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# Reviving the Federal Crime of Gratuities

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# REVIVING THE FEDERAL CRIME OF GRATUITIES

Sarah N. Welling<sup>\*</sup>

*The federal crime of gratuities prohibits people from giving gifts to federal public officials if the gift is tied to an official act. Both the donor and the donee are liable. The gratuities crime is dysfunctional in two main ways. It is overinclusive in that it covers conduct indistinguishable from bribery. It is underinclusive in that it does not cover conduct that is clearly dangerous: gifts to public officials because of their positions that are not tied to a particular official act.*

*This Article argues that Congress should extend the crime of gratuities to cover gifts because of an official's position rather than leaving the crime to cover only gifts because of particular official acts. The danger to bias-free government because of gifting based on official positions is demonstrated in recent research on influence and reciprocity. The rule for reciprocity is powerful and hard to fight because participants are generally unaware it is operating on them. Gifting officials based on their positions is not adequately controlled by mandated disclosure or ethics prohibitions. This Article urges Congress to amend the gratuities crime to expand it and avoid the dangers of overcriminalization by inserting mens rea terms into the crime. The appropriate mens rea terms are knowledge of the facts for donees and knowledge of the facts and law for donors. Congress should also address the overbreadth of the crime by taking one situation, when donors transfer value to donees because of future official acts, out of the gratuities crime because it is indistinguishable from the crime of bribery. This Article proposes amendments to implement these changes in terms familiar to the federal criminal law.*

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<sup>\*</sup> Ashland-Spears Distinguished Research Professor, University of Kentucky College of Law. I thank the Sixth Circuit Criminal Pattern Jury Instruction Committee for helping me think about federal criminal law; Professor George Brown and Thomas M. Susman for providing shoulders for me to stand on; Faculty Services Librarian Franklin Runge for research assistance, especially in the social sciences; April Brooks for digital assistance; and Professor Robert Schwemm for everything.

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## INTRODUCTION

The little-known federal crime called gratuities prohibits giving gifts to federal public officials if the gift is tied to an official act.<sup>1</sup> Gratuities is a political corruption crime, a junior varsity version of bribery.<sup>4</sup> Both the donor/private citizen and the donee/public official are liable, and liable to the same extent.<sup>2</sup> The gratuities crime was enacted in 1962 and became effective in 1963.<sup>3</sup> The crime needs to be amended after our 50 years of experience with it.

The gratuities crime is dysfunctional in two main ways. It is overinclusive in that it covers conduct indistinguishable from bribery.<sup>4</sup> It is underinclusive in that it does not cover conduct that is clearly dangerous—namely, gifts to public officials because of their office.<sup>5</sup> Recent research shows how dangerous these gifts are in terms of influencing public officials based on the rule of reciprocity. The urge humans have to reciprocate is powerful and unconscious.<sup>6</sup> Based on this research, when a donor transfers value to a donee, the injury to society is sufficient in terms of biased officials to warrant treating the conduct as criminal.

Thus, the gratuities crime should be broadened to include gifts that are given to public officials because of their official *positions* but are not tied to a particular act. The *United States v. Sun-Diamond Growers of California* case, decided by the Supreme Court in 1999, established that such gifts are not covered by the gratuities statute.<sup>7</sup> The Court's main rationale was that the plain words of the statute require that the donor give the gift "for or because of any official act."<sup>8</sup> The Court reached a defensible conclusion based on the words in the statute.<sup>9</sup> The statutory language should be amended to cover gifts to public officials based on their positions. In this situation, even if the government cannot prove that the gift was tied to a particular official act, the gift is harmful and dangerous because it will lead to bias in the public official's conduct based on the human inclination to reciprocate.<sup>10</sup>

This Article first proposes that Congress amend the gratuities statute to correct these problems and second suggests a seamless and practical way to do so. Congress should extend the crime of gratuities to cover the situation where a donor transfers value to donees because of their positions. Prohibiting this conduct under criminal law is the best way to control it; merely mandating disclosure of the gifting or treating it under the ethics rules is not an effective method of control.

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1. 18 U.S.C. § 201(c)(1) (2012).
  2. *Id.* Hereinafter, private citizen donors will simply be referred to as *donors* and donee public officials will be referred to as *donees*.
  3. *See* 18 U.S.C. § 201.
  4. *See infra* Part III.
  5. *See infra* Part V.A.
  6. *See infra* Part V.B.1–2.
  7. 526 U.S. 398, 406–08 (1999).
  8. *Id.*
  9. *See infra* note 74 and accompanying text.
  10. *See infra* Part V.B.1–2.

Concerns raised by potential overcriminalization<sup>11</sup> may be addressed with the usual criminal law technique of adding a *mens rea* element to the statute. As of now, the statute has no *mens rea* term, and the courts have failed to develop a coherent theory of *mens rea* for the crime.<sup>12</sup> Amending the statute to add a *mens rea* term will not only avoid the dangers of overcriminalization but will also eliminate confusion regarding the elements of the crime,<sup>13</sup> and send the job of defining the elements back to the appropriate institution—Congress.

Based on an analysis of the dangers and interests involved, this Article proposes adding *mens rea* terms that distinguish between donors and donees. Although courts have recognized that the liability of donors and donees is not interdependent,<sup>14</sup> the proposal to impose different *mens rea* requirements for the two types of defendants has not been raised in legal literature. Congress should amend the gratuities statute to provide that donors are liable only if they know both the facts and the law, and donees are liable only if they know the facts. These *mens rea* best suit the actors because donees can be expected to know the law while donors should be protected from criminal liability unless they understand they are doing something wrong.

This Article begins by describing the current elements and basic rationale of the gratuities crime in Part I. It then separates the situations to which the crime applies into four categories of conduct to examine the scope and application of the crime. Part II covers the situation when a donor gives something to a public official because of a *personal act or relationship*; the Article concludes that the crime appropriately does not cover this conduct. Part III covers situations where the donor gives something to a public official because of *future official acts*; Part III concludes that the crime does apply to this situation, but that its application is too broad because it is indistinguishable from bribery. Part IV covers situations where the donor gives something to a public official because of *past official acts* and concludes that the gratuities crime covers this conduct and works well. Part V discusses situations where the donor gives something to a public official not because of an identifiable official act, but rather because of the donee's *position* generally; this Part concludes that the crime of gratuities does not apply to this situation currently, but it should. Part V then explains my proposal to expand the crime to cover gifts received because of official position and to avoid overcriminalization by adding *mens rea* terms. Finally, Part VI places these situations on a continuum of harm and, somewhat less theoretically, proposes

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11. See George D. Brown, *The Gratuities Debate and Campaign Reform: How Strong is the Link?*, 52 WAYNE L. REV. 1371, 1372 (2006); Richard E. Myers II, *Adaptation and Resiliency in Legal System: Complex Times Don't Call for Complex Crimes*, 89 N.C. L. REV. 1849, 1865–68 (2011).

12. See *infra* Part V.D.2.a.

13. See *infra* note 22.

14. See, e.g., *United States v. Evans*, 572 F.2d 455, 480 (5th Cir. 1978) (citing *United States v. Anderson*, 509 F.2d 312, 332 (D.C. Cir. 1974); *United States v. Miller*, 340 F.2d 421, 424–25 (4th Cir. 1965)).

specific amendments to the statute to implement the suggestions.<sup>15</sup>

## I. BACKGROUND OF THE CRIME

### A. *Birth and Elements*

The crime of gratuities prohibits transfers of value to federal public officials because of an official act.<sup>16</sup> It became a crime in 1963 as part of a series of laws designed to deal with conflicts of interest in federal employees.<sup>17</sup> The particular statute, titled *Bribery of Public Officials and Witnesses*, actually prohibits two crimes, bribery and gratuities.<sup>18</sup> The term *gratuities* does not appear in the statute<sup>19</sup> but is an accepted nickname for the crime defined in § 201(c)(1) of the statute<sup>20</sup> which states:

(c) Whoever—

(1) otherwise than as provided by law for the proper discharge of official duty—

(A) directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act

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15. This Article excludes discussion of transfers of value to federal public officials that qualify as campaign contributions. Such contributions raise issues of constitutionality and campaign finance policy beyond the scope of this Article. *See generally* LAWRENCE LESSIG, *REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT* (2011); Samuel Issacharoff, Comment, *On Political Corruption*, 124 HARV. L. REV. 118 (2010). After this exclusion, the issues that remain to be discussed include gifts to federal public officials, including elected officials, in forms other than cash, and any kind of gift, including cash, given to federal public officials who are appointed rather than elected. This Article uses the term public official to include federal employees in all branches of government at all levels. Professor Kathleen Clark has pointed out that some provisions exclude particular federal employees. *See* Kathleen Clark, *Do We Have Enough Ethics in Government Yet?: An Answer from Fiduciary Theory*, 1996 U. ILL. L. REV. 57, 58 n.2; *see also, e.g.*, Standards of Ethical Conduct for Employees of the Executive Branch; Proposed Amendments Limiting Gifts from Registered Lobbyists and Lobbying Organizations, 76 Fed. Reg. 56330 (proposed Sept. 13, 2011) (to be codified at 5 C.F.R. pt. 2635) (proposing a regulation in executive branch gift rules to eliminate distinct treatment for career workers and political appointees).

16. 18 U.S.C. § 201(c)(1) (2012).

17. The statute became effective in 1963 as part of an act codified at 18 U.S.C. §§ 201–18 that had no name, but the chapter where it was codified, Chapter 11 of Title 18, is called “Bribery, Graft and Conflicts of Interest.” Roswell Perkins of the New York Bar, drafter of the statute, characterized the purpose as limiting government conflicts of interest. *See* Roswell B. Perkins, *The New Federal Conflict-of-Interest Law*, 76 HARV. L. REV. 1113, 1113 n.2, 1114–15 (1963).

18. *See* 18 U.S.C. § 201.

19. *Id.*

20. *See, e.g.*, *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 400 (1999) (describing § 201(c)(1) as “the illegal gratuity statute”); U.S. SENTENCING GUIDELINES MANUAL § 2C1.2 (2010); Brown, *supra* note 11, at 1375–76.

performed or to be performed by such public official, former public official, or person selected to be a public official; or

(B) being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally for or because of any official act performed or to be performed by such official or person[.]<sup>21</sup>

The basic idea of the crime is that giving anything of value to a federal public official for or because of an official act is a crime for both the donor and the donee.<sup>22</sup> The term *public official* includes all persons acting for or on behalf of the U.S. government.<sup>23</sup> The statute describes things that may not be given as “anything of value.”<sup>24</sup> Official acts include any decision on any matter that may be pending or may be brought before a public official.<sup>25</sup> Some examples of the gratuities crime are described below.<sup>26</sup>

21. 18 U.S.C. § 201(c)(1).

22. *See, e.g.*, United States v. Hoffmann, 556 F.3d 871, 875 (8th Cir. 2009) (affirming jury instruction stating that crime had three elements: defendant gave unauthorized things of value to a federal employee for or because of an official act); *see also* United States v. Schaffer, 183 F.3d 833, 840 (D.C. Cir. 1999), *vacated as moot*, 240 F.3d 35 (D.C. Cir. 2001) (stating that the district court correctly instructed that gratuities crime has three separate elements: defendant knowingly gave thing of value to public official for or because of official act); United States v. Patel, 32 F.3d 340, 344–45 (8th Cir. 1994) (finding that a jury instruction was proper that had three elements for the crime of giving an illegal gratuity); United States v. Campbell, 684 F.2d 141, 147 (D.C. Cir. 1982) (finding five elements to the illegal gratuity offense). Commentators have explored the elements of the crime. *See generally* Randall D. Eliason, *Surgery with a Meat Axe: Using Honest Services Fraud to Prosecute Federal Corruption*, 99 J. CRIM. L. & CRIMINOLOGY 929 (2009); Charles B. Klein, *What Exactly Is an Unlawful Gratuity After United States v. Sun-Diamond Growers?*, 68 GEO. WASH. L. REV. 116 (1999); Joseph R. Weeks, *Bribes, Gratuities and the Congress: The Institutionalized Corruption of the Political Process, the Impotence of Criminal Law to Reach it, and a Proposal for Change*, 13 J. LEGIS. 123 (1986).

23. *Public official* is defined as “an officer or employee or person acting for or on behalf of the United States or any department, agency or branch of Government thereof . . . .” 18 U.S.C. § 201(a)(1).

24. *Id.* § 201(c)(1)(A)–(B).

25. *Id.* § 201(a)(3).

[T]he term “official act” means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official’s official capacity, or in such official’s place of trust or profit.

*Id.*; *see generally* United States v. Valdes, 475 F.3d 1319 (D.C. Cir. 2007) (interpreting “official act”).

26. *See infra* Part V.

The main limit on the crime is that transfers of value to public officials are prohibited only if they are given or received “for or because of any official act.”<sup>27</sup> This phrase obviously excludes from the crime gifts given to federal officials for or because of birthdays, friendship, or other personal or emotional reasons.<sup>28</sup> The Supreme Court has further construed this term “for or because of an official act” to require a link between the gift to the public official and a *particular* official act.<sup>29</sup> The crime is not established by proof that a public official received a gift because of his official position or because of some undefined official act; rather, the gift to the official must be linked to a particular official act.<sup>30</sup>

The statute also specifies the timing of the gift to the public official vis-à-vis the official act.<sup>31</sup> Gifts are prohibited if they are given or received because of any official act “performed or to be performed.”<sup>32</sup> Thus, gifts to public officials are prohibited both for past official acts and for future official acts.

### ***B. Rationale***

Roswell Perkins, the drafter of 18 U.S.C. § 201, first articulated the rationale for the crime of gratuities by noting that “[t]he deleterious results of [allowing public officials to accept transfers of economic value from private sources] may range all the way from natural gratitude to economic dependence.”<sup>33</sup> Leading commentator George Brown has identified and collected more specific rationales for the crime;<sup>34</sup> these generally focus on the threat that such gratuities pose to democratic values.<sup>35</sup> Permitting gifts to public officials allows officials to use their public office for private gain.<sup>36</sup> Gratuities raise the risk of preferential treatment for donors and undermine equality of access to government services.<sup>37</sup>

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27. 18 U.S.C. § 201(c)(1).

28. *See infra* Part II.

29. *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 406, 414 (1999).

30. *Id.* at 405–06.

31. *See* 18 U.S.C. § 201(c)(1).

32. *Id.*

33. Perkins, *supra* note 17, at 1119.

34. *See* George D. Brown, *Putting Watergate Behind Us—Salinas, Sun-Diamond, and Two Views of the Anticorruption Model*, 74 TUL. L. REV. 747, 769–70 (2000) [hereinafter Brown, *Putting Watergate Behind Us*]; George D. Brown, *The Gratuities Offense and the RICO Approach to Independent Counsel Jurisdiction*, 86 GEO. L.J. 2045, 2051–54 (1998) [hereinafter Brown, *The Gratuities Offense*].

35. Brown, *supra* note 11, at 1398.

36. Brown, *The Gratuities Offense*, *supra* note 34, at 2054 (citing Beth Nolan, *Public Interest, Private Income: Conflicts and Control Limits on the Outside Income of Government Officials*, 87 NW. U. L. REV. 57, 72, 80–81 (1992)).

37. *Id.*; Nolan, *supra* note 36, at 80 & n.89, 81. The Fifth Circuit explained:

The purpose of [the gratuities statute] is to reach any situation in which the judgment of a government agent might be clouded because of payments or gifts made to him by reason of his position “otherwise than as provided by law for the proper discharge of official duty.” Even if corruption is not intended by either the donor or the donee, there is still a

Gratuities increase the risk that donees will have divided loyalties.<sup>38</sup> Gifting to public officials contributes to inefficient government.<sup>39</sup> Gratuities are really bribes, but the government cannot prove the quid pro quo or the basis for the exchange.<sup>40</sup> And, finally, gratuities have the appearance of impropriety.<sup>41</sup>

### C. *Four Applications*

The situations where the gratuities crime might apply can be divided into four categories. These are

1. Donor gives to a public official because of personal reasons.
2. Donor gives to a public official because of a future official act.
3. Donor gives to a public official because of a past official act.
4. Donor gives to a public official because of his or her official position.

These four applications are each discussed below.

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tendency in such a situation to provide conscious or unconscious preferential treatment of the donor by the donee, or the inefficient management of public affairs. These statutes, like the predecessor legislation, are a congressional effort to eliminate the temptation inherent in such a situation . . . .

United States v. Evans, 572 F.2d 455, 480 (5th Cir. 1978). Shortly after the crime was enacted, the Second Circuit explained:

The awarding of gifts thus related to an employee's official acts is an evil in itself, even though the donor does not corruptly intend to influence the employee's official acts, because it tends, subtly or otherwise, to bring about preferential treatment by Government officials or employees, consciously or unconsciously, for those who give gifts as distinguished from those who do not. . . . The iniquity of the procuring of public officials, be it intentional or unintentional, is so fatally destructive to good government that a statute designed to remove the temptation for a public official to give preferment to one member of the public over another, by prohibiting all gifts 'for or because of any official act,' is a reasonable and proper means of insuring the integrity, fairness and impartiality of the administration of the law.

United States v. Irwin, 354 F.2d 192, 196 (2d Cir. 1965).

38. Brown, *The Gratuities Offense*, *supra* note 34, at 2054 (citing *Evans*, 572 F.2d at 480; Perkins, *supra* note 17, at 1119).

39. *Evans*, 572 F.2d at 480.

40. Brown, *The Gratuities Offense*, *supra* note 34, at 2054–55 (citing Daniel Hays Lowenstein, *Political Bribery and the Intermediate Theory of Politics*, 32 UCLA L. REV. 784, 850 (1985)).

41. *Id.* at 2054 (citing SPECIAL COMM. ON THE FED. CONFLICT OF INTEREST LAWS, ASSN. OF THE CITY OF NEW YORK, CONFLICT OF INTEREST AND FEDERAL SERVICE 219 (1960)); *see also* Valdes v. United States, 475 F.3d 1319, 1327–28 (D.C. Cir. 2007) (en banc) (stating that gratuities crime strikes at “the appearance of evil” (quoting H.R. REP. NO. 87-478, at 19 (1961))).

## II. GIFTING BECAUSE OF A PERSONAL ACT OR RELATIONSHIP: APPROPRIATELY NOT CRIMINAL

When a donor gives a gift to a federal public official because of a personal act or relationship, it is not a crime under the gratuities statute.<sup>42</sup> This outcome is fine and needs no change, but a brief discussion of this limit on the crime is helpful for perspective on the conduct that is covered by the crime.

Personal gifts are excluded from the crime by the statutory language that requires the gratuities to be given “for or because of an official act.”<sup>43</sup> Official acts include any decision on any matter that may be pending or may be brought before a public official.<sup>44</sup> If the gift is for or because of friendship or social purpose, it is not covered by the gratuity statute.<sup>45</sup>

To establish that a gift was given or received because of an official act, the government must prove that the gift was *in some part* based on an official act.<sup>46</sup> The gift need not be based exclusively on an official act; this element is met if the gift is based in part on the donee’s official act and in part on personal reasons.<sup>47</sup> The courts developed this mixed-motive doctrine based on the rationale that a legal purpose should not immunize participants who also have an illegal purpose.<sup>48</sup>

The courts have identified factors useful to distinguish personal gifts from gifts based on an official act. These factors are whether the donor treated the gift as an expense to be reimbursed by an employer;<sup>49</sup> whether the donor deducted the gift

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42. See *supra* notes 27–30 and accompanying text.

43. 18 U.S.C. § 201(c)(1) (2012).

44. *Id.* § 201(a)(3) provides:

[T]he term “official act” means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official’s official capacity, or in such official’s place of trust or profit.

*Id.* § 201(a)(3); see generally *Valdes*, 475 F.3d at 1322–23 (interpreting “official act”).

45. *E.g.*, *United States v. Hoffmann*, 556 F.3d 871, 875 (8th Cir. 2009); *United States v. Biaggi*, 853 F.2d 89, 99–100 (2d Cir. 1988); *United States v. Standefer*, 610 F.2d 1076, 1080 (3d Cir. 1979) (en banc), *aff’d on other grounds*, 447 U.S. 10 (1980).

46. See, *e.g.*, *United States v. Gaines*, Nos. 92-5446, 92-5501, 1993 U.S. App. LEXIS 15310, at \*17 (4th Cir. June 23, 1993) (unpublished); *Biaggi*, 853 F.2d at 99–100; *Standefer*, 610 F.2d at 1080; *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 413–14 (1999). *But cf. Hoffmann*, 556 F.3d at 874–75 (stating that theory-of-defense instruction requiring acquittal if donor gave things “solely” because of goodwill and friendship was improper but instructions taken as whole were accurate; conviction affirmed).

47. *Gaines*, 1993 U.S. App. LEXIS 15310, at \*17.

48. See *United States v. Biaggi*, 909 F.2d 662, 683 (2d Cir. 1990) (“A valid purpose that partially motivates a transaction does not insulate participants in an unlawful transaction from criminal liability.”); see also *United States v. Bryant*, 655 F.3d 232, 245–46 (3d Cir. 2011) (approving that jury instructions that allowed conviction of mail fraud based on dual purpose).

49. See, *e.g.*, *Hoffmann*, 556 F.3d at 873 n.2, 874, 878.

as a business expense;<sup>50</sup> whether the participants had a history of gift-giving before the donee became an official;<sup>51</sup> whether the gift-giving continued after the donee was no longer an official;<sup>52</sup> whether the donor gave comparable gifts to others;<sup>53</sup> whether the donor and donee had a social relationship outside their official capacities;<sup>54</sup> whether the gifts fell into a pattern tracking the official acts;<sup>55</sup> and whether the gift was unusually valuable.<sup>56</sup>

With this limit in place, old friends from school may continue to share sports tickets and meals after one goes to work for the federal government based on their pre-existing personal relationship. College roommates may continue to exchange birthday and holiday gifts even after one of them becomes the Secretary of Commerce. Personal friends may give each other gifts, and this ability is not extinguished by the gratuities crime when one becomes a federal official.

### III. GIFTING BECAUSE OF FUTURE OFFICIAL ACTS: COVERAGE BY GRATUITY CRIME IS TOO BROAD AND INDISTINGUISHABLE FROM BRIBERY

The gratuities crime covers gifts based on official acts “performed or to be performed.”<sup>57</sup> The drawback to this language is that it is so broad that sometimes the gratuities crime is indistinguishable from bribery. Congress intended bribery and gratuities to be different crimes, with bribery being the more serious.<sup>58</sup> Bribery does not require that the public official actually be influenced.<sup>59</sup> Instead, bribery only requires a *mens rea* of intent to influence (in the case of a donor) or the intent to be influenced (in the case of a donee). This *mens rea* for bribery—an intent to influence or to be influenced—is the main distinction between the crimes of bribery and gratuities.<sup>60</sup>

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50. *Id.* at 873 n.2.

51. *See Standefer*, 610 F.2d at 1080.

52. *Id.*

53. *Id.*

54. *See United States v. Gaines*, Nos. 92-5446, 92-5501, 1993 U.S. App. LEXIS 15310, at \*18–19 (4th Cir. June 23, 1993) (unpublished); *Standefer*, 610 F.2d at 1080.

55. *See United States v. Biaggi*, 853 F.2d 89, 100 (2d Cir. 1988).

56. *See, e.g., Gaines*, 1993 U.S. App. LEXIS 15310, at \*18; *Biaggi*, 853 F.2d at 99–100.

57. 18 U.S.C. § 201(c)(1) (2012).

58. *See United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 404–08 (1999). *Compare* 18 U.S.C. § 201(b)(4) (indicating a 15-year maximum sentence for bribery), *with id.* § 201(c)(3) (noting a two-year maximum sentence for gratuities).

59. *See United States v. Brewster*, 408 U.S. 501, 526 (1972); *United States v. Arroyo*, 581 F.2d 649, 655 (7th Cir. 1978).

60. *Sun-Diamond*, 526 U.S. at 404 (stating that “distinguishing feature” of bribery is that it requires intent to influence or to be influenced); *see* 18 U.S.C. § 201(b)(1); *see also United States v. Umans*, 368 F.2d 725, 728–29 (2d Cir. 1966); *Brown*, *supra* note 11, at 1376.

Although this *mens rea* is the main difference, the language of the gratuities statute that refers to “any official act performed *or to be performed*”<sup>61</sup> is confusing because it expands the crime of gratuities so much that it is indistinguishable from the crime of bribery. Based just on this statutory language, the crimes of gratuities based on future official acts and bribery were hard to distinguish before *Sun-Diamond* was decided.<sup>62</sup> After *Sun-Diamond* required the government to prove a link between the gift and a particular official act, the crimes of gratuities and bribery became impossible to distinguish.<sup>63</sup>

The problem arises when a donor gives a gift to a donee because of an official act “to be performed.” An act “to be performed” is a particular act in the future.<sup>64</sup> In an effort to give this language meaning and explain how a donor can give a gift because of an act to be performed in the future without it also being a bribe—*i.e.*, without the donor intending to influence the donee’s conduct—courts and commentators have conjured up the idea of a “forward-looking gratuity.”<sup>65</sup>

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61. 18 U.S.C. § 201(c)(1)(A)–(B) (emphasis added).

62. As the D.C. Circuit explains:

Where the statute [sic] does cause great difficulty for a trial judge, a difficulty which we hold proved fatal to the conviction in this case, is that in addition to the problem of drawing a distinction between one definable offense and innocent conduct, where both offenses are charged a trial judge must also draw a tripartite distinction between conduct with the defined intent to constitute an offense under the bribery section (c), conduct with the requisite intent to constitute an offense under the gratuity section (g), and conduct with an intent which constitutes no offense at all. The trial judge strove manfully—and judicially—make [sic] these fine distinctions for the jury. Yet we have found it difficult ourselves, with adequate time to reflect and ponder, to understand the subtle distinctions made in the written text of the instructions. . . .

We do not fault the District Judge here for his failure to illuminate the obscure; it may not be easy under this statute to make the tripartite distinction, although we think it is clearly possible to draw instructions making sufficiently clear the line between guilt and innocence under each subsection of section 201 taken separately.

*United States v. Brewster*, 506 F.2d 62, 78–79 (D.C. Cir. 1974); see Brown, *The Gratuities Offense*, *supra* note 34, at 2061–62.

63. PATRICK LEAHY, PUBLIC CORRUPTION PROSECUTION IMPROVEMENTS ACT OF 2007, S. REP. NO. 110-239, at 6 (2007) (stating that the holding of *Sun-Diamond* “makes the [gratuity] statute nearly impossible to differentiate from the federal bribery statute . . .”); Brown, *supra* note 11, at 1372, 1388.

64. See *supra* notes 27, 61 and accompanying text.

65. The “forward-looking gratuity” was first identified in *United States v. Schaffer*, 183 F.3d 833, 841–42 (D.C. Cir. 1999), *vacated as moot*, *United States v. Shaffer III*, 240 F.3d 35 (D.C. Cir. 2001). The D.C. Circuit described the gratuities crime as falling into three categories based on “temporal focus”: (1) gifts that were a reward for past action; (2) gifts that were intended to entice a public official to maintain a position previously staked out; and (3) gifts given with the intent to induce a public official to propose, take, or shy away from future official act. *Schaffer*, 183 F.3d at 841–42. The third category of gratuities crime was nicknamed “forward-looking gratuities” by commentators. See Brown,

The theory of a forward-looking gratuity is that the donor gives a gift to a public official because the public official has committed to do a particular act in the future; the commitment is in the past, but the act is “to be performed” in the future. The gift is a gratuity because it is a reward or tip for the commitment to do the act.<sup>66</sup>

Yet in this situation, when the donor is giving the gift because of a future act, surely the donor is giving the gift not because of past conduct (the commitment in words—which is helpful but not conclusive) but because the donor wants to ensure that the donee carries through with the act. The donor wants to lock in the public official. In other words, the donor intends to influence the conduct of the donee. The idea that the donor is grateful for the past verbal commitment and rewards it with a gift while remaining indifferent as to whether the commitment is kept and the act is done is not persuasive. Rather, in this situation, the donor has the intent of influencing the public official to complete the act the public official committed to perform.<sup>67</sup> This is bribery.<sup>68</sup>

The confusion between bribery and gratuities because of particular future official acts is exacerbated by the jury instruction on inferring intent, which is an instruction given by every district court. That instruction provides:

Ordinarily, there is no way that a defendant’s state of mind can be proved directly, because no one can read another person’s mind and tell what that person is thinking. . . . But a defendant’s state of mind can be proved indirectly from the surrounding circumstances. . . . You may . . . consider the natural and probable results of any acts that the defendant knowingly did . . . , and whether it is reasonable to conclude that the defendant intended those results.<sup>69</sup>

Thus, juries are specifically instructed on their freedom to infer intent. When the gratuities prosecution is based on gifting because of a particular future official act, the jury will be instructed on its freedom to infer the defendant’s intent to influence the donee.

The conclusion that the crime of gratuities is difficult to distinguish from bribery is not a new idea. Commentators have documented the confusion regarding the line between the two crimes over the years.<sup>70</sup> The only point I would add is my

*supra* note 1120, at 1380 (describing the *Sun-Diamond* Court’s treatment of “forward-looking gratuities”); *see generally* Klein, *supra* note 22 (defining the scope of the forward-looking gratuity in the wake of *Sun-Diamond*).

66. *See* Klein *supra* note 22, at 118–19.

67. *See* Eliason, *supra* note 22, at 980 & n.219.

68. *See supra* notes 45–47, 57–60.

69. SIXTH CIRCUIT PATTERN JURY INSTRUCTIONS (CRIMINAL) § 2.08(2)–(4) (2001).

70. Brown, *supra* note 11, 1372, 1376; Brown, *Putting Watergate Behind Us*, *supra* note 34, at 771 (describing the overlap between crimes of bribery and gratuities (citing Daniel Hays Lowenstein, *Political Bribery and the Intermediate Theory of Politics*, 32 UCLA L. REV. 784, 795–97 (1985)); Klein, *supra* note 22, at 129; *see also* Eliason, *supra* note 22, at 960, 985; Weeks, *supra* note 22, at 132–33.

suggestion on how to solve the confusion. I propose eliminating the forward-looking gratuity altogether and letting that conduct be covered by the crime of bribery.

The best way to eliminate forward-looking gratuities is for Congress to amend the statute to delete the language referring to acts “or to be performed.” The statutory language in the gratuities subsection would be changed from “[f]or or because of an official act performed or to be performed” to “[f]or or because of an official act performed.” Deleting the phrase “or to be performed” from the gratuity subsections of the statute is a simple and clean way to put an end to the forward-looking gratuity and the resulting garble between the crimes of bribery and gratuities.

#### **IV. GIFTING BECAUSE OF PAST OFFICIAL ACTS: COVERAGE BY GRATUITY CRIME WORKS WELL**

In the situation where a donor transfers a gift to a donee because of an official act the donee did in the past, the current gratuities crime works well. The donor’s gift can be characterized as a reward, a tip, or a type of thank-you.<sup>71</sup> This conduct is dangerous at a level that makes its categorization as the crime of gratuities appropriate: This conduct is not so innocuous that it should not be considered a crime at all, yet the risk of influencing the donee’s conduct is not so great as to be characterized as the crime of bribery.

#### **V. GIFTING BECAUSE OF AN OFFICIAL’S POSITION: NOT COVERED BY GRATUITY CRIME BUT SHOULD BE**

##### *A. Not Covered Under Current Gratuities Statute*

Let us imagine a situation where donors give to public officials presents that are not because of personal reasons and that are not tied to particular official acts. Let’s imagine that the donor is giving the presents to the public official just to curry favor, create general goodwill, and to maintain access to the official. One of the Supreme Court Justices posed this hypothetical during the oral argument in the case:

QUESTION: Do you say [the gift to the public official] has to be because of some particular official act?

MR. BLOOM [attorney for defendant Sun-Diamond]: . . . [W]e do believe that—that the statute calls for a link between a gift on one hand and some specific or identifiable official act.

QUESTION: Specific or identifiable. Well, I mean—I mean, let’s say I’m—I’m AT&T, and I just give enormous quantities of money to the Chairman of the Federal Communications Commission.

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71. See, e.g., *United States v. Ring*, 628 F. Supp. 2d 195, 205 (D.D.C. 2009) (noting that the gratuities charge was sufficient where donor Ring gave sports tickets to donee as a “thank you” for help rendered earlier); see also Eliason, *supra* note 22, at 938, 945.

....

QUESTION: That doesn't violate this Act?

....

QUESTION: Saying, you know, I'm not asking you to do anything in particular. I have no particular case in mind.

(Laughter.)

....

QUESTION: I just—I just want you—just—I just want you to be a friend; that's all.

(Laughter.)

MR. BLOOM: I strongly suspect that if I had matters before the FCC or before any department, it's not going to be terribly difficult for the prosecutor, especially with the resources of the grand jury, to be able to identify matters.

....

QUESTION: No, no. Wait. You have to take my hypothetical. There is no particular matter that AT&T mentioned to the Chairman. It just said, you know, I just love Chairmen of the FCC. They are wonderful people. They're—you know, they could make a lot more money elsewhere. I—this is in appreciation of your taking all this time out to serve the people. And I—you know, here's a couple of million dollars.

(Laughter.)

MR. BLOOM: Well, I strongly suspect that a jury could find that it was for an act, if one were identified. But using your hypothetical—

QUESTION: No particular act.

MR. BLOOM: I understand, sir. Using your hypothetical, I would suspect that that person could be charged under one of the other statutes—the salary supplementation statute. It sounds like he's giving the money because of the job and because of his acts as—pursuant—

QUESTION: My question was—was not whether he could be charged under one of the other statutes. It's whether he can be charged under this statute.

MR. BLOOM: Right. And our answer is no.

QUESTION: Is no?

MR. BLOOM: Is no.<sup>72</sup>

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72. Transcript of Oral Argument, *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398 (1999) (No. 98-131), 1999 U.S. Trans Lexis 17, at \*29-31.

Although this colloquy generated plenty of laughter, the Supreme Court embraced the argument unanimously, holding that the gratuities crime did not apply to gifting because of an official's position.<sup>73</sup> This result is perhaps defensible because the language in the gratuities statute always provided that the transfer of value had to be given or received because of an official "act."<sup>74</sup>

However, as discussed below, social science research has established that gifting to public officials that is not tied to a particular act, but rather is because of their positions, is dangerous because it influences the participants and leads to biased public officials.

### ***B. Gifts to Public Officials Because of Their Positions are Dangerous***

Research shows that gifting is dangerous in two basic ways. The following Subsections illustrate that gifting is dangerous because: (1) it creates a desire for the recipient to reciprocate, and (2) the desire to reciprocate arises from the person's unconscious.

#### *1. Influence Research: The Urge to Reciprocate*

The primary danger of gifting to public officials because of their position is based on social science research on influence. This influence research shows that a powerful way to affect how people behave is to trigger the built-in urge to reciprocate. The basic human nature rule is, "[W]e should try to repay, in kind, what another person has provided us . . . . [W]e are *obligated* to the future repayment of favors, gifts, invitations and the like."<sup>75</sup>

The urge to reciprocate, often called the norm or rule of reciprocity,<sup>76</sup> is an automatic human response<sup>77</sup> based on internalized social norms, possibly with an evolutionary basis.<sup>78</sup> It is extensive in that all human societies subscribe to it,

73. United States v. Sun-Diamond Growers of Cal., 526 U.S. 398, 408, 414 (1999).

74. 18 U.S.C. § 201(c)(1) (2012).

75. ROBERT B. CIALDINI, INFLUENCE: SCIENCE AND PRACTICE 19 (5th ed. 2009); see also Robert B. Cialdini & Vlaslas Griskevicius, *Social Influence*, in ADVANCED SOCIAL PSYCHOLOGY: THE STATE OF THE SCIENCE 389 (Roy F. Baumeister & Eli J. Kimmel eds., 2010) (stating reciprocation rule as "[o]ne should be more willing to comply with a request from someone who has previously provided a favor or concession"); LESSIG, *supra* note 15, at 107–15 (describing the federal government as a gift economy based on reciprocity).

76. See, e.g., CIALDINI, *supra* note 75, at 22 ("reciprocity rule"); LESSIG, *supra* note 15, at 109; Jerry M. Burger et al., *The Norm of Reciprocity as an Internalized Social Norm: Returning Favors Even When No One Finds Out*, 4 SOC. INFLUENCE 11, 11–12 (2009); Mark A. Whatley et al., *The Effect of a Favor on Public and Private Compliance: How Internalized is the Norm of Reciprocity?*, 21 BASIC & APPLIED SOC. PSYCHOL. 251, 251 (1999).

77. CIALDINI, *supra* note 75, at 1–16.

78. *Id.* at 20 (noting rule for reciprocation is "deeply implanted" in us); LESSIG, *supra* note 15, at 132 ("We don't need a Sigmund Freud here. We all recognize the drive deep in our bones (or, more accurately, our DNA) to reciprocate." (citing Robert L. Trivers, *The Evolution of Reciprocal Altruism*, 46 Q. REV. BIOLOGY 35 (1971))); Burger et al., *supra*

and it permeates exchanges of every kind.<sup>79</sup> The power of the rule of reciprocity is fueled by a double whammy of feelings: We feel bad when we do not reciprocate and find ourselves indebted,<sup>80</sup> and we feel good when we do reciprocate.<sup>81</sup> This rule is so powerful that the urge to reciprocate can overwhelm other variables that normally determine how a person acts.<sup>82</sup>

One of the classic experiments illustrating the power of the rule of reciprocity was conducted by Dennis Regan.<sup>83</sup> Two subjects were asked to rate paintings as part of a study of art appreciation.<sup>84</sup> Actually, one of the subjects was an undercover associate of experimenter.<sup>85</sup> During a break in the rating process, the undercover associate left the room for a few minutes.<sup>86</sup> In some cases, he returned with two bottles of Coke, one for himself and one for the real subject.<sup>87</sup> In other cases, he returned empty-handed.<sup>88</sup> After the paintings were all rated, the undercover subject asked the real subject to do him a favor and buy some raffle tickets the undercover subject was selling for 25 cents apiece.<sup>89</sup> Subjects who had received a coke bought twice as many raffle tickets as the subjects who had not been given the prior favor.<sup>90</sup> On average, subjects who had been given a 10-cent drink bought two raffle tickets, amounting to 50 cents or a 500% return on the 10-cent gift, and some bought as many as seven, amounting to \$1.75 or a 1,750% return on the 10-cent gift.<sup>91</sup>

Researchers have identified more particular characteristics of the rule for reciprocity. One feature concerns uninvited first favors: Donees feel compelled to reciprocate even for gifts they did not request.<sup>92</sup> This response to uninvited gifts

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note 76, at 17; Whatley et al., *supra* note 76, at 252; Jonah Lehrer, *Kin and Kind*, NEW YORKER, Mar. 5, 2012, at 36.

79. CIALDINI, *supra* note 75, at 19 (citing Alvin W. Gouldner, *The Norm of Reciprocity: A Preliminary Statement*, 25 AM. SOC. REV. 161, 175 (1960)).

80. *Id.* at 34 (pointing out that negative feelings of indebtedness, including both internal discomfort and possibility of external shame, are psychologically costly); LESSIG *supra* note 15, at 109–10 (describing the feeling of moral obligation in the gift economy of the federal government).

81. Ryan Goei & Franklin J. Boster, *The Roles of Obligation and Gratitude in Explaining the Effect of Favors on Compliance*, 72 COMM. MONOGRAPHS 284, 285 (2005); Whatley et al., *supra* note 76, at 258.

82. CIALDINI, *supra* note 75, at 23–26.

83. Dennis T. Regan, *Effects of a Favor and Liking on Compliance*, 7 J. EXPERIMENTAL SOC. PSYCHOL. 627 (1971).

84. *Id.* at 631.

85. *Id.* at 630.

86. *Id.* at 631.

87. *Id.*

88. *Id.*

89. *Id.* at 632.

90. *Id.* at 634.

91. See CIALDINI, *supra* note 75, at 24, 35 (describing Regan's experiment).

92. *Id.* at 31.

developed so a person could initiate a relationship without a fear of loss.<sup>93</sup> Another feature of the rule for reciprocity is unequal exchanges. The rule of reciprocity frequently triggers unequal exchanges because to be rid of the uncomfortable feeling of indebtedness, people will often agree to a request for a substantially larger return gift than one they received.<sup>94</sup> Based on this propensity for unequal exchanges, donors who intends to exploit this trait of human nature can maximize what they receive in return.<sup>95</sup>

Another specific feature researchers have identified is that the value of the gift is not that important. Even the smallest gifts often make donees feel obligated to reciprocate.<sup>96</sup> The rule for reciprocity is not affected by anonymity, so even if no one will know whether the donee reciprocated, she still will feel an urge and will do so.<sup>97</sup> And the impact of the rule is enduring, so the desire to repay fades over time only when the gift is relatively small.<sup>98</sup>

The original research on reciprocity was published by Alvin Gouldner in 1960.<sup>99</sup> Over the years, researchers have replicated the results and further investigated the rule of reciprocity.<sup>100</sup> The leading authority today on influence

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93. *Id.* at 30 (“The [reciprocity] rule was established to promote the development of reciprocal relationships between individuals so that one person could initiate such a relationship without the fear of loss. If the rule is to serve that purpose, then an uninvited first favor must have the ability to create an obligation.”).

94. *Id.* at 33–34.

95. *Id.* at 11, 28–31.

96. LESSIG, *supra* note 15, at 111 (“And as economist Michele Dell’Era demonstrates, the gifts necessary to make this system of reciprocity work need not be large.”); Cialdini & Griskevicius, *supra* note 75, at 390 (“People often feel obligated to reciprocate even the smallest gift.”); Jo-Ann Tsang, *Gratitude for Small and Large Favors: A Behavioral Test*, 2 J. POSITIVE PSYCHOL. 157, 164 (2007) (explaining that although some studies show that people report stronger feelings based on larger gifts or favors, value is not a significant variable; “when people actually receive a favor from another person, the present data suggest that the value of the favor may matter less; rather, ‘it’s the thought that counts.’” (citation omitted)); *see also* Troyen A. Brennan et al., *Health Industry Practices That Create Conflicts of Interest: A Policy Proposal for Academic Medical Centers*, 295 JAMA 429, 430–31 (2006) (noting the “myth of small gifts” and citing influence research as the basis for a proposal that academic medical centers prohibit all gifts from drug and medical device companies to physicians).

97. *See* Burger et al., *supra* note 76, at 17; Whatley et al., *supra* note 76, at 257–58 (summarizing that reciprocity effect is not affected by anonymity variable).

98. CIALDINI, *supra* note 75, at 20.

99. *See id.* at 19 (citing Gouldner, *supra* note 79, 175); Goei & Boster, *supra* note 81, at 284–85.

100. *See generally supra* notes 75–98 (indicating relevant studies). Much of the significant research was published by Dennis Regan in 1971. *See* Regan, *supra* notes 83–91. Regan’s research is explained in several publications. *See* CIALDINI, *supra* note 75, at 22; Thomas M. Susman, *Private Ethics, Public Conduct: An Essay on Ethical Lobbying, Campaign Contributions, Reciprocity, and the Public Good*, 19 STAN. L. & POL’Y REV. 10, 15–16 (2008) [hereinafter Susman, *Private Ethics*] (explaining Regan’s research); Thomas M. Susman, *Lobbying in the 21st Century—Reciprocity and the Need for Reform*, 58

generally, and specifically on how the rule of reciprocity influences human behavior, is Robert Cialdini.<sup>101</sup>

This influence research has not found its way into the criminal law on gratuities. The first work was published in 1960, just two years before Congress adopted the gratuities crime, and it is not mentioned in the legislative history.<sup>102</sup> When Congress adopted the crime, the data on influencing human behavior was not widely known, nor had it been replicated by multiple studies as it has been today.<sup>103</sup> The courts have not relied on this influence research in the case law on gratuities. Two commentators have noted the implications of the influence research for government ethics and corruption, but they did not specifically discuss implications for the crime of gratuities.<sup>104</sup>

The implications of this influence research for the crime of gratuities are that all gifting to public officials because of their official position should be prohibited. When the characteristics of the rule of reciprocity are applied in the context of gifts to public officials because of their official position, the specific dangers of these gifts become clear. First, because donees feel compelled to reciprocate even uninvited first favors or gifts, gifts to donees compromise the ability of the public officials to decide whom they are indebted to, and the choice is put in the hands of donors.<sup>105</sup> Second, because the rule frequently triggers unequal exchanges, a donor who is so inclined can exploit this feature by giving a small gift which may well trigger a larger return gift from the donee.<sup>106</sup> Third, the value of the gift the donor gives is not important; even the smallest gifts will make donees feel obligated to reciprocate.<sup>107</sup> Donees will feel the urge to reciprocate

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ADMIN. L. REV. 737, 747–48 (2006) [hereinafter Susman, *Lobbying*] (detailing Regan’s experiment).

101. See generally CIALDINI, *supra* note 75; see also Cialdini & Griskevicius, *supra* note 75, at 385–408. Robert B. Cialdini & Noah J. Goldstein, *Social Influence: Compliance and Conformity*, 55 ANN. REV. PSYCHOL. 591 (2004); see also Susman, *Private Ethics*, *supra* note 100, at 16 (citing Cialdini’s book); Susman, *Lobbying*, *supra* note 100, at 748 (discussing Cialdini’s book).

102. See generally S. REP. NO. 2213 (1962).

103. See Cialdini & Griskevicius, *supra* note 75, at 388–91 (2010) (collecting numerous studies confirming the power of reciprocity); see also *supra* note 100.

104. Cialdini notes that the strength of the reciprocity rule is evident in the restrictions on gifts to legislative and judicial officials. CIALDINI, *supra* note 75, at 27. Thomas Susman, an expert on government ethics and lobbying, provides the most detailed treatment of the influence research, analyzing the power of reciprocity in the context of lobbyists and elected officials. See, e.g., Susman, *Private Ethics*, *supra* note 100; Susman, *Lobbying*, note 100. Other writers have mentioned it in passing. ALEXANDER J. FIELD, ALTRUISTICALLY INCLINED? THE BEHAVIORAL SCIENCE, EVOLUTIONARY THEORY, AND THE ORIGINS OF RECIPROCITY 17–18 (2001); Douglas A. Terry, *Don’t Forget about Reciprocal Altruism: Critical Review of the Evolutionary Jurisprudence Movement*, 34 CONN. L. REV. 477, 503–04 (2002).

105. See CIALDINI, *supra* note 75, at 31.

106. *Id.* at 33.

107. See *supra* note 96.

even if the gesture remains anonymous to all but the donor and donee.<sup>108</sup> And finally, the feeling of indebtedness that the rule engenders in donees is enduring and fades over time for only the most trivial gifts.

*2. The Influence of Reciprocity is Unconscious*

One characteristic of the rule of reciprocity makes it particularly dangerous—namely, that persons acting under its influence are not aware of it; the influence exerted by the rule of reciprocity is unconscious.<sup>109</sup> This is because the urge to reciprocate is an ingrained and automatic human response.<sup>110</sup> The automaticity of the response makes it difficult to control.<sup>111</sup> Thus, even if the donor and the donee have no plan to abide by the rule for reciprocity, they will likely follow it unconsciously.<sup>112</sup> This feature of the rule of reciprocity echoes the themes of Daniel Kahneman's research on the automaticity of unconscious thinking patterns and responses.<sup>113</sup> If they are asked if a gift affected them, donees can say no and believe it. As Professor Cialdini explains:

Regularly, we hear [politicians] proclaiming total independence from the feelings of obligation that influence everyone else.

. . . Excuse me if I, as a scientist, laugh. . . . Elected and appointed officials often see themselves as immune to the rules that apply to [the] rest of us. . . . But, to indulge them in this conceit when it comes to the rule of reciprocity is not only laughable, it's dangerous.<sup>114</sup>

So, the public official can thoroughly and honestly deny that the gifting affected his or her conduct, while the evidence shows that it probably did.

In sum, this influence research demonstrates that gifting to government officials is dangerous to equal access in government without any link to a particular act and that it is more threatening to the health of democratic governance than was previously known. The impact of such gifting is to create an intolerable temptation for public officials to act with bias in favor of the donor. And, to exacerbate the situation, usually the donee is unaware of this impact. This research

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108. See Burger et al., *supra* note 76, at 17; Whatley et al., *supra* note 76, at 257–58.

109. LESSIG, *supra* note 15, at 114, 132; see also CIALDINI, *supra* note 75, at 27–28; Daylian M. Cain et al., *The Dirt on Coming Clean: Perverse Effects of Disclosing Conflicts of Interest*, 34 J. LEGAL STUD. 1, 5 (2005) (noting that many believe that conflicted professionals are consciously and intentionally acting corruptly, whereas “considerable research suggests that bias is more frequently the result of motivational processes that are unintentional and unconscious”).

110. LESSIG, *supra* note 15, at 114, 132.

111. CIALDINI, *supra* note 75, at 45.

112. *Id.* at 2–10 (discussing automatic human responses that operate as efficient mental shortcuts); LESSIG, *supra* note 15, at 114, 132 (recognizing that the act of reciprocating is often an unconscious human function).

113. See DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2011).

114. CIALDINI, *supra* note 75, at 27.

supports extending the ban on gifts beyond the one set of donors (lobbyists) and donees (members of Congress)<sup>115</sup> to all donors and all unelected federal officials. Although it was understandable that Congress did not take this research into account in 1962, it is indefensible to ignore it now. Based on this research, Congress should expand the crime of gratuities to include gifts to public officials unconnected to an official act.

### *C. Gifting Because of Position Should Be Prohibited*

#### *1. Disclosure Alone is Not an Effective Method of Control*

One approach to control gifting to public officials is to require disclosure.<sup>116</sup> This regulatory technique is the easiest and most gentle form of control. Disclosure is a popular approach these days<sup>117</sup> and is used frequently in the law.<sup>118</sup> Disclosure requirements may be enforced through civil penalties, criminal penalties, or both.<sup>119</sup> However, disclosure is not an effective method of controlling conduct. First, the goals of disclosure are unclear.<sup>120</sup> If the theory is

115. Honest Leadership and Open Government Act of 2007, 2 U.S.C. § 1613 (2012).

116. *E.g.*, Susman, *Private Ethics*, *supra* note 100, at 20–21 (maximizing disclosure is one alternative to reduce impact of reciprocity norm when lobbyists give things to elected legislators); Susman, *Lobbying*, *supra* note 100, at 750 (insisting in “full and immediate disclosure” is the most important step to limit impact of reciprocity norm when lobbyists give things to elected officials).

117. Elizabeth Rosenthal, *I Disclose . . . Nothing*, N.Y. TIMES, Jan. 22, 2012, at SR1 (“[D]isclosure has become the go-to solution for a wide range of problems—from unethical campaign financing to rising corporate carbon emissions . . .”).

118. *See, e.g.*, 2 U.S.C. § 434(a)(1), (b)(2)(A)–(K), (e)(2)(A)–(B), (e)(3) (2012) (requiring national committees of political parties to report receipts and disbursements of funds); 15 U.S.C. §§ 78m(1)(a)(3)(A)–(C), (c)(1)–(2), 7261(b)–(c) (2012) (prescribing disclosure requirements for publicly held companies); 17 C.F.R. § 229.402 (2013) (requiring corporations to disclose executive compensation); 12 C.F.R. §§ 226.5, 226.17 (2013) (stating disclosure requirements under The Truth in Lending Act, 12 U.S.C. § 63806, 15 U.S.C. §§ 1604, 1647(c)(5), 1639(I), and 1639(h)); Transparency Reports and Reporting of Physician Ownership or Investment Interests, 76 Fed. Reg. 78743 (proposed Dec. 19, 2011) (to be codified at 42 C.F.R. pts. 402 and 403) (proposing regulation that physicians be required to divulge financial interests); RULES OF THE HOUSE OF REPRESENTATIVES, RULE XXVI, H.R. DOC. NO. 111-157, at 995 (2011) (requiring clerk to compile disclosure reports filed under the Ethics in Government Act and to make them available to the public); *see also* Julie Powell, *An Appetite for Straight A’s*, N.Y. TIMES, Feb. 17, 2012, at A23 (stating that New York City restaurants are required to display their sanitary grade from health inspectors); Editorial, *What College Students Need to Know*, N.Y. TIMES, Feb. 20, 2012, at A18 (stating that the 1990 Student Right to Know Act requires colleges and universities that receive federal aid to disclose graduation rates and that the 2008 Higher Education Opportunity Act requires schools to offer a way for consumers to determine actual costs after student aid is taken into account).

119. *See, e.g.*, 2 U.S.C. § 1603 (2012) (imposing disclosure requirements on lobbyists); *id.* § 1606 (2012) (providing civil and criminal penalties for non-compliance).

120. Rosenthal, *supra* note 117 (citing Dr. Kevin Weinfurt, Professor of Psychiatry, Duke Univ.).

that mandated disclosure will deter people from the underlying conduct, we have to assume that disclosers feel some shame or aversion.<sup>121</sup> Often that assumption is not warranted.<sup>122</sup> Generally, disclosure laws have not been effective in deterring conduct.<sup>123</sup> For example, every person with a subprime mortgage signed the disclosure statements mandated by the Truth in Lending Act.<sup>124</sup>

Alternatively, if the goal of disclosure is to provide more complete information that then allows recipients of that information to adjust their conduct, the efficacy of disclosure depends on two other assumptions.<sup>125</sup> The first assumption is that recipients are able to understand the disclosed information and its implications.<sup>126</sup> But often the information is so complex that we cannot assume people can derive meaning from it.<sup>127</sup>

The second assumption required for this theory of disclosure to work is that recipients can adjust their conduct to respond appropriately to the information.<sup>128</sup> Yet, often options for response do not exist or are unclear. For example, it is clear enough that diners can avoid eating at a restaurant with a low sanitary score, but it is less clear how recipients are to respond to the disclosure of the fact that their doctor received gifts from particular pharmaceutical companies.<sup>129</sup>

Finally, disclosure requirements are only effective if they are consistently enforced.<sup>130</sup> And assuming disclosure requirements are consistently enforced may not be warranted.

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121. See Floyd Norris, *Which Bosses Really Care if Shares Rise?*, N.Y. TIMES, June 2, 2006, at C1 (stating that many hope that “full disclosure will shame corporate boards and bosses into cutting back on excessive pay”).

122. See Chuck Collins, *Disclosure Alone Won’t Stop Runaway CEO Pay*, LEXINGTON HERALD-LEADER, Apr. 13, 2007, at A13; Daniel Akst, *Why Rules Can’t Stop Executive Greed*, N.Y. TIMES (Mar. 5, 2006), [http://www.nytimes.com/2006/03/05/business/yourmoney/05cont.html?\\_r=0](http://www.nytimes.com/2006/03/05/business/yourmoney/05cont.html?_r=0).

123. Rosenthal, *supra* note 117 (“If recent history serves as a guide, disclosure laws . . . do not necessarily . . . prevent the things they were meant to deter.”).

124. See 12 C.F.R. §§ 226.5, 226.17 (2013).

125. See Cain et al., *supra* note 109, at 3 (“For disclosure to be effective, the recipient of advice must understand how the conflict of interest has influenced the advisor and must be able to correct for that biasing influence.”); James Surowiecki, *The Talking Cure*, NEW YORKER, Dec. 9, 2002, at 54.

126. Cain et al., *supra* note 109, at 5.

127. LESSIG, *supra* note 15, at 251–58 (providing a four-page list of contributions to Congress and noting that while the information seems very important, its meaning is unclear); Amitai Etzioni, *Disclosure Is Not Enough*, AMITAI ETZIONI NOTES (Sept. 24, 2008, 4:32 PM), <http://blog.amitaietzioni.org/2008/09/disclosure-is-not-enough.html>; see also Brennan et al., *supra* note 96, at 431 (“[R]ecipients of information who are not experts in a particular field often find it impossible to identify a biased opinion that they read or hear about that subject.”).

128. Cain et al., *supra* note 109, at 3–4.

129. See, e.g., Brennan et al., *supra* note 96, at 431.

130. See Etzioni, *supra* note 127.

More startling is the news that disclosure is not only ineffective but may be affirmatively harmful. Disclosure may first harm recipients of the information. Recipients of information struggle with “unlearning, ignoring, or suppressing the use of knowledge (such as biased advice) even if they are aware that it is inaccurate.”<sup>131</sup> Moreover, research suggests that disclosure increases rather than decreases the information recipients trust in the discloser because the recipients view the disclosers as more credible agents.<sup>132</sup> Thus, disclosure perversely leads recipients to rely on disclosers more rather than less.<sup>133</sup>

Another type of harm caused by compelled disclosure is the impact on the persons disclosing the information.<sup>134</sup> Disclosure is dangerous here in many ways. First, disclosure allows persons disclosing to feel freer to engage in underlying pernicious conduct. Disclosers feel less personally responsible once their conduct is disclosed. This impact is sometime called “moral licensing.”<sup>135</sup> After disclosure, acting on the conflict seems like fair play; disclosure reduces guilty feelings for engaging in conflict-inducing conduct.<sup>136</sup> Along the same lines, persons disclosing may even feel a sly pride, surmising that the compelled disclosure is evidence that they are players.<sup>137</sup>

Second, the impact of disclosure on persons disclosing is harmful because disclosure operates as an attractive risk-management strategy that allows them to reduce their legal liability while continuing the underlying conduct.<sup>138</sup> The impact of disclosure on the persons disclosing is also harmful because it fuels competition. Here, the best example is executive compensation, where required disclosure has led to a race in compensation and perks.<sup>139</sup> As Warren E. Buffett,

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131. Cain et al., *supra* note 109, at 6.

132. *Id.* at 5–6.

133. *See id.*; Paul Sullivan, *In Investing, Disclosure Only Gets You So Far*, N.Y. TIMES, Feb. 9, 2012, at F6; Surowiecki, *supra* note 125, at 54.

134. *See* Cain et al., *supra* note 109, at 6–7.

135. *Id.* at 7.

136. Rosenthal, *supra* note 117 (“Indeed, disclosure has taken on the gestalt of confession: Dump the information and be absolved of further moral or legal responsibility.”).

137. Chuck Collins of the Institute for Policy Studies suggests that chief executive officers actually like public disclosure of their compensation. Collins asks, “Would you discipline an exhibitionist by making them disrobe in the town square?” *See* Collins, *supra* note 122.

138. *See* Cain et al., *supra* note 109, at 18; Rosenthal, *supra* note 117 (“Often the goal of disclosure is to reduce or eliminate the legal risk . . . It is so [disclosers] can say, ‘Hey, we told you so.’” (quoting Dr. Kevin Weinfurt, Professor of Psychiatry, Duke Univ.)).

139. *See* Akst, *supra* note 122; Joseph Nocera, *Disclosure Won’t Tame C.E.O. Pay*, N.Y. TIMES, Jan. 14, 2006, at C1 (stating that if the SEC requires fuller disclosure of executive compensation because “whenever [C.E.O.s] discover a fellow C.E.O. is getting something they don’t have, they make a grab for it. In other words, as laudable as more disclosure is, there is a real possibility that it will make a bad situation worse.”); Norris, *supra* note 121; *cf.* Ginia Bellafante, *Did You Give the Doorman Enough?*, N.Y. TIMES,

the chief executive of Berkshire Hathaway, explains, “[t]he unintended consequence [of disclosure] could be that it becomes a shopping list for C.E.O.’s. . . . Of the seven deadly sins, the one that seems to work more than greed is envy.”<sup>140</sup>

Finally, disclosure is harmful to society. It has a band-aid-like masking effect and so allows society to feel that it is dealing with the danger presented by the disclosed conduct. This relieves pressure to take effective action. In other words, disclosure allows the status quo to continue and reduces pressure to make more important institutional changes.<sup>141</sup> Disclosure is also dangerous for society because it makes the underlying conduct reported seem fine and normal. As other authors have more eloquently put it, disclosure can “legitimize,”<sup>142</sup> “normalize,”<sup>143</sup> and “sanitize”<sup>144</sup> undesirable conduct. If disclosure does not entirely normalize the conduct, it surely trivializes the conduct. In sum, disclosure alone, without prohibition, is not positive or even benign but is affirmatively harmful.

When the compelled-disclosure approach is examined specifically in the context of gifting, the inadequacies and positive harms of disclosure are evident. Current law requires disclosure of some gifts made to officials of the executive,<sup>145</sup> legislative,<sup>146</sup> and judicial branches.<sup>147</sup> An assumption of this approach is that recipients of the disclosed information (the public) on gifts would likely have the ability to understand it, at least on a basic level. This information will not be as complex as, for example, data on corporate finance. The public may not

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Dec. 25, 2011, at MB1 (examining how people evaluate their conduct by comparison to others’ conduct in tipping doormen at the holidays).

140. See Norris, *supra* note 121 (quoting Warren E. Buffett, chief executive of Berkshire Hathaway).

141. See Cain et al., *supra* note 109, at 3; Rosenthal, *supra* note 117; Surowiecki, *supra* note 125, at 54.

142. KRISTEN M. LORD, *THE PERILS AND PROMISE OF GLOBAL TRANSPARENCY: WHY THE INFORMATION REVOLUTION MAY NOT LEAD TO SECURITY, DEMOCRACY, OR PEACE* 3 (2006).

143. LESSIG, *supra* note 15, at 257–58; see also Weeks, *supra*, note 22, at 143 (stating that disclosure of campaign contributions to Congress was ineffective and “may well have simply institutionalized the quid pro quo as the normal and, at least by implication, the accepted manner by which legislation is enacted”); Rosenthal, *supra* note 117.

144. See Brennan et al., *supra* note 96, at 431.

145. Ethics in Government Act of 1978, 5 U.S.C. app. 4 § 102(a)(2)(A) (2012); 5 C.F.R. § 2634.304 (2013).

146. 5 U.S.C. app. 4 §§ 101–111 (2012), also adopted as *THE STANDING RULES OF THE SENATE*, SENATE MANUAL, S. DOC. NO. 112-1, Rs. XXXIV, XLI(1) (2012), available at <http://rules.senate.gov/public/index.cfm?p=RulesOfSenateHome>.

147. GUIDE TO JUDICIARY POLICY § 620.50, available at <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/RulesAndPolicies/conduct/Vol02C-Ch06.pdf> (“Disclosure Requirements: Judicial officers and employees subject to the Ethics in Government Act of 1978 and the instructions of the Financial Disclosure Committee of the Judicial Conference of the United States must comply with the Act and the instructions in disclosing gifts.”).

understand all the more subtle implications of the information, but they will probably not be overcome by complexity.<sup>148</sup> This assumption likely holds true.

The second assumption, that recipients can adjust their conduct to respond to the information, is more of a problem. In the case of unelected public officials, it is unclear how recipients can adjust conduct once gifting information is disclosed. For example, how are we to respond to the disclosure of gifts received by Supreme Court Justices?<sup>149</sup> And even if recipients have a way to respond to the gifting information, as noted above, research demonstrates that people have trouble adjusting their conduct appropriately.<sup>150</sup> Based in part on this research, the medical education field has concluded that disclosure of gifts to physicians from medical device companies is ineffective and has proposed instead that all gifts to physicians from medical device companies be prohibited.<sup>151</sup>

Disclosure exacerbates the underlying problem in the context of gifting. One example is provided by Senator Saxby Chambliss.<sup>152</sup> When the Senate was considering limiting lawmakers' use of corporate jets in 2006, Senator Chambliss opposed the limits. Rather than limit the conduct, he said, the simple answer was to require disclosure of corporate jet use.<sup>153</sup> The reason he took this position then became clear: Senator Chambliss used corporate jets more than most other senators.<sup>154</sup> His support of the disclosure approach illustrates harmful aspects of requiring disclosure. Disclosers feel less guilty and freed up to continue the practice, and society imagines that the problem has been handled so no further change to the status quo is necessary.<sup>155</sup> Treating the conduct with disclosure avoids more aversive action, like prohibition.

Another example of the positive harm caused by compelled disclosure of gifts is revealed by a prosecutor's remarks on the prosecution of Senator Ted Stevens. Senator Stevens was prosecuted and found guilty on seven counts of lying

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148. See Richard A. Serrano & David G. Savage, *Justice Thomas Reports Wealth of Gifts*, L.A. TIMES, Dec. 31, 2004, at A1 (recounting gifts received and reported by Justice Clarence Thomas between 1998 and 2003, including a \$19,000 Bible from a Republican donor, \$15,000 for a Lincoln bust from the American Enterprise Institute, \$5,000 in cash from a mobile home enthusiast, \$1,200 in tires from a trucking executive, \$1,200 in batteries from former law clerks, and an \$800 jacket from the Daytona 500 auto race).

149. See *id.*

150. Cain et al., *supra* note 109, at 5–6.

151. Brennan et al., *supra* note 96, at 431 (proposing that academic medical centers prohibit all gifts from drug and medical device companies to physicians).

152. Sheryl Gay Stolberg, *Fight Looms on Lawmakers' Use of Corporate Jets*, N.Y. TIMES, Mar. 8, 2006, at A19.

153. *Id.*

154. Sheryl Gay Stolberg, *Fight Looms on Lawmakers' Use of Corporate Jets*, N.Y. TIMES (March 8, 2006), available at <http://www.nytimes.com/2006/03/08/08lobby.html> (issuing a March 13, 2006 amendment to the March 8, 2006 article stating that: Senator Chambliss ranked third among current senators who from 2001 to 2005 reimbursed companies for jet travel).

155. See *supra* notes 122–23, 135–38, 141–44 and accompanying text.

to the government for not reporting the value of gifts on a disclosure form.<sup>156</sup> Because of government errors, this verdict was set aside and no judgment of conviction was entered.<sup>157</sup> A prosecutor later characterized the case as “piddly,” not one of the “crimes of the century. . . . It was a forms case—a guy got his financial disclosure forms wrong.”<sup>158</sup> Thus, the treatment of gifting as a target for disclosure trivialized the danger of the underlying gifting conduct.

## 2. Gifting Because of Position is Not Currently Prohibited

### a. Ethics Rules

Under current law, gifts to public officials are regulated by various ethics laws. This is the regulatory structure the Court referred to in *Sun-Diamond*.<sup>159</sup> As Kathleen Clark has noted, this regulatory structure is complicated; it includes statutes, regulations, and executive orders, and the laws are so complex that a cottage industry has developed around them.<sup>160</sup> These rules begin with a statute, § 7353, that generally prohibits gifts to all federal employees from certain interested donors.<sup>161</sup> The statute then authorizes each branch of government to issue regulations establishing exceptions.<sup>162</sup> The executive, legislative, and judicial branches have all adopted their own regulations that prohibit or authorize gifts in various circumstances.<sup>163</sup> Within the executive branch, the maze of regulations is even more convoluted because each *agency* has adopted its own set of regulations.<sup>164</sup> Aside from these rules based on § 7353, Congress has adopted

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156. Senator Stevens was prosecuted under 18 U.S.C. § 1001(a)(1)–(2). In re: Contempt Finding in United States v. Stevens, William M. Welch and Brenda K. Morris, Appellants, United States v. Stevens, 663 F.3d 1270, 1271 (D.C. Cir. 2011) (No. 10-5372), 2011 U.S. App. LEXIS 24431, at \*2.

157. The verdict was set aside because the government violated the Constitution in failing to disclose exculpatory evidence to the defense. *Id.*

158. Charlie Savage, *Elite Unit's Problems Pose Test for Attorney General*, N.Y. TIMES, May 8, 2009, at A20 (quoting a former federal prosecutor with the public integrity unit).

159. United States v. Sun-Diamond Growers of Cal., 526 U.S. 398, 409–10 (1999).

160. Clark, *supra* note 15, at 64–67.

161. 5 U.S.C. § 7353 (2012).

162. *Id.* § 7353(b)(1).

163. See 5 C.F.R. § 2635.201–.205 (2013) (regulating the executive branch); THE STANDING RULES OF THE SENATE, SENATE MANUAL, S. DOC. NO. 112-1, R. XXXV (2012) (regulating Senators and Senate employees); THE RULES OF THE HOUSE OF REPRESENTATIVES, HOUSE RULES MANUAL, H.R. DOC. NO. 111-157, R. XXV (2012) (regulating Representatives and House employees); GUIDE TO JUDICIARY POLICY Canon 4D4 § 620 (regulating federal judges).

164. See *Agency Supplemental Regulations*, U.S. OFF. GOV'T ETHICS, <http://www.oge.gov/Laws-and-Regulations/Agency-Supplemental-Regulations/Agency-Supplemental-Regulations/> (last visited Apr. 7, 2013) (listing 48 sets of supplemental agency regulations found in various parts of Title 5 of the Code of Federal Regulations).

several miscellaneous statutes.<sup>165</sup> And on top of these statutes, in 2007, in the wake of the Abramoff scandal, Congress adopted other statutes that prohibit certain gifts.<sup>166</sup>

These ethics laws do not prohibit gifts from all donors to all public officials because of their official positions. As Professor Clark points out, in the main statute, all donees are covered but only certain categories of donors are covered.<sup>167</sup> This approach of applying the prohibition based on the identity of the donor is called the prohibited source approach.<sup>168</sup> Another statute also prohibits gifts but only from donors who are foreign governments.<sup>169</sup> Two additional statutes prohibit gifts based on the particular type of donees, specifically government employees involved in the procurement process<sup>170</sup> and meat inspectors.<sup>171</sup> The most recently adopted statute, from 2007, prohibits gifts only from particular donors (registered lobbyists) to particular public officials (persons in the legislative branch).<sup>172</sup> This statute limits the prohibition on gifts using both the prohibited source and prohibited donee approaches.

These ethics prohibitions are pieces of a puzzle that do not cover all gifts that donors give to donees because of the officials' positions.<sup>173</sup> The morass of ethics rules is so difficult to understand, the law is almost unknowable, and the patchwork character of the law leads to overlaps and gaps<sup>174</sup> and other curious features.<sup>175</sup>

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165. See Clark, *supra* note 15, at 83 n.133, 84 nn.135 & 139 (citing 5 U.S.C. § 7342 (2012); 41 U.S.C. § 423(p)(3)(A) (2012); 21 U.S.C. § 622 (2012)).

166. See 2 U.S.C. §§ 1606, 1613 (2012).

167. See Clark, *supra* note 15, at 82–83 (discussing 5 U.S.C. § 7353(a)(1)–(2) (2012)).

168. *E.g.*, United States v. Sun-Diamond Growers of Cal., 526 U.S. 398, 411 (quoting 5 C.F.R. § 2635.203(d)(4) (1999) as forbidding gifts from a “prohibited source”).

169. 5 U.S.C. § 7342.

170. 41 U.S.C. § 2104(a) (2012).

171. 21 U.S.C. § 622 (2012).

172. 2 U.S.C. §§ 1606, 1613 (2012).

173. See 5 C.F.R. § 2635.202(a)(2) (2013) (prohibiting federal employees in the executive branch from soliciting or accepting a gift “[g]iven because of the employee’s official position”). The Supreme Court described this provision as one that “makes unlawful approximately (if not precisely)” the gifts the government argued for (and lost on) in *Sun-Diamond*, 526 U.S. at 411. The regulations, however, after stating this general rule, go on to establish many qualifications and exceptions. 5 C.F.R. § 2635.203 (2013) (“Definitions”); *Id.* § 2635.204 (2013) (“Exceptions”).

174. See generally Clark, *supra* note 15, at 80–84 (identifying various redundancies and gaps in the ethics rules).

175. The most curious feature is an executive branch regulation stating: “Relationship to illegal gratuities statute. Unless accepted in violation of paragraph (c)(1) of this section, a gift accepted under the standards set forth in this subpart shall not constitute an illegal gratuity otherwise prohibited by 18 U.S.C. 201(c)(1)(B).” 5 C.F.R. § 2635.202(b). As the Court noted in *Sun-Diamond*, “We are unaware of any law empowering [the Office of Government Ethics] to decriminalize acts prohibited by Title 18 of the United States Code.” 526 U.S. at 411.

At any rate, if the ethics rules do cover a particular kind of gifting, that coverage is not a persuasive reason to forego criminalizing that conduct. Ethics prohibitions do not make criminal prohibitions unnecessary. In view of how likely it is that such gifts will influence the public official and lead to bias, these ethics prohibitions alone are not adequate. Criminal prohibitions are warranted; Congress should make such gifts a crime. Richard E. Myers II has persuasively argued that using excessive numbers of detailed regulations for punishment is an undesirable approach to controlling conduct and that we should rather rely on crimes to “map our moral intuitions.”<sup>176</sup> Gifts to public officials because of their positions should be controlled by amending the gratuity statute to criminalize them.

#### b. Criminal Law

The most recently adopted statute, from 2007, prohibits gifts only from particular donors (registered lobbyists) to particular public officials (persons in the legislative branch).<sup>177</sup> These statutes limit the prohibition on gifts using both the prohibited source and prohibited donee approaches.<sup>178</sup>

If disclosure is required by ethics laws, lying or failing to disclose may be treated as a crime under 18 U.S.C. § 1001—a federal criminal statute that prohibits lying to and failing to disclose information to the government.<sup>179</sup> In 2011, two high-profile prosecutions of public officials, who received things of value from private donors because of their official positions, ended. The defendants were Senator Ted Stevens<sup>180</sup> and David Safavian.<sup>181</sup> Senator Stevens received gifts including approximately \$250,000 worth of goods and services to upgrade his house in Alaska.<sup>182</sup> David Safavian, who was at the time Chief of Staff for the Administrator of the Government Services Administration, received a golf junket to Scotland and England,<sup>183</sup> which included, *inter alia*: a private charter flight,<sup>184</sup> golf fees costing more than \$300 per round,<sup>185</sup> and hotel rooms at around \$500 per night.<sup>186</sup>

These two public officials were prosecuted not for receiving gifts because of their positions, but for lying about them to the government. Senator Stevens was found guilty by a jury on seven counts of making a false statement to the

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176. Myers, *supra* note 11, at 1872–73.

177. See 2 U.S.C. §§ 1606, 1613.

178. See *id.*

179. See 18 U.S.C. § 1001(a), (c) (2012).

180. See *In re* Contempt Finding in United States v. Stevens, 663 F.3d 1270, 1271 (D.C. Cir. 2011).

181. See United States v. Safavian, 649 F.3d 688, 689 (D.C. Cir. 2011).

182. Neil A. Lewis, *Dismissal for Stevens, but Question on ‘Innocent,’* N.Y. TIMES, Apr. 12, 2009, at A14.

183. United States v. Safavian, 644 F. Supp. 2d 1, 4 (D.D.C. 2009), *aff’d*, 649 F.3d 688 (D.C. Cir. 2011).

184. *Id.* at 4, 21.

185. *Id.* at 22.

186. *Id.* at 23.

government, although the verdict was later set aside.<sup>187</sup> David Safavian was found guilty by a jury on four counts of lying to the government,<sup>188</sup> his convictions were affirmed.<sup>189</sup>

In both *Stevens* and *Safavian*, the defendants' conduct underlying the false statements involved receiving things of value for or because of their official position. But they were not prosecuted for that, likely because the *Sun-Diamond* interpretation of the gratuities statute made that theory of prosecution unavailable. Instead, the defendants were prosecuted for lying to government about the things of value they received.

This approach has drawbacks. These two pieces of conduct, receiving gifts because of an official position and lying to the government, are distinct pieces of criminal conduct with distinct harms. If defendants did both, they should face liability for both.

Moreover, prosecuting public officials for lying to the government but not for underlying conduct that led to the lies diminishes the legitimacy and credibility of federal criminal law. These cases were pretextual prosecutions to the extent that the defendants were suspected of committing a crime and were investigated based on some conduct (accepting the things of value) and then prosecuted based on unrelated conduct (lying to the government).<sup>190</sup> This has been dubbed the Al Capone approach to criminal prosecution.<sup>191</sup> Daniel Richman and William Stuntz have identified the government argument in support of the Al Capone approach<sup>192</sup> and chronicled how this argument wins in courts and is tolerated in the academic literature.<sup>193</sup> Professors Richman and Stuntz criticize this approach because it muddies the signals a criminal prosecution sends to society, and the justice system loses credibility when the charges that motivate a prosecution do not coincide with

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187. Senator Stevens was found guilty by a jury on seven counts of 18 U.S.C. § 1001 for not reporting the value of gifts on a campaign disclosure form. *See In re Contempt Finding in United States v. Stevens*, 663 F.3d 1270, 1271 (D.C. Cir. 2011); Lewis, *supra* note 182 (stating that Mr. Stevens was convicted on seven counts). The verdict was set aside because the government violated the Constitution in failing to disclose exculpatory evidence to the defense. *See United States v. Stevens*, No. 08-cr-231(EGS), 2009 U.S. Dist. LEXIS 39046, at \*1–2 (D.D.C. April 7, 2009).

188. *Safavian*, 644 F. Supp. 2d at 7. The four counts included three counts of making false statements under 18 U.S.C. § 1001(a)(1) (2012) and one count of obstruction of justice under 18 U.S.C. § 1505 (2012). *Id.*

189. *United States v. Safavian*, 649 F.3d 688, 694 (D.C. Cir. 2011).

190. *See* Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 584–85 (2005).

191. *See* Harry Litman, *Pretextual Prosecution*, 92 GEO. L.J. 1135, 1182 (2004); Richman & Stuntz, *supra* note 190, at 584–85.

192. Richman & Stuntz, *supra* note 190, at 584 (“The government responds that . . . false statements . . . or whatever the charged offense . . . is a legitimate crime, something for which any ordinary citizen might be prosecuted and punished if guilty. Surely the Al Capones of the world should not be immune from punishment for the small crimes they commit by virtue of their larger crimes.”).

193. *Id.* at 584–85.

the charges on which defendants are convicted.<sup>194</sup> That is exactly the situation here in using false statements to the government as the basis for prosecution instead of using the gratuities conduct. This approach to prosecution is not healthy for federal criminal law.<sup>195</sup>

*3. Gifting Because of Position Should Be Prohibited as a Crime by Amending the Gratuity Statute to Cover It*

Influence research indicates that when donors transfer value to donees because of the public officials' positions, the public officials will be influenced to reciprocate.<sup>196</sup> Controlling such gifts through disclosure alone is not an adequate response, and ethics rules and current criminal laws do not prohibit this conduct comprehensively and clearly. Congress should amend the gratuities statute to prohibit gifting to public officials because of their positions. Before going ahead with the specifics, however, we need to address the dangers of overcriminalization.

*D. Possible Limits to Avoid Overcriminalization*

One possible critique of my proposal to criminalize gifts based on an official's position is that it may overcriminalize the behavior. The drawbacks of overcriminalization in the context of gratuities have been well articulated by George Brown.<sup>197</sup> They include concerns about vagueness, prosecutorial discretion, criminalization of ethics rules, and criminalization of innocent conduct.<sup>198</sup> Other commentators have recognized the legitimate dangers of overcriminalization in general.<sup>199</sup> These concerns must be addressed if the gratuities crime is expanded.

*1. Ways to Avoid Overcriminalization: Possible Solutions*

Several methods to limit the gratuities crime to avoid overcriminalization have been suggested or adopted. One is to limit the crime to certain types of donors or donees. An example of this approach is the criminal statute adopted after the Abramoff scandal in 2007 that prohibits gifts from registered lobbyists to certain officials in the executive branch.<sup>200</sup> Professor Brown, who endorses expanding the crime of gratuities, has explored this approach to criminalizing gratuities.<sup>201</sup> The downside of this method of limiting the crime is that it

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194. *Id.* at 586–87.

195. *See* Myers, *supra* note 11, at 1855, 1864 (stating that crime is not an appropriate subject for elite and expert views but instead should reflect broadly held moral commitments). *But see* Litman, *supra* note 191, at 1182 (arguing that objections in principle to the Al Capone approach fail; that the approach in actual practice is generally justified; and that the considerations driving the approach are legitimate and sensible).

196. *See supra* Part V.B.

197. Brown, *supra* note 11, at 1372.

198. *See id.* at 1387–94.

199. Myers, *supra* note 11, at 1865–66.

200. *See* Honest Leadership and Open Government Act of 2007, 2 U.S.C. §§ 1606, 1613 (2012).

201. *See* Brown, *supra* note 11, at 1413.

constitutes a piecemeal approach to the problem that is not broad enough to handle all the dangers of gifting.

A second approach to limit the dangers of overcriminalization is to include in the statute some minimum amount of value that the thing given to the public official must reach. For example, the statute could prohibit gifts to public officials because of their positions with a value over \$50 or \$100. Federal criminal law has occasionally used this approach to set floors for what constitutes criminal behavior.<sup>202</sup> This is not the best limiting technique for gratuities because, as discussed above, influence research shows that even small gifts can trigger the urge to reciprocate.<sup>203</sup>

An unusual approach to limiting the crime is evidenced in a 2011 bill that was before the Senate.<sup>204</sup> This bill proposed to reverse the *Sun-Diamond* result—that gifts based on an official’s position are not criminal—and extend the gratuities crime to cover all benefits given to public officials because of their position.<sup>205</sup> The bill’s proposal was consistent with the proposal in this Article. However, the Senate’s bill went on to carve out from the amended crime all gifts given or accepted in conformity with the ethics rules.<sup>206</sup> In effect, this was a safe harbor from criminal liability based on the complex ethics rules and regulations discussed above.<sup>207</sup> This definition of the crime as depending on whether the defendant complied with the ethics rules has the drawback of making the criminal liability line impossible to understand.<sup>208</sup> This is not the best approach for criminal law, which should strive for clarity in charting society’s broad moral conclusions.<sup>209</sup>

## 2. My Solution: Limit the Crime the Old-Fashioned Way, with a Mens Rea Element

The best way to limit the law to avoid overcriminalization is for Congress to add *mens rea* terms to the statute.<sup>210</sup> This is the criminal law’s traditional way of avoiding overcriminalization. Before proposing a particular *mens rea* for gratuities, this Article examines what the *mens rea* is now. Nowhere have courts or commentators provided a comprehensive analysis of the *mens rea* for the crime of gratuities.

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202. See, e.g., 18 U.S.C. § 1957 (2012); 18 U.S.C. § 666 (2012).

203. See *supra* note 96 and accompanying text.

204. See Public Corruption Prosecution Improvements Act, S. 401, 112th Cong. (as introduced in the Senate, Feb. 17, 2011). The Senate did not take action and the proposed 2011 bill died.

205. *Id.* § 12.

206. *Id.* § 12(a)(4).

207. PATRICK LEAHY, PROPOSED PUBLIC CORRUPTION PROSECUTION IMPROVEMENTS ACT OF 2007, S. REP. NO. 110-239, at 6 (2007) (characterizing the carve-out as a “safe harbor”).

208. See Clark, *supra* note 15, at 64–67.

209. See Myers, *supra* note 11, at 1864, 1867, 1877–78.

210. See *id.* at 1873–74.

### a. The *Mens Rea* Currently

The *mens rea* for gratuities is not easily defined. The statute has no *mens rea* term,<sup>211</sup> but Congress sometimes writes empty criminal statutes and leaves the *mens rea* to the courts.<sup>212</sup> The Supreme Court holds that the requirement of *mens rea* is a background presumption, and the courts will generally infer *mens rea* when the statute is empty to avoid strict liability crimes.<sup>213</sup> The following Subpart starts with cases from the Supreme Court and the District of Columbia Circuit, then looks at the cases from other circuits decided after *Sun-Diamond*, and finally examines cases from other circuits decided before *Sun-Diamond*.

#### i. The Supreme Court and D.C. Circuit

The Supreme Court has considered the crime twice. Both of these cases arose in the D.C. Circuit and are best understood against the background of all the D.C. Circuit's gratuities case law. The D.C. Circuit case law is also important on its own because it is where most gratuities cases arise.<sup>214</sup>

In the first Supreme Court case, *United States v. Brewster*, the defendant donee was a former U.S. Senator.<sup>215</sup> He was indicted on four counts of bribery and one count of gratuities for soliciting and taking money in return for his actions on postal rate legislation when he was in the Senate.<sup>216</sup> The defendant moved to dismiss the indictment because the prosecution would require examination of his legislative behavior and would run afoul of the Speech or Debate Clause.<sup>217</sup> Although the Speech and Debate Clause protects legislators from investigations regarding their official business, the Supreme Court held in 1972 that the prosecution could proceed because taking bribes is not part of the legislative

211. See 18 U.S.C. § 201(c)(1) (2012). This statute omits any of the usual *mens rea* terms like purposefully, intentionally, knowingly, recklessly, negligently, willfully, or corruptly. *Id.*

212. See, e.g., Protection of Children Against Sexual Exploitation Act of 1977, 18 U.S.C. § 2251(a) (2012); 18 U.S.C. § 924(c) (2012) (showing that the firearms crime includes no *mens rea* in the statute, but courts have imposed a *mens rea* of "knowingly"); Hobbs Act, 18 U.S.C. § 1951 (2012) (showing that although the Hobbs Act includes no *mens rea* in the statute, courts have read in a *mens rea* element). Recently, Justice Scalia described and criticized Congress's approach to drafting criminal statutes:

We face a Congress that puts forth an ever-increasing volume of laws in general, and of criminal laws in particular. It should be no surprise that as the volume increases, so do the number of imprecise laws. . . . Fuzzy, leave-the-details-to-be-sorted-out-by-the-courts legislation is attractive to the Congressman who wants credit for addressing a national problem but does not have the time (or perhaps the votes) to grapple with the nitty-gritty. In the field of criminal law, at least, it is time to call a halt.

*Sykes v. United States*, 131 S. Ct. 2267, 2288 (2011) (Scalia, J., dissenting).

213. See *Staples v. United States*, 511 U.S. 600, 607 & n.3 (1994); *Morissette v. United States*, 342 U.S. 246, 250–56 (1952).

214. See generally Eliason, *supra* note 22.

215. 408 U.S. 501, 502 (1972).

216. *Id.*

217. *Id.* at 503.

process.<sup>218</sup> Most of the decision focused on the bribery counts, but in one paragraph addressing the gratuity count, the Court stated:

[I]t is, once again, unnecessary to inquire into the [defendant's] act or its motivation. To sustain a conviction it is necessary to show that [defendant] solicited, received, or agreed to receive, money with knowledge that the donor was paying him compensation for an official act. Inquiry into the legislative performance itself is not necessary; evidence of the [defendant's] knowledge of the alleged briber's illicit reasons for paying the money is sufficient to carry the case to the jury.<sup>219</sup>

This language means that to be liable for gratuities, a donee must have knowledge that the donor gave him the gift for or because of an official act; in other words, the donee must have a *mens rea* of knowledge of the facts.<sup>220</sup>

After the Supreme Court held that the *Brewster* prosecution could continue,<sup>221</sup> the defendant went to trial.<sup>222</sup> The jury instructions stated that the defendant official had to have received the gifts “willfully and knowingly rather than by mistake or accident,” and further stated that the government did not have to prove “any corrupt intent.”<sup>223</sup> The defendant was convicted on three counts of gratuities. On appeal, the D.C. Circuit found these instructions to be in error and reversed the convictions because the instructions did not clearly distinguish among bribery, gratuity, and no crime with indisputable clarity.<sup>224</sup>

This case does not further the *mens rea* analysis. The D.C. Circuit first quotes the Supreme Court language reprinted above stating that for a gratuities conviction, the donee must have knowledge that the gift was for or because of an official act.<sup>225</sup> But the circuit court then holds that a gratuities conviction based on instructions requiring the defendant to act “willfully and knowingly” was error for other reasons.<sup>226</sup> The court also makes a number of curious random statements about *mens rea*. The court identifies the “otherwise clause” of the statute as the

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218. *Id.* at 525–26.

219. *Id.* at 527.

220. The strength of *Brewster* is undermined somewhat because *mens rea* was not the main issue; moreover, throughout the decision, the Court focused on the crime of bribery and often discussed the crimes of bribery and gratuities without distinguishing them. *See, e.g., id.* at 502 (“This direct appeal from the District Court presents the question whether a Member of Congress may be prosecuted under 18 U.S.C. §§ 201(c)(1), 201(g), for accepting a bribe in exchange for a promise relating to an official act.”). The Court also stated that “[t]he counts of the indictment involved in the instant case were based on 18 U.S.C. § 201, a bribery statute . . . Subsections (c)(1) and (g) prohibit the accepting of a bribe in return for being influenced in or performing an official act.” *Id.* at 505–06. When this decision was handed down in 1972, the gratuities crime had already been codified in 18 U.S.C. § 201(g) (2012).

221. *Id.* at 528–29.

222. *See generally* United States v. Brewster, 506 F.2d 62 (D.C. Cir. 1974).

223. *Id.* at 80.

224. *Id.* at 67–68, 81–82.

225. *Id.* at 76.

226. *Id.* at 81–83.

basis for *mens rea*.<sup>227</sup> The court notes that “general criminal intent” is required.<sup>228</sup> After noting that a donee must have knowledge that the donor gave the gift for or because of an official act, the court recharacterizes this as “a certain guilty knowledge.”<sup>229</sup> Overall, the court’s statements and holding are curious and inconsistent.

In 1982, in *United States v. Campbell*, the D.C. Circuit handed down an opinion that not only failed to clarify the *mens rea* for gratuities but affirmatively injected new confusion.<sup>230</sup> The government charged a trucking company and a judge of the D.C. Superior Court with various political corruption crimes, and the jury convicted each defendant on one count of gratuities.<sup>231</sup> The gratuities count charged that the construction company, which had received hundreds of tickets for weight violations, gave the judge adjudicating the tickets help with moving his household goods.<sup>232</sup> Three times the D.C. Circuit describes the jury instructions as requiring that defendants have a *mens rea* of “knowingly and willfully.”<sup>233</sup> But the problem is that in concluding the discussion, the Court affirms the convictions and announces, “[i]t was more than sufficient in this case for the trial court to require that the alleged gratuities be given and received ‘knowingly and willingly’ and ‘for or because of an official act.’”<sup>234</sup> In this statement, the court used the word “willingly” rather than the word “willfully.”

The court did not offer any explanation or authority, so it is unclear what to make of this change in words. The switch might not have mattered, but “willingly” is the term that subsequent decisions picked up and wove into the gratuities law of the D.C. Circuit.<sup>235</sup> Likely, the switch in words was a typo. The word “willingly” is generally not used in federal criminal law and has no established meaning.<sup>236</sup> Congress has not used the term in any regularly prosecuted criminal statute.<sup>237</sup> Aside from the gratuities cases in the D.C. Circuit, the term “willingly” has shown up in the case law only rarely,<sup>238</sup> and in all the cases it was

227. *Id.* at 71.

228. *Id.* at 82.

229. *Id.*

230. *See* 684 F.2d 141 (D.C. Cir. 1982).

231. *Id.* at 144–45.

232. *Id.* at 144.

233. *See id.* at 147–48.

234. *Id.* at 150.

235. *See, e.g.,* *United States v. Sun-Diamond Growers of Cal.*, 138 F.3d 961, 965–67 (D.C. Cir. 1998), *aff’d*, 526 U.S. 398 (1999); *United States v. Gatling*, 96 F.3d 1511, 1522 (D.C. Cir. 1996) (citing *United States v. Campbell*, 684 F.2d 141, 149–50 (D.C. Cir. 1982)).

236. *See infra* notes 237–40 and accompanying text.

237. I know of no statute where the term was used, but because there are at least 4,000 federal crimes spread throughout many titles, I cannot say Congress has *never* used it. *See generally* John S. Baker, Jr., *Measuring the Explosive Growth of Federal Crime Legislation*, FEDERALIST SOC’Y (Oct. 1, 2004), <http://www.fed-soc.org/publications/detail/measuring-the-explosive-growth-of-federal-crime-legislation>.

238. *See United States v. Hoffecker*, 530 F.3d 137, 174 (3d Cir. 2008); *United States v. Dearing*, 504 F.3d 897, 902 (9th Cir. 2007); *United States v. George*, 386 F.3d 383,

likely a mistake.<sup>239</sup> Outside case law, the term “willingly” sometimes turns up, but in all these sources, when the authority is checked, the writer merely substituted the word “willingly” for “willfully.”<sup>240</sup>

Thus, after using the term willfully three times, the D.C. Circuit just made a mistake in substituting the term willingly for willfully in the one sentence at the end of its opinion. The D.C. Circuit’s introduction of the term willingly in *Campbell* and its use in succeeding cases does not illuminate but confuses the *mens rea* for gratuities.<sup>241</sup>

The second time the Supreme Court considered the crime of gratuities was in 1999 in *United States v. Sun-Diamond Growers of California*.<sup>242</sup> The defendant was a trade association for growers of raisins, figs, walnuts, prunes, and hazelnuts. It was charged with gratuities for giving gifts to the Secretary of Agriculture, Mike Espy,<sup>243</sup> including, tickets to the U.S. Open tennis tournament, luggage, meals, a framed print, and a crystal bowl.<sup>244</sup> The defendant was convicted

397 (2d Cir. 2004); *United States v. Osborne*, 68 F.3d 94, 100 (5th Cir. 1995); *United States v. Soriano*, 880 F.2d 192, 198 (9th Cir. 1989); *United States v. Crop Growers Corp.*, 954 F. Supp. 335, 348 n.14 (D.D.C. 1997).

239. In *Hoffecker*, 530 F.3d at 174, the court states that the district court gave an instruction on “willingly,” but later in the case, the circuit court states at least five times that the instructions used the term “willfully” and quotes the instructions using that word. *See id.* at 177, 181–82. In *Osborne*, 68 F.3d at 100 n.18, the authority the court cites for “willingly” is 18 U.S.C. § 1201(a)(1) (2012) and *United States v. Jackson*, 978 F.2d 903, 910 (5th Cir. 1992), but both of those sources use the term “willfully.” In two of the cases, the court’s main instruction used the word “willingly,” but the court defined the term “willfully.” *See Dearing*, 504 F.3d at 902; *George*, 386 F.3d at 397. In *Crop Growers Corp.*, 954 F. Supp. at 348 n.14, the court uses the word “willingly” for the aiding and abetting statute, which uses the term “willfully.” Finally, in *Soriano*, 880 F.2d at 198, the court states that the indictment uses “willingly” when an earlier quote of the indictment shows it used the term “willfully.”

240. *See, e.g.*, 1A KEVIN F. O’MALLEY ET AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS § 19:02 (6th ed. 2008) (stating that in *Dixon v. United States*, 548 U.S. 1 (2006), the issue was whether the defendant acted “willingly,” but the term used in both the statute (18 U.S.C. § 1001 (2012)) and the case is “willfully”); 2B KEVIN F. O’MALLEY ET AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS § 61.05 (5th ed. 2000) (stating that in *United States v. Anaya*, 509 F. Supp. 289 (S.D. Fla. 1980), the issue was whether defendants “willingly” transported Cuban nationals, but the term used in both the statute (18 U.S.C. § 1324 (2012)) and the case was “willfully”).

241. In addition, reconciling the D.C. Circuit’s conclusions in *United States v. Campbell*, 684 F.2d 141 (D.C. Cir. 1982), and *United States v. Brewster*, 506 F.2d 62 (D.C. Cir. 1974), is not easy. In 1974, the *Brewster* court concluded that instructions requiring the defendant to have a *mens rea* element of willfully and knowingly were error because of a blurry tripartite distinction. *See* 506 F.2d at 78–81. But in *Campbell* in 1982, instructions that required the defendant to have a *mens rea* element of knowingly and willfully/willingly were deemed more than sufficient to meet the plain error standard. *See* 684 F.2d at 150.

242. 526 U.S. 398 (1999).

243. *Id.* at 400–01.

244. *Id.* at 401. The indictment had two gratuities counts. Count I alleged that Sun-Diamond gave Secretary of Agriculture Espy tickets to the 1993 U.S. Open Tennis Tournament worth \$2,295, luggage worth \$2,427, meals worth \$665, and a framed print and

at trial, but the D.C. Circuit reversed because the instructions allowed the jury to convict Sun-Diamond based on gifts given because of the official's position rather than the gifts being linked a particular act. The government appealed, and the Supreme Court agreed with the D.C. Circuit: The government could not convict the defendant donor for gratuities based on giving things to a public official because of the official's position but rather had to prove that the donor's gifts were tied to a particular official act.<sup>245</sup>

On *mens rea*, the jury instructions required the defendant to give the gifts to the federal official "knowingly and willingly."<sup>246</sup> The Supreme Court does not discuss these *mens rea* terms because it finds the instructions erroneous on other grounds, i.e., their reference to the donee's official position rather than to a particular official act.<sup>247</sup> In the course of the opinion, the Court makes one comment that arguably refers to the *mens rea* for gratuities. The Court states that the main difference between the crime of bribery and gratuities is the "intent element": Bribery requires an intent to influence the public official whereas the gratuities crime "requires only that the gratuity be given . . . 'for or because of' an official act."<sup>248</sup> This statement is surely correct, but it does not tell us anything about *mens rea*—about whether the donor and donee must *intend* that the gift be because of an official act, or *know* that the gift is because of an official act, or *know* that gifting because of an official act is illegal. Reading the decision to establish anything about the *mens rea* for the crime is a stretch. Between the two Supreme Court cases, *Brewster* provides some guidance on the *mens rea* for the crime (the donee must have knowledge of the facts—that is, knowledge that the donor gave him the gift because of an official act) but *Sun-Diamond* does not.

In *United States v. Schaffer*, the D.C. Circuit decided the first case after the Supreme Court narrowed the gratuities crime in *Sun-Diamond*.<sup>249</sup> The

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crystal bowl worth \$524. See *United States v. Sun-Diamond*, 138 F.3d 961, 964–65 (D.C. Cir. 1998), *aff'd*, 526 U.S. 398 (1999). Count II charged that Sun-Diamond paid \$3,100 for Secretary Espy's girlfriend to accompany him to the International Nut Conference in Athens, Greece. *Id.* at 965 n.1. The jury convicted on Count I and acquitted on Count II. See *id.* at 965 n.1.

245. *Sun-Diamond*, 526 U.S. at 414 (affirming the D.C. Circuit's judgment reversing the conviction).

246. *Id.* at 413. The district court's instructions stated that the government must prove that the defendant "knowingly and willingly" gave the gifts "at least in part" because of the public official's position. The court used the terms "knowingly and willingly" three times in describing what the government must prove about the defendant's conduct. See *id.*

247. The Court's characterization of the question in the case was narrow. The Court stated, "[t]he point in controversy here is that the instructions went on to suggest that § 201(c)(1)(A), unlike the bribery statute, did not require any connection between respondent's intent and a specific official act." *Id.* at 405. The Court's statement of the holding was also narrow. The Court concluded, "[w]e hold that, in order to establish a violation of 18 U.S.C. § 201(c)(1)(A), the Government must prove a link between a thing of value conferred upon a public official and a specific 'official act' for or because of which it was given." *Id.* at 414. Thus the conviction was reversed.

248. *Id.* at 404.

249. 183 F.3d 833 (D.C. Cir. 1999).

defendant, an employee of Tyson Foods, was indicted for various political corruption crimes, including two counts of gratuities for giving gifts to Secretary of Agriculture Mike Espy. The instructions at trial were based in part on a theory of accomplice liability and required the defendant donor to have a *mens rea* of intent to participate in the crime and intent to make the crime succeed.<sup>250</sup> The defendant was convicted on one count of gratuities,<sup>251</sup> but the trial court reversed the conviction for insufficient evidence of intent to influence, and the D.C. Circuit affirmed.<sup>252</sup>

However, requiring evidence of intent to influence produces an incoherent result. The Supreme Court pointed out in *Sun-Diamond* that while the crime of bribery requires a *mens rea* of intent to influence, the crime of gratuities does not.<sup>253</sup> That difference in *mens rea* is one of the main distinguishing factors between the crimes of gratuities and bribery. The *Schaffer* opinion is a thorough garble of *mens reas* for gratuities and bribery and does not advance the cause of defining the *mens rea* for gratuities. Furthermore, as the first opinion discussing the gratuities crime after *Sun-Diamond* was decided, the court was not focused on *mens rea* but on fleshing out the meaning of the new requirement of connection to a particular official act.<sup>254</sup> Rather than helping to define the *mens rea* for gratuities, this case is the poster child for the confused line between the crimes of bribery and gratuities.<sup>255</sup>

The D.C. Circuit has also articulated a *mens rea* for the crime of gratuities in two other cases, but neither of these involved a gratuities prosecution, so the

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250. *Id.* at 842 n.10 (instructing that the government must prove the defendant “intentionally participate[d] in the commission of a crime”; “knowingly associated himself with the persons who committed the crime”; “intended . . . to make the crime succeed”; and, “knowingly and intentionally aided and abetted the principal offenders in committing the crime”).

251. The conviction was based on the defendant giving Espy four seats at the inaugural dinner worth \$6,000. *See id.* at 837, 842.

252. *Id.* at 844. The court asks whether a rational jury could find the defendant had “the requisite statutory intent to influence,” and then spends several paragraphs explaining why the evidence of intent to influence was insufficient. *Id.* at 842–45.

253. *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 404–05 (1999); *see* 18 U.S.C. § 201(c)(1) (2012). Other circuit courts had recognized this difference in *mens rea* for some time. *See, e.g., United States v. Patel*, 32 F.3d 340, 345 (8th Cir. 1994) (“We further note that the instruction Patel requested incorrectly states the law because it required the jury to find that Patel gave [the public official] the gratuity in order to influence him with respect to the hotel’s sale, which is not supported by the language in § 201(c)(1)(A).”).

254. *See Schaffer*, 183 F.3d at 840 (stating that the trial court focused on proof of the official act and “we focus our attention there as well”).

255. In *Valdes v. United States*, 475 F.3d 1319, 1322 (D.C. Cir. 2007) (en banc), the D.C. Circuit stated that unlike the anti-bribery provision, the anti-gratuity provision did not require that the payment actually influence the performance of an official act. This helps somewhat to clarify the confusion generated by *Schaffer* on the distinction between gratuities and bribery, but it does not say anything about the *mens rea* required for the two crimes, specifically whether an intent to influence is required as a *mens rea* for gratuities.

language is dicta. In *United States v. Gatling*, the defendants were federal officials in charge of allocating section 8 subsidized housing, and they were convicted, *inter alia*, on one count of conspiracy to commit bribery.<sup>256</sup> On appeal, they claimed the evidence of bribery was insufficient and showed only the crime of gratuities.<sup>257</sup> The court rejected this challenge, but in passing stated that the *mens rea* for gratuities is “knowingly and willingly.”<sup>258</sup> Repetition of the term “willingly,” which was injected into the law by the D.C. Circuit’s typo in *Brewster*, is not helpful in defining *mens rea*.

In its most recent case on gratuities, in 2010, the D.C. Circuit announced in *United States v. Project on Government Oversight* (“*POGO*”) that the *mens rea* for the gratuities crime was intent, and it did not further specify intent *as to what*.<sup>259</sup> The court based its conclusion that intent was a required element of the crime on the Supreme Court’s *Sun-Diamond* opinion. According to the *POGO* court, the Supreme Court in *Sun-Diamond* defined the *mens rea* for gratuities as being intentional.<sup>260</sup> This finding was based on the statutory language requiring the gift to be given “for or because of an official act.”<sup>261</sup> This analysis is dubious on many levels.

In *POGO*, the question was whether a civil action by the government for monetary penalties under 18 U.S.C. § 209(a) required the defendant to have *mens rea*.<sup>262</sup> To reach its interpretation of § 209(a), the D.C. Circuit analogized its case to *Sun-Diamond*, but this approach has a number of problems.<sup>263</sup> The words in question in the two statutes are not similar. In the gratuity crime, the words in question were “for or because of an official act,” whereas the words in question in *POGO* were “as compensation for” government work.<sup>264</sup> Moreover, the D.C. Circuit’s reading of *Sun-Diamond* as establishing a *mens rea* of intent is a stretch; it depends on picking and choosing language carefully and combining quotes from separate passages in *Sun-Diamond* into a single sentence.<sup>265</sup> Finally, even assuming the D.C. Circuit’s conclusion that the Supreme Court in *Sun-Diamond* established a *mens rea* of intent for the gratuities crime is persuasive, that statement by the D.C. Circuit is dicta. The *POGO* case did not involve the gratuities statute but a different statute, and one that was being applied in a civil

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256. 96 F.3d 1511, 1515 (D.C. Cir. 1996).

257. *Id.* at 1518.

258. *Id.* at 1522 (citing *United States v. Campbell*, 684 F.2d 141, 149–50 (D.C. Cir. 1982)).

259. 616 F.3d 544 (D.C. Cir. 2010).

260. *Id.* at 554.

261. The *POGO* court states: “[T]he Supreme Court has described that language as containing an ‘intent element’ namely, a ‘connection between respondent’s intent and a specific official act.’” *Id.* at 550 (citation omitted).

262. *Id.* at 548.

263. *Id.* at 554.

264. *Id.* at 550.

265. *Id.* at 550, 554.

action rather than as a crime.<sup>266</sup> Thus, the D.C. Circuit's announcement that the crime of gratuities has a *mens rea* of intent is dubious.

ii. Courts Outside the D.C. Circuit

aa. Cases Decided After *Sun-Diamond*

Courts of Appeals outside the D.C. Circuit have handed down few decisions since *Sun-Diamond* was decided,<sup>267</sup> and only three decisions mention *mens rea* at all. In *United States v. Hoffman*, the Eighth Circuit affirmed a gratuities conviction despite the defendant's arguments that the instructions were error and the proof insufficient.<sup>268</sup> The defendant's main argument was that the gifts he gave to the public official were personal and had no connection to an official act.<sup>269</sup> On *mens rea*, the court first characterizes the elements instruction, which did not include *mens rea*, as correct.<sup>270</sup> This suggests that gratuities is a strict liability crime. But later in the opinion, the court quotes a previous Eighth Circuit case on the point that "the government must prove beyond a reasonable doubt that the defendant intended to reward the [public official]."<sup>271</sup> The court then concludes without further elaboration that the instructions were not error and the proof of the "requisite intent to reward" was sufficient.<sup>272</sup> This decision is internally inconsistent on whether *mens rea* is required.<sup>273</sup>

In *United States v. McCarter*, a panel of the Eleventh Circuit issued an unpublished opinion in which it found the evidence of gratuities and bribery sufficient.<sup>274</sup> The court stated that although the defendant's receipt of things of value did not necessarily establish her "knowledge of illegal activities or requisite intent to violate the law, . . . there was sufficient evidence of her knowledge and intent to support her conviction."<sup>275</sup> The court uses the words knowledge and intent but leaves unspecified knowledge *of what* and intent *to do what*. This decision also has little value because it is unpublished, and it lumps bribery and gratuities

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266. *POGO* is a civil case where the decision was based on criminal law principles. The statutes provided two ways for the government to enforce this standard: through criminal prosecution or a civil action. In *POGO*, the government chose a civil enforcement theory. But the court resolves the elements of the civil violation by referring to the background principles of criminal law. The statutory language of the prohibition in § 209(a) was the same for both criminal and civil enforcement, but the relevance of the criminal law principles in a civil enforcement case is not obvious.

267. See Eliason, *supra* note 22, at 930 n.3.

268. 556 F.3d 871, 875, 878 (8th Cir. 2009).

269. *Id.* at 874.

270. *Id.* at 875.

271. *Id.* at 876 (quoting *United States v. Patel*, 32 F.3d 340, 344–45 (8th Cir. 1994)).

272. *Id.* at 877.

273. The decision also includes a dissent arguing that the defendant's *mens rea* did not coincide with the conduct. See *id.* at 878–79 (Bye, J., dissenting.).

274. 219 F. App'x 921, 930 (11th Cir. 2007) (unpublished).

275. *Id.*

together in the discussion, making specific conclusions on the *mens rea* for gratuities impossible.<sup>276</sup>

Finally, in *United States v. Antico*, the court discussed whether *Sun-Diamond* had any impact on the requirement of a quid pro quo in Hobbs Act prosecutions and concluded it did not.<sup>277</sup> In recounting the holding of *Sun-Diamond*, the court refers to the Supreme Court's recognition of a required connection between "the public official's intent and a specific official act."<sup>278</sup> That is the only reference to *mens rea* in *Antico*. The unexplained reference to intent is not helpful, and at any rate, it is dicta because this is not a gratuities case. In sum, these three decisions addressing *mens rea*, including one that is dicta and one that is unpublished, are not good authority.

#### bb. Cases Decided Before *Sun-Diamond*

The case law from other circuits before *Sun-Diamond* is similarly not helpful. Some cases recount the elements of gratuities without including any *mens rea* factor.<sup>279</sup> Sometimes the decisions are opaque: The courts merely announce a conclusion on *mens rea* without explanation or authority.<sup>280</sup> Sometimes the opinions are internally inconsistent on *mens rea*.<sup>281</sup>

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276. *See id.*

277. 275 F.3d 245, 259–60 (3d Cir. 2001).

278. *Id.* at 260.

279. *See United States v. Strand*, 574 F.2d 993, 995 n.2 (9th Cir. 1978) (stating that the gratuity statute requires only that the thing of value be either unlawfully given or unlawfully accepted for the proper discharge of official duty).

280. *See United States v. Patel*, 32 F.3d 340, 344–45 (8th Cir. 1994) (instructing a jury that the government had to prove that defendant donor had intent to reward donee); *United States v. Alessio*, 528 F.2d 1079, 1082–83 (9th Cir. 1976) (holding evidence of defendant's intent sufficient without specifying intent to what).

281. *See United States v. Bustamante*, 45 F.3d 933, 940 (5th Cir. 1995), *overruled on other grounds by* 526 U.S. 398 (1999) (stating several times that no *mens rea* was required but then finding proof sufficient that defendant public official knew he was receiving a gift of a loan guaranty); *United States v. Previte*, 648 F.2d 73, 82 (1st Cir. 1981) (stating that defendant donee must have "guilty knowledge"; that he must have "the specific intent to violate the substantive statute"; and that an instruction requiring the defendant to act "knowingly, willfully, and unlawfully" was not plain error); *United States v. Evans*, 572 F.2d 455, 479, 480–82 (5th Cir. 1978), *overruled on other grounds by* 526 U.S. 398 (1999). In *Evans*, the Court found evidence sufficient for jury to infer defendant's "guilty knowledge." *Id.* at 479. The Court also stated that statute makes it illegal for a public official to accept a thing of value to which he is not lawfully entitled, "regardless of the intent of the donor or donee"; however, the Court found evidence sufficient that defendant accepted the things of value "knowingly and purposefully and not through accident, misunderstanding, inadvertence or other innocent reasons." *Id.* at 480–81. The Court wrote: "The jury was well justified in concluding that Evans accepted the money and favors with knowledge that the payments were made because of his official position." *Id.* at 482. In *United States v. Irwin*, the Court affirmed a conviction based on a jury instruction that defendant must act willfully, knowingly, and intentionally, as distinguished from inadvertently or negligently. 354 F.2d 192, 196–98 (2d Cir. 1965). The Court stated that

Sometimes the case law is contradictory within a circuit.<sup>282</sup> Sometimes the authority does not exist as cited,<sup>283</sup> and sometimes the cases mischaracterize the statute.<sup>284</sup> In some cases, the definition of the *mens rea* is clouded by the presence of an aiding-and-abetting theory or a conspiracy charge.<sup>285</sup> Sometimes the courts garble the discussion of the *mens rea* for gratuities with the *mens rea* for bribery.<sup>286</sup> Sometimes the holding on *mens rea* is so intertwined with the *Sun-Diamond* issue (whether the government must prove a particular official act) that besides the fact that the cases have been overruled on other grounds, the conclusion on *mens rea* is called into question.<sup>287</sup> Sometimes the *mens rea* language is dicta.<sup>288</sup> Sometimes the court is reviewing only for plain error.<sup>289</sup> In

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“for or because” language requires a “particular state of mind, design or purpose, which is the essence of intent.” *Id.* at 197. The Court also stated that the government must prove that the defendant committed the prohibited act “knowingly and purposefully and not through accident, misunderstanding, inadvertence or other innocent reasons” and that iniquity of procuring public officials is destructive “be it intentional or unintentional.” *Id.* at 196–97.

282. Compare *Irwin*, 354 F.2d at 197–98 & n.3 (affirming conviction based on jury instruction that defendant must act willfully, knowingly, and intentionally, as distinguished from inadvertently or negligently), with *United States v. Umans*, 368 F.2d 725, 730 (2d Cir. 1966) (stating that gratuities are criminal “regardless of the intent of either payor or payee with respect to the payment”).

283. See *Umans*, 368 F.2d at 730. *Umans* cites *Irwin*, 354 F.2d 192, 198 (2d Cir. 1965), for the proposition that the gratuity statute makes it a crime when an official receives a sum he is not entitled to receive “regardless of the intent of either payor or payee with respect to the payment”; however, that proposition is not supported by the *Irwin* decision at that cite. *Id.* The *Irwin* court states that the trial judge “fully and correctly” charged the jury that the defendant must have acted willfully, knowingly and intentionally. *Irwin*, 354 F.2d at 197–98 & n.3.

284. See *Strand*, 574 F.2d at 995 n.2 (stating that the gratuity subsections “require only that the thing of value be given or accepted ‘otherwise than as provided by law for the proper discharge of official duty,’” thereby omitting any reference to statutory language that the thing of value be given or accepted for or because of an official act).

285. See *United States v. Biaggi*, 909 F.2d 662, 681 (2d Cir. 1990) (stating that evidence did not permit jury to find that defendant knew his father received stock as a bribe or gratuity and without that knowledge, the defendant’s conviction for aiding and abetting the crime could not stand); *Previte*, 648 F.2d at 81–82 (holding that the instruction on conspiracy to accept gratuity was not plain error).

286. See *United States v. Biaggi*, 853 F.2d 89, 99–100 (2d Cir. 1988) (affirming two counts of conviction for gratuity but using bribery terms “in exchange for” and “quid pro quo”); *United States v. Alessio*, 528 F.2d 1079, 1082 (9th Cir. 1976) (stating that evidence supported the gratuities conviction, but the donor knew that donee was in position to affect conditions of confinement).

287. See *United States v. Bustamante*, 45 F.3d 933, 940–41 (5th Cir. 1995); *United States v. Standefer*, 610 F.2d 1076, 1080 (3d Cir. 1979) (en banc); *United States v. Evans*, 572 F.2d 455, 482 (5th Cir. 1978); *Alessio*, 528 F.2d at 1082. All four cases were overruled on other grounds by *United States v. Sun-Diamond Growers of California*, 526 U.S. 398 (1999).

288. See *Strand*, 574 F.2d at 995 n.2.

289. See *Previte*, 648 F.2d at 82 (holding that instruction was not plain error).

one case, the opinion was unpublished.<sup>290</sup> Reading the cases to determine the *mens rea* for gratuities is an exercise in all the sources of ambiguity in common law authority.

iii. Summary

This analysis of the case law demonstrates that the courts have failed to develop a coherent theory of *mens rea* for the gratuities crime. To the extent that the case law can be said to establish any *mens rea*, it is that defendants who are donees must have knowledge of the facts. This conclusion is supported by the Supreme Court's decision in *Brewster*.<sup>291</sup> The Second Circuit corroborated this conclusion in *United States v. Biaggi*.<sup>292</sup> In *Biaggi*, the court reversed Richard Biaggi's gratuities conviction for aiding and abetting a donee (his father, Congressman Biaggi) because the evidence was insufficient that defendant Richard knew that shares of stock were given to his father as a bribe or a gratuity.<sup>293</sup> This case is fair authority for the proposition that a donee cannot be convicted of gratuities without knowledge of the facts, although the clarity of the holding on the *mens rea* is impaired somewhat by the presence of the aiding-and-abetting theory of prosecution.<sup>294</sup> Although we may discern this tiny nugget of *mens rea* law from the cases, the overriding message is that the courts have not defined a *mens rea* for gratuities.

**b. The Proposed *Mens Rea***

In considering the best *mens rea* term to add to an expanded gratuities statute, the first step is to recognize that the *mens rea* required for the donor and the donee need not be the same. Courts have concluded that the liability of the donor and public official is not interdependent and need not be coextensive.<sup>295</sup> As a practical matter, imposing different *mens rea* elements for donors and donees

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290. United States v. Gaines, Nos. 92-5446, 92-5501, 1993 U.S. App. Lexis 15310 (4th Cir. 1993) (unpublished).

291. See *supra* Part V.D.2.a.i.

292. 909 F.2d 662, 690–93 (2d Cir. 1990).

293. *Id.* at 681.

294. See *Biaggi*, 909 F.2d at 681; *United States v. Previde*, 648 F.2d 73, 81–82. Generally, courts hold that aiding and abetting under 18 U.S.C. § 2 requires a *mens rea* of intent to promote the underlying crime. See, e.g., *United States v. Bryant*, 461 F.2d 912, 920 (6th Cir. 1972); see generally SIXTH CIRCUIT PATTERN JURY INSTRUCTIONS (CRIMINAL) § 4.01(2)(C) (2001) (requiring a *mens rea* for aiding and abetting of “intent” to help commit the underlying crime). But the *Biaggi* court discusses the defendant's *mens rea* in terms of knowledge, and it follows that up by citing cases holding that an aider and abetter must have the same mental state as the principal. 909 F.2d at 681.

295. See, e.g., *United States v. Evans*, 572 F.2d 455, 480 (5th Cir. 1978) (citing *United States v. Anderson*, 509 F.2d 312, 333 (D.C. Cir. 1974); *United States v. Miller*, 340 F.2d 421 (4th Cir. 1965)).

would be relatively easy because the statute covers these actors in separate subsections.<sup>296</sup>

Considering the liability of the donor and donee as distinct questions, what *mens rea* term is appropriate for donees? Conviction should require knowledge of the facts. In other words, public officials must know that they are federal public officials who received a thing of value for or because of their official position. If the official did not know all these items, the *mens rea* element would not be met and the public official would not be liable. This *mens rea* element would require, *inter alia*, that donees know they received a gift for or because of their official position. If they thought they received the gift based on a personal relationship, they would have a failure-of-proof defense that they lacked the *mens rea*.<sup>297</sup>

Although knowledge of the facts should be required, knowledge of the law should not be required. With these defendants, who are necessarily public officials, the law can safely rely on the background presumption of the common law that defendants know the law.<sup>298</sup> This presumption is particularly appropriate in the context of the gratuities crime where all the defendants who are donees would necessarily be government employees who are trained.<sup>299</sup> They should be careful.<sup>300</sup>

And what *mens rea* is most appropriate for defendants who are donors? As with donees, the *mens rea* should require knowledge of the facts. This means

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296. Donors are covered in 18 U.S.C. § 201(c)(1)(A) and donees are covered in § 201(c)(1)(B).

297. For such a defense, the defendants would have to establish that they thought it was exclusively based on personal factors—see mixed-motive cases, previously discussed in Part II.

298. *Bryan v. United States*, 524 U.S. 184, 193 (1998); *Cheek v. United States*, 498 U.S. 192, 199 (1991).

299. *See, e.g., United States v. Safavian*, 644 F. Supp. 2d 1, 20 (D.D.C. 2009), *aff'd*, 649 F.3d 688 (D.C. Cir. 2011) (recounting evidence that defendant attended ethics training course required annually of all GSA employees and that he received ethics training materials).

300. *See Valdes v. United States*, 475 F.3d 1319, 1331 (D.C. Cir. 2007) (en banc) (Kavanaugh & Williams, JJ., concurring):

Covered public officials who want to stay clearly on the safe side of the criminal-law line (not to mention comply with the phalanx of non-criminal regulatory provisions in this area) therefore would be well-advised not to accept certain gifts in the first place, rather than pinning their hopes on after-the-fact arguments premised on statutory terms such as “in return for” or “official act” or “official duty.” In other words, absent an authorization or exception, public officials might decline monetary gifts and ensure that trips, tickets, and the like are paid for by the officials themselves, by the government when so allowed, or (in the case of elected officials) by a campaign or political committee when so allowed. That’s certainly simpler, cleaner, and cheaper than attempting to argue afterwards that a particular gift was not linked to an official action.

that donors would have to know that they gave a thing of value to a federal public official for or because of the official's position.

At this point, the best *mens rea* for donors and donees diverges. In addition to knowledge of the facts, conviction of donors should require knowledge of the law. Donors should be liable for the gratuities crime only if they knew it was illegal to give things of value to public officials for or because of their official position. Donors are not public officials but are presumably private citizens. They are not trained. This requirement of knowledge of illegality responds to courts' concerns that the crime does not provide notice and fair warning to the average citizen that the conduct is criminal.<sup>301</sup> The Supreme Court has endorsed requiring knowledge of illegality when the criminal conduct is not "inevitably nefarious"<sup>302</sup> or "inherently malign."<sup>303</sup> Giving a gift to a public official for or because of his or her official position falls handily into the category of crimes that should require knowledge of illegality. This crime for donors warrants an exception to the general rule that ignorance of law is no defense.

When Congress uses the term "willfully" to require the government to prove that the defendant knew his conduct was illegal, one question that arises is what level of knowledge the government must prove to satisfy this requirement.<sup>304</sup> Does the defendant have to know of the particular statute he is violating, or is knowledge that the conduct is generally illegal sufficient? In *United States v. Bryan*,<sup>305</sup> the Supreme Court concluded that the term "willfully" in a firearm statute requires only general knowledge of illegality.<sup>306</sup> Congress apparently agrees with this interpretation, because in 2010, it added a definition of the term willfully to the healthcare fraud statute that adopts this position.<sup>307</sup> If this approach, which was adopted by the Court in *Bryan* and by Congress for healthcare fraud, was applied to the term "willfully" in the gratuities statute, this would mean that the government only has to prove that donors knew generally that gifting because of position was illegal. The government would not have to prove that the donor knew of § 201(c)(1)(A) and intended to violate it.

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301. *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 411 (1999); *Valdes*, 475 F.3d at 1323.

302. *Ratzlaf v. United States*, 510 U.S. 135, 144 (1994).

303. *Arthur Anderson LLP v. United States*, 544 U.S. 696, 703–04 (2005).

304. *See, e.g., United States v. Whab*, 355 F.3d 155, 161–62 (2d Cir. 2004).

305. 524 U.S. 184 (1998).

306. *Id.* at 195 n.23, 196.

307. *See* 18 U.S.C. § 1347(b) (2012). No legislative history explains Congress's purpose in adding this definition to § 1347(b) exactly, but Congress made the same change at the same time to another healthcare fraud statute, the anti-kickback statute (42 U.S.C. § 1320a-7b(b) (2012)), and the legislative history of that addition states that the purpose is to make it clear that the government need only prove "that the defendant knew that the conduct in question was unlawful, but not that it was a violation of the anti-kickback statute per se." *See* JENNIFER STAMAN, CONG. RESEARCH SERV., HEALTH CARE FRAUD AND ABUSE LAWS AFFECTING MEDICARE AND MEDICAID: AN OVERVIEW 5 (2010), available at <http://aging.senate.gov/crs/medicaid20.pdf>.

Congress can impose these *mens rea* requirements relatively easily. The Supreme Court generally interprets the term “knowingly” in criminal statutes to require knowledge of the facts but not the law.<sup>308</sup> The Supreme Court generally interprets the term “willfully” in criminal statutes to require knowledge of illegality.<sup>309</sup> Thus, the gratuities statute could require the *mens reas* discussed above by providing that donees would be liable if they acted “knowingly” and donors would be liable if they acted “knowingly and willfully.” Once these *mens rea* elements were added, they would carry along with them the usual *mens rea* doctrines: Jurors would be instructed that knowledge could be established by proof of willful blindness<sup>310</sup> and that they could infer the defendants’ *mens reas* based on the defendants’ conduct.<sup>311</sup>

This approach to avoiding overcriminalization, which is based on the criminal law’s traditional way of avoiding overcriminalization by relying on the limiting impact of a *mens rea* element, has benefits for both the individual gratuities crime and for federal criminal law generally. For the crime, the addition of the *mens rea* element will resolve the confusion over *mens rea* discussed earlier in the Article.<sup>312</sup> To the extent the courts have established any coherent *mens rea*, the one proposed is consistent with that case law in requiring a *mens rea* of knowledge of the facts for donees. The proposed *mens reas* (knowledge of the facts for donees and knowledge of the facts and law for donors) also add an appropriate differentiation in the scope of the crime for public officials and private citizens. By requiring knowledge of the law for donors, the *mens rea* element responds to concerns that the crime may not provide adequate notice.<sup>313</sup>

For federal criminal law generally, the addition of *mens rea* terms is also healthy. Congress should consider and include these important elements when it adopts the crime rather than just leave the matter to the courts for case-by-case definition.<sup>314</sup>

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308. See *Bryan*, 524 U.S. at 193 & n.15 (characterizing *Liparota v. United States*, 471 U.S. 419 (1985) as an exception to this rule).

309. See *id.* at 193; *Ratzlaf v. United States*, 510 U.S. 135, 141–49 (1994); *Cheek v. United States*, 498 U.S. 192, 199–200 (1991); *Potter v. United States*, 155 U.S. 438, 446 (1894); see also *United States v. Moore*, 612 F.3d 698, 703 (D.C. Cir. 2010) (Kavanaugh, J., concurring).

310. See, e.g., *United States v. Heredia*, 483 F.3d 913, 918 n.4 (9th Cir. 2007) (en banc); *United States v. Jewell*, 532 F.2d 697, 700 (9th Cir. 1976) (en banc).

311. SIXTH CIRCUIT PATTERN JURY INSTRUCTIONS (CRIMINAL), § 2.08(2)–(4) (2011) (inferring required mental state); see also *Staples v. United States*, 511 U.S. 600, 615 n.10 (1994) (“We, of course, express no view concerning the inferences a jury may have drawn regarding petitioner’s knowledge from the evidence in the case.”).

312. See *supra* Part V.D.2.

313. See, e.g., *Valdes v. United States*, 475 F.3d 1319, 1323 (D.C. Cir. 2007).

314. See *Myers*, *supra* note 11, at 1878.

## VI. THE PROPOSED SOLUTION

In this Article, I discussed how the crime of gratuities should apply to four situations.<sup>315</sup> Comparing these four situations among themselves helps sort out and identify the relative harm of each.

### A. *Locating These Four Situations on a Continuum of Harm*

If these four possible applications of the gratuities crime are arranged on a single continuum of harm, the least harmful is obviously personal gifts, which are appropriately not criminal at all. These can be characterized as having a zero percent risk of harm. At the other end of the spectrum, gifts because of an official act to be performed in the future present the greatest likelihood of harm. Here, the likelihood of bias and influence on government process is so great that the crime should be classified as a type of bribery. We would locate the two remaining situations—gifting because of past official acts and gifting because of the donee's position—between these two poles, again based on the likelihood of harm in the form of biased public officials. These two situations are dangerous to equality in government, but the danger is not as certain as when the gift is tied to a particular future act. These situations are appropriately treated as the crime of gratuities. The idea that political corruption crimes can be effectively defined by analyzing the harm caused by the conduct has recently been persuasively articulated by Lisa Kern Griffin.<sup>316</sup> She argues that although political corruption crimes are difficult to define with precision, focusing on the harm the conduct causes to the political system—in the form of distortion to public officials' neutral decisionmaking—is the best way to mark out the contours of corruption crimes.<sup>317</sup> That analysis is useful here in defining the appropriate scope of the gratuities crime; this is because social science research establishes that the harm to society presented by donors gifting officials due to their positions is not limited to the appearance of impropriety but is based on the risk of actual bias in public officials' conduct.<sup>318</sup>

### B. *Specifics: Proposed Amendments*

To implement the changes to the crime of gratuities proposed in this Article, Congress needs to amend the statute. The version below includes the changes suggested in this Article. Deleted material is indicated by a strike-through and new material is indicated by an underline.

(c) Whoever otherwise than as provided by law for the proper discharge of official duty—

(1) ~~directly or indirectly~~ knowingly and willfully gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of

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315. See *supra* Part I.C.

316. Lisa Kern Griffin, *Adaptation and Resiliency in Legal System: The Federal Common Law Crime of Corruption*, 89 N.C. L. REV. 1815 (2011).

317. *Id.* at 1817–18.

318. See *id.* at 1837; see also *supra* Part V.B.1.

(A) the official's position, or

(B) any official act performed ~~or to be performed~~ by such public official, ~~former public official~~, or person selected ~~to be a public official~~;

or

(2) being a public official, former public official, or person selected to be a public official, ~~otherwise than as provided by law for the proper discharge of official duty, directly or indirectly~~ knowingly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally for or because of

(A) the official's position or

(B) any official act performed ~~or to be performed~~ by such official or person;

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

Changes in the statutory subsection on gratuities include the amendments advocated in this Article. One change is that forward-looking gratuities have been eliminated because they are indistinguishable from bribery. This change was implemented by deleting the words “or to be performed” following the term official act.<sup>319</sup> The second change is that a status-based theory of liability was added. In other words, donors and donees may now be liable for the crime of gratuities if they give or receive things of value because of the donee’s *position*. This change is manifested by adding the words “the official’s position” following the phrase “for or because of.”<sup>320</sup> The third amendment is that *mens rea* terms have been added to the statute. As described above, the donor will be required to have a *mens rea* of knowledge of the facts (knowledge that they are giving a thing of value to a public official for or because of the official’s position or official act performed) and knowledge that such conduct is illegal. This change was implemented by adding the terms “knowingly and willfully” to the subsection covering donors.<sup>321</sup> For donees, a *mens rea* of knowingly has been added, which requires that those defendants have knowledge of the facts (knowledge that they are receiving a thing of value for or because of their position or official act performed) but not knowledge of the law.<sup>322</sup> In addition, the proposed new subsection on gratuities includes some minor<sup>323</sup> and stylistic changes.<sup>324</sup>

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319. The words “or to be performed” were deleted from 18 U.S.C. §§ 201(c)(1)(B), (c)(2)(B) (2012).

320. See 18 U.S.C. §§ 201(c)(1)(A), (c)(2)(A).

321. See *id.* § 201(c)(1).

322. See *id.* § 201(c)(2).

323. The proposed subsection includes four minor changes. In the subsection on donees, subsection (c)(2), the word “personally” has been deleted for two reasons. This word is inconsistent in that it does not appear in the subsection on donors, and this word is not important in that it has not been discussed in any of the case law. In both subsections,

### C. Attitude of Congress and the Courts

Congress may be receptive to the idea of modifying the gratuities crime as suggested in this Article. In the past, Congress has reacted to Supreme Court decisions that narrow a crime by amending the statute to reverse the Court.<sup>325</sup> Although the Senate was considering a bill to expand various political corruption crimes, including gratuities, the bill recently died.<sup>326</sup>

Defining gratuities because of an official's position as a crime is consistent with the Court's reliance on analyzing the nature and extent of the harm in the criminal context and in the political corruption context. Gifting to public officials because of their positions can be defined as conduct where injury in the form of biased public officials is sufficient to warrant criminalizing the conduct.<sup>327</sup> In *Caperton v. A.T. Massey Coal Co.*, the Court concluded that a judge's refusal to recuse himself was a violation of the Due Process Clause.<sup>328</sup> The Court's evaluation of the harm did not depend on finding that the judge was actually biased,<sup>329</sup> nor on finding that the judge's participation in the case presented the appearance of impropriety. Rather, the Court's analysis focused on the objective probability of actual bias.<sup>330</sup> Under this approach, when a donor transfers value to a public official because of his or her position, the recent influence research shows a significant objective risk that the public official will be biased; the harm is not limited to the appearance of impropriety. This decision supports the proposal to expand the crime of gratuities, although other Supreme Court decisions can be found which suggest the Court might not initiate such an expansion on its own.<sup>331</sup>

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the phrase "directly or indirectly" has been deleted because it has no meaning and has never come up in the courts. In the subsection on donees, subsection (c)(2), the phrase "otherwise than as provided by law for the proper discharge of official duty" has been deleted because it is redundant. Finally, some language was deleted in the last line of the subsection on donors, subsection (c)(1), because it was unnecessary and also inconsistent with the language used in subsection (c)(2).

324. The stylistic change was that the outline headings were reordered to be more efficient and to clearly indicate alternatives. The new outline headings would require renumbering current subsections (c)(2) and (c)(3) as (c)(3) and (c)(4), respectively.

325. See *Ratzlaf v. United States*, 510 U.S. 135 (1994), *rev'd by* Riegle Community Development and Regulatory Improvement Act of 1994 § 411, 31 U.S.C. §§ 5322(a), (b), 5324(c) (2012) (crime of structuring transactions); *McNally v. United States*, 483 U.S. 350 (1987), *rev'd by* 18 U.S.C. § 1346 (2012) (crime of mail fraud).

326. See Public Corruption Prosecution Improvements Act, S. 401, 112th Cong. (as introduced in the Senate, Feb. 17, 2011). The Senate did not take action and the proposed 2011 bill died.

327. Cf. *Lawrence v. Texas*, 539 U.S. 558, 567 (2003) (noting that "injury to a person or abuse of an institution the law protects" is generally necessary for the government to make conduct unlawful).

328. 556 U.S. 868, 890 (2009).

329. *Id.* at 2263.

330. *Id.* at 2263, 2265.

331. See, e.g., *Citizens United v. Federal Election Comm'n*, 130 S. Ct. 876, 910–11 (2010) (stating that the appearance of influence will not harm democratic governance and that ingratiation and access are not corruption); see also *Brown*, *supra* note 11, at 1372–

### CONCLUSION

This Article urges Congress to extend the crime of gratuities to cover gifts because of an official's position rather than leave the crime to cover only gifts because of particular official acts. The danger of gifting based on official positions to bias-free government is demonstrated in the recent research on influence and reciprocity. This influence is especially dangerous because participants are oblivious to its impact. This conduct is not adequately controlled by mandated disclosure or ethics prohibitions. When Congress amends the gratuities crime to expand it, Congress can avoid the dangers of overcriminalization by inserting *mens rea* elements into the statute, which it should have incorporated when it first drafted the statute. The appropriate *mens rea* terms are knowledge of the facts for donees and knowledge of the facts and law for donors. A secondary point of this Article is that Congress should remove one situation, when donors transfer value to donees because of *future* official acts, out of the gratuities crime because it is indistinguishable from the crime of bribery. With these changes, the federal crime of gratuities will be revived.

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74 (analyzing the Supreme Court's attitude as of 2006 toward political corruption as it bears on gratuities).