benjamin was an independent judge whose decision in this matter could not be controlled by the litigant Blankenship.

But no one who is genuinely concerned about independence—or maybe better, improper dependence—would limit considerations to formal independence alone.¹⁴

This, he argues, is an inappropriate dependency.¹⁵ The intuition of dependence corruption applies to election-related fundraising, where a set of funders becomes entirely essential to a candidate's success. In each case, one would have to conclude that the person in elected office was necessarily, as a structural matter, dependent. Corruption would exist even if those funders never demanded anything, but regularly voted their conscience, because their conscience (which is not the conscience of the public) would have the ability to direct who got elected and, through that, the policies that they chose to pursue. A candidate might have a choice to reject their funding, but because no candidate could get elected without their funding, such a choice is not a meaningful or serious one. In this model, contracts (exchanges) could create a subset of dependencies but are not necessary or sufficient for dependency. The dependency analysis is finally an analysis of power, and corruption means that power is allocated in the wrong place in a political society, according to the society's own terms.

12. *Id.* at 65.

13. *Id.*

14. Lawrence Lessig, *What Everybody Knows and What Too Few Accept*, 123 HARV. L. REV. 104, 105 (2009).

15. *Id.*

Supreme Court cases have also used dependence corruption (sometimes at the same time as using quid pro quo corruption). In *Davis v. FEC*,¹⁶ the Court said that burdening a candidate's expenditure of his own funds on his own campaign does not further the State's anticorruption interest.¹⁷ Indeed, the Court stated that "reliance on personal funds *reduces* the threat of corruption,"¹⁸ because "the use of personal funds . . . reduces the candidate's dependence on outside contributions."¹⁹

This phrasing indicates that at least some members of the Court see "dependence" upon campaign contributions as a kind of corruption. Professor Lessig argues that "a representative democracy that developed a competing dependency, conflicting with the dependency upon the people, would be 'corrupt.'"²⁰ Representatives "depend" on sources of private wealth, so that they can be reelected, but in so doing they weaken the integrity of the system.²¹

This dependency constrains action and undermines the institution. Professor Lessig argues that dependency alone is not corrupting, but inappropriate dependencies are corrupting: if an institution is designed to be dependent upon the will of a handful of people, but is, in fact, dependent upon the will of a second group of people, that institution is corrupt. If the institution is dependent upon the set of people for whom it was designed to be dependent, the institution is not corrupt.

The essential move in Professor Lessig's formulation is the move away from individual indictment. A public officer who is dependent is not corrupt, he argues, but a system that encourages and requires this kind of dependency is corrupt. Therefore, one can still use the language of corruption to describe what happens when private interests predominate, but the corruption attaches to the system, not the individuals. Effectively, he argues that, if corruption is necessary to get a job, it no longer becomes a corrupt act to engage in that system.

I have previously explained why I think morality is an essential part of the understanding of corruption in the personal sense. What I think Lessig's account lacks is an explanation of why we would use the same condemning word to describe something fundamentally different in the structural sphere. Looking at its social function, I think that the function of saying "the college is corrupt" or "Congress is corrupt" implicitly involves some of the relevant actors either being corrupting or corrupted in the personal sense, so

16. 554 U.S. 724 (2008).

17. *Id.* at 741 (stating that "discouraging [the] use of personal funds[] disserves the anti-corruption interest").

18. *Id.* at 740–41.

19. *Id.* at 738 (quoting *Buckley v. Valeo*, 424 U.S. 1, 53 (1976)). The Court in *Buckley v. Valeo* reasoned that "the use of personal funds reduces the candidate's dependence on outside contributions and thereby counteracts the coercive pressures and attendant risks of abuse" of money in politics. 424 U.S. at 53.

20. LAWRENCE LESSIG, *REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT* 128 (2011).

21. *Id.* at 141–42.

that there is a deep entanglement between the personal and institutional accusation.

III. WHY DOES IT MATTER?

All three of us agree that we need publicly financed elections. We all are suspect of the Court's decision in *Citizens United v. FEC*.²² There is very little we disagree on. So why does it matter?

My definition is actually grounded in a political pragmatism—my own belief that without moral language that engages moral sentiments, two things become extremely difficult. The first is the equal treatment of the public. I believe that the inequality in treatment of the public is almost inevitable without love, and equality in treatment is only enabled by love. Although there are critical factors that help create this love, we must engage the moral sentiments. In practice, few people will actually be equality oriented and selfish at the same time. So it is not so much that equal treatment is impossible without love, but that it is far less likely. So as a practical and not theoretical matter, this human engagement with the nature of desire actually matters.

Second, it is difficult, although not impossible, to engage political change without using the accusatory and moral language of corruption. Corruption has been the bugle cry in some of the most important moments of political change. People respond very powerfully to wrongness, to immorality, and, in particular, to personal immorality (an individual is corrupt or was corrupted)—arguably more powerfully than they respond to the language of political equality. Or rather, because I also believe in the power of the rhetoric of political equality, they respond to both best when there is both a moral condemnation and a moral vision, blended together.

But the most essential reason I disagree with Professor Hasen and Professor Lessig is because I believe that the human condition—the human heart—is capable of public love, but only if there is a grammar and public support for that kind of love. Patriotism, love of country—that exists, that is real.

Another reason it matters is that the more you understand that corruption is actually fundamentally a moral accusation, the easier it is to understand that anticorruption laws are necessarily over- and underinclusive and not designed to actually criminalize corruption so much as make corruption less likely.

The law of corruption can never exactly match acts of corruption, but is always going to be, in essence, prophylactic. It will always be both over- and underinclusive because, while law is good at many things, digging into the heart to discover why we give a campaign contribution, a bottle of wine, or a car, is not something the law is particularly good at. In other words, while a jury might be able—with real difficulty—to determine that the bottle of wine was given in order to influence a public act, it is almost

22. 558 U.S. 310 (2010).

impossible for a jury to determine whether the desire for influence came from a desire for the good of the public or a narrow, selfish desire.

Because of this, the primary job of structuring a system to prevent corruption must necessarily focus on areas where structural conflicts of interest are present. For instance, a law preventing a lawmaker from having outside income from interests directly affected by his decisions is a law that is necessarily both over- and underinclusive, but it is an essential anticorruption law. There are some lawmakers who are capable of being a lawyer for, say, Boeing and then not treating Boeing any differently when Boeing is asking for a tax break. However, the law preventing these conflicts makes corruption less likely.

A law prohibiting revolving doors does the same thing. Over half of the members of Congress now go on to lobby when leaving Congress.²³ Some of them may be capable of being in Congress without giving a greater weight to their potential future employers, but others will not, and so the revolving door law is needed. It will never cover all instances, because there are plenty of shadow lobbying jobs that are not covered by the prohibition.

But even an extortion or a bribery law, intended to apply only to those individuals who have transgressed in a particular way, is essentially prophylactic under my definition. That is because a person who gives a \$10 million car in an explicit deal to a politician in exchange for changing a law might be doing so for publicly oriented reasons or for narrow, selfish reasons. However, laws against giving gifts with intent to influence political behavior make it far less likely that selfish behavior will be present.

CONCLUSION

While we may want to root out corruption, there is no world without corruption and, in fact, no political world in which it is not everywhere. People in and out of power will always serve their own interests. Our goal then is to build a system with as much public orientation as possible and as little corruption as possible—not a fantasy world without any corruption at all. The goal of anticorruption laws is both to protect and build a political culture that cherishes and nourishes love for the public. Some of these laws also serve the end of enabling greater political equality. And that is also an essential democratic value and the value that democracy adds.

The primary reason for passing laws against limits on campaign spending may have to do with the value of political equality, the basic idea that each person's interest should be valued equally. This is an extremely powerful and essential democratic idea. I support this idea. It is, I would argue, one of the key reasons behind most of the laws that we want.

23. *Revolving Door: Former Members of the 113th Congress*, OPENSECRETS.ORG, <http://www.opensecrets.org/revolving/departing.php> (last visited Oct. 21, 2015) [<http://perma.cc/K8PG-GLQL>].