

## THE FEDERAL BRIBERY STATUTE, CAMPAIGN CONTRIBUTIONS, AND THE FIRST AMENDMENT

Alice, fed up with what she perceived to be a morally decaying society, decided to become politically active. She goes online, fills out the relevant disclosure forms, and authorizes a \$25 charge on her debit card for her United States Senator. In the comments section of the internet page she types, “Thanks for all your hard work with morals legislation. Here’s a small donation (all I can afford) to encourage your good work.”

Meanwhile, Big Fish is meeting with another United States Senator. After a brief talk about why milk price supports need increased, he slips a grease-paper envelope, stuffed with \$100 bills, to the Senator. “Here’s a little something for you.”

Under the federal bribery statute, Alice and Fish have both committed felonies. Each are equally culpable under the law, though the reader can clearly see that they were engaging in extraordinarily different conduct.

Although the federal bribery statute’s scope is sweeping, covering conduct well beyond the “the most blatant and specific attempts of those with money to influence governmental action,”<sup>1</sup> it has been given scant attention. Legal scholars and political scientists are, in Professor Lowenstein’s words, guilty of “sins of omission” for ignoring bribery.<sup>2</sup> Little has changed since Professor Lowenstein’s 1985 article. Thus, this Article seeks to fill a small gap in cavern.

Part I of this Article will introduce the reader to the federal bribery statute. Part II will introduce the reader to the First Amendment’s overbreadth doctrine and Part III will discuss bribery’s unconstitutionality under the void-for-vagueness doctrine. In Part IV the author

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<sup>1</sup> *Buckely v. Valeo*, 424 U.S. 1, 28 (1976).

<sup>2</sup> Daniel H. Lowenstein, Political Bribery and the Intermediate Theory of Politics, 32 *UCLA L. Rev.* 784, 786 (April, 1985).

presents substantial criticisms against his positions. Finally, in Part V, the Author will propose a solution that will allow prosecutors to fight corruption yet allow breathing room for free speech.

## **PART I. INTRODUCTION TO THE FEDERAL BRIBERY STATUTE.<sup>3</sup>**

### **A. The Statutory Language**

The federal bribery statute reads:<sup>4</sup>

(b) Whoever—

(1) directly or indirectly, corruptly gives, offers or promises anything of value to any public official . . .or offers or promises any public official . . . to give anything to any other person or entity, with intent—

(A) to influence any official act; or

(B) to influence such public official . . . to commit. . .or allow, any fraud. . .on the United States; or

(C) to induce such public official . . . to do or omit to do any act in violation of the lawful duty of such official or person. . . ;

(2)being a public official . . . directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity, in return for:

(A) being influenced in the performance of any official act;

(B) being influenced to commit. . .or allow, any fraud. . .on the United States; or

(C) being induced to do or omit to do any act in violation of the official duty of such official . . . ; . . . shall be fined. . .or imprisoned. . .or both. . . .

### **B. The Elements of Bribery.**

A public official includes any “person acting for or on behalf of the United States, or any department, agency, or branch of government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of

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<sup>3</sup> It is not my intent to delve deeply into the federal bribery statute. Rather, I seek only to establish that Alice’s conduct is covered.

<sup>4</sup> 18 U.S.C. §201.

government.” An official act includes “[a]ny 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.”<sup>5</sup>

Corrupt intent does not necessarily mean “bad,” “evil,” or “malicious.” Instead, it merely means “with the intent to influence.”<sup>6</sup> Thus, in a bribery prosecution, the judge will instruct the jury as follows:<sup>7</sup>

In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant [gave] [offered] [promised] something of value to [a public official]; and

Second, the defendant acted corruptly, that is, with the intent to [influence an official act made by the [public official]] [persuade the [public official] to omit to do an official act in violation of [public official]’s lawful duty.

### **C. The Elements Applied to Alice**

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<sup>5</sup> 18 U.S.C. §201(a)(3). *See, United States v. Birdsall*, 233 U.S. 223 (1914).

<sup>6</sup> See United States Attorneys’ Manual at 2047 (“Beginning on or about (date) , and continuing thereafter through on or about (date) , in the District of (venue) , (name of defendant) , the defendant herein, did directly and indirectly, corruptly give, offer and promise a thing of value, that is (description of corpus of the bribe) to (name of recipient) , a public official, that is (recipient’s job title or position) , with the intent to influence official acts, that is (description of official act defendant sought to be influence) , in violation of Section 201(b)(1) of Title 18, United States Code.”) (emphasis added).

<sup>7</sup> See, e.g., Ninth Circuit Model Criminal Jury Instructions, No. 8.8 (2003).

Alice gave a “something of value” to her Senator, namely, \$25.<sup>8</sup> If anything is a thing of value, money surely is.<sup>9</sup> Alice also had an “intent to influence an official act,” as her letter said “Here’s a small donation (all I can afford) to encourage your good work.” The word “encourage” means she seeks to influence something Senator Smith might do in the future.<sup>10</sup> Alice might have thought she was merely giving a campaign contribution. Instead, she is guilty of bribery.<sup>11</sup>

Although this illustration seems ridiculous, Alice’s conduct clearly falls under the federal bribery statute’s coverage. As Professor Lowenstein noted:<sup>12</sup>

[T]he possibility of a campaign contribution being a bribe was implicit in the Supreme Court’s campaign finance decision, *Buckley v. Valeo*. In that case the plaintiffs, challenging the campaign contribution limits in the Federal Election Campaign Act, argued that bribery laws were a less restrictive means of preventing corruption arising out of campaign financing than were contribution limits. The Court rejected this argument, reasoning that bribery laws deal with “only the most blatant and specific” instances of corruption. Neither the plaintiffs’ argument nor the Court’s response would have been coherent unless plaintiffs and the Court assumed that a campaign contribution could be a bribe. It is therefore evident that a campaign contribution is a “thing of value” for bribery purposes [ ].

It is also the Department of Justice’s understanding that “A bribery charge can be premised on a campaign contribution.”<sup>13</sup>

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<sup>8</sup> There is no statutory requirement that the thing of value offered exceed a *de minimus* value.

<sup>9</sup> See Lowenstein, at 807 (collecting cases describing non-monetary things of value).

<sup>10</sup> See United States Attorneys’ Manual at §2044 (“An aphorism sometimes used to sum up the distinction between a bribe and a gratuity is that a bribe says ‘please’ and a gratuity says ‘thank you.’”)

<sup>11</sup> Lowenstein, *supra*, at 808 (“Numerous courts have held that campaign contributions may be bribes.”); See also f.n. 86 (collecting cases). Incidentally, the first scholarly work addressing the intersection of bribery laws and campaign contributions appears to be student note. Note, Campaign Contributions and Federal Bribery Law, 92 Harv. L. Rev. 451 (Dec. 1978).

<sup>12</sup> Lowenstein, *supra*, at 808-09 (citations omitted).

<sup>13</sup> *Supra*, note 9.

What's worse is that the prosecution could more easily prove a case against Alice than against Fish. Because, although we know Fish met with a public official ("United States Senator"), all the facts indicate is that he "talked" about milk price supports and handed the Senator money. Although there is circumstantial evidence of bribery, the case against Alice would be based on her own admissions in a public disclosure form. With Fish, there is no direct evidence to prove his *mens rea*.

Thus, the only thing keeping Alice from prison is prosecutorial discretion. Or is it?

## **PART II. THE FIRST AMENDMENT'S OVERBREADTH DOCTRINE**

### **A. Introduction**

Generally a person charged under a criminal statute may attack the law only as it is being applied to him or her. Justice Kennedy wrote in *Sabri v. United States*, "Facial challenges [against criminal laws] are especially to be discouraged."<sup>14</sup>

Thus, the astute reader might could argue that the Alice hypothetical is a non-issue, since no prosecutor would file charges against her. As such, there would never be a case or controversy before the courts.

Putting aside this rosy view of prosecutorial discretion,<sup>15</sup> the reader would still be mistaken. Challenges brought against laws affecting speech are special, and thus may be attacked facially. Justice White wrote for the Court in *Broadrick v. Oklahoma* "that facial

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<sup>14</sup> *Sabri v. United States*, 124 S.Ct. 1941, 1948 (2004).

<sup>15</sup> See Part IV, *infra*.

overbreadth adjudication is an exception to our traditional rules of practice.”<sup>16</sup> The principle still stands, as Justice Kennedy demonstrated in *Ashcroft v. Free Speech Coalition*,<sup>17</sup> a case concerning a federal law prohibiting virtual porn:

“The Constitution gives significant protection from overbroad laws that chill speech within the First Amendment’s vast and privileged sphere. Under this principle, [a law] is unconstitutional on its face if it prohibits a substantial amount of protected expression.”<sup>18</sup>

Moreover, “a law imposing criminal penalties on protected speech is a stark example of speech suppression”<sup>19</sup> that must be carefully scrutinized.

One way of understanding overbreadth challenges is to think of it in terms of standing: A defendant has third-party standing to vindicate First Amendment interests for parties not before the Court.<sup>20</sup> That is, the defendant would not necessarily need to attack the law as it is being applied to him. Instead, he’s allowed to attack the law as it *could* be applied to others. In other words, courts will allow Big Fish to walk from the courtroom a free man if he can show that the federal bribery statute covers Alice’s conduct.<sup>21</sup>

To show that the federal bribery statute is overbroad and thus unconstitutional under the First Amendment, the defendant must show two things: (1) it covers a substantial amount of (2)

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<sup>16</sup> *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

<sup>17</sup> *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244 (2002).

<sup>18</sup> *Id.*

<sup>19</sup> *Free Speech Coalition*, 535 U.S. at 244.

<sup>20</sup> See, *Secretary of State v. Joseph H. H. Munson Co., Inc.*, 467 U.S. 967 (1984).

<sup>21</sup> *Broadrick*, 413 U.S. at 610 (“Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court. A closely related principle is that constitutional rights are personal and may not be asserted vicariously.”) (citations omitted).

protected speech. And although the Court has not specifically said so, there seems to be a another requirement, namely, (3) that the law pass the level of scrutiny applicable to the covered speech.

**B. Substantial Amount.**

At issue in *Ashcroft v. Free Speech Coalition*<sup>22</sup> was the Child Pornography Protection act of 1996, which criminalized the production or possession of “any visual depiction”<sup>23</sup> of “a minor engaging in a sexually explicitly conduct.” The Court had to decide whether the CPPA was unconstitutional under the First Amendment’s overbreadth doctrine. As the reader can see, the law covered a universe of child pornography. But that law had a fatal defect. It criminalized two types of pornography: virtual child pornography and morphed child pornography.<sup>24</sup>

The federal bribery statute, like the CPPA, covers a substantial amount of conduct. And also like the CPPA, it covers a universe of speech essential to the democratic process, namely campaign contributions.

**C. Protected Speech.**

Alice can argue that the \$25 check she sent to Senator was as a campaign contribution. As such, it was protected under the First Amendment.

A *per curiam* Court first articulated the level of scrutiny applicable to campaign contributions in *Buckely v. Valeo*: “Even a significant interference with protected rights of

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<sup>22</sup> *Ashcroft v. Free Speech Coalition*, 534 U.S. 234 (2003).

<sup>23</sup> 18 U.S.C. 2252 et seq.

<sup>24</sup> Using computer technology, a pornography can “morph” innocent images of children into pornographic ones.

political association may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms.”<sup>25</sup>

The level of scrutiny applicable to campaign contributions has not changed since *Buckley*.

At the very least, it is entitled to closely drawn scrutiny, as Justice Souter wrote in *Shrink Missouri*: “Thus, under *Buckley*’s standard of scrutiny, a contribution limit \*\*\* could survive if the Government demonstrated that contribution regulation was closely drawn to match a sufficiently important interest [ ].”<sup>26</sup> Chief Justice Rehnquist wrote in his dissenting opinion in *McConnell v. FEC*, “Under our precedent, restrictions on political contributions implicate important First Amendment values and are constitutional only if they are ‘closely drawn’ to reduce the corruption of federal candidates or the appearance of corruption.”<sup>27</sup>

Justices Stevens and O’Connor wrote in *McConnell* that “the chosen means of regulatin[g] [campaign contributions] are closely drawn to address that real or apparent corruption.”<sup>28</sup>

Justices Thomas and Scalia would apply an even higher level of scrutiny, writing that campaign finance laws, including contribution limitations are “subject to strict scrutiny.”<sup>29</sup>

Under this test, “broad prophylactic caps on ... giving to the political process ... are unconstituional,” because they are not narrowly tailored.<sup>30</sup> In *Nixon v. Shrink Missouri PAC*,<sup>31</sup>

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<sup>25</sup> *Buckley v. Valeo*, 424 U.S. 1, 25 (1976) (per curiam) (citations and quotation marks omitted).

<sup>26</sup> *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 388 (2000).

<sup>27</sup> *McConnell v. FEC*, 540 U.S. 93, 350-51 (2004) (Rehnquist, C.J., dissenting) (citing *Buckley v. Valeo*, 424 U.S. 1, 26-27 (1976) (per curiam)).

<sup>28</sup> *McConnell*, 540 U.S. at 185, f.n. 72.

<sup>29</sup> *FEC v. Beaumont*, 539 U.S. 146, 164 (2003) (Thomas, J., dissenting).

<sup>30</sup> *Id.*

Justice Kennedy dissented from the Court's judgment affirming restrictions on amount of money PAC can contribute to political candidates.

Putting aside what heightened scrutiny members of the Court would apply; the base level of scrutiny applicable to campaign contributions is indisputable. Laws reaching campaign contributions must be closely drawn to important governmental interests. Thus, if the bribery statute is to avoid facial invalidity, it must be closely drawn to important governmental interests.

#### **D. Closely Drawn Scrutiny.**

The Author concedes that the interest is preventing corruption and the appearance of corruption is significant.<sup>32</sup> However, the law must also be closely drawn.

The law can not be closely drawn since campaign contributions are already heavily regulated, first under the under the Federal Elections Campaign Act (FECA) and then under Bipartisan Campaign Reform Act (BCRA).<sup>33</sup>

In other words, the law is not closely drawn because a citizen who complies fully with BCRA and FECA, which were specifically tailored to campaign contributions, can still commit a crime under the federal bribery statute.

### **III. VOID-FOR-VAGUENESS**

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<sup>31</sup> *Nixon v. Shrink, Missouri PAC*, 528 U.S. 377 (2000).

<sup>32</sup> *See, Buckley v. Valeo*, 424 U.S. 1, 25 (1976).

<sup>33</sup> Pub. L. No. 107-155 (March 22, 2002), 116 Stat. 81.

Sometimes a law's overbreadth can lead to its being struck down under the void-for-vagueness doctrine. The Court wrote that it has "traditionally viewed vagueness and overbreadth as logically related and similar doctrines."<sup>34</sup>

Over a century ago, the Court outlined the policy of what would become the void-for-vagueness doctrine: "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of government."<sup>35</sup>

The void-for-vagueness doctrine has remained vibrant, and "requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."<sup>36</sup> The void-for-vagueness doctrine protects a citizen from "standardless sweep[s] [that] allows policemen, prosecutors, and juries to pursue their personal predilections."<sup>37</sup> The aim is also to avoid giving police, prosecutors, and juries undue discretion in defining what conduct is prohibited.

It is not enough for a criminal defendant to boldly assert that a statute is vague.<sup>38</sup> All language is, to some degree and to some people, vague. Indeed, very respected and credible

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<sup>34</sup> *Keyishian v. Board of Regents*, 385 U.S. 589, 609, 87 S.Ct. 675, 687, 17 L.Ed.2d 629 (1967).

<sup>35</sup> *United States v. Reese*, 92 U.S. 214, 221 (1875).

<sup>36</sup> *Village of Hoffman Estates v. Flipside*, 455 U.S. 489 (1982).

<sup>37</sup> *Smith*, *supra*, 415 U.S. at 574.

<sup>38</sup> *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991).

philosophers have theorized that the only language lacking vagueness is the language within each person's own mind: Your own private language.<sup>39</sup> Instead of merely shouting that statutory language is vague, a criminal defendant must show that the statute so vague that a reasonable person would not know what conduct is prohibited.<sup>40</sup> In this special context of Free Speech Clause issues, the defendant can show that a reasonable person is not on notice as to what conduct is prohibited because the statute's language is so broad that no one would consider enforcing it literally.

Indeed, the Department of Justice writes:  
A bribery charge can be premised on a campaign contribution. But be careful.  
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**PRACTICE TIP:** Where the transaction represents a bona fide campaign contribution, prosecutors must normally be prepared to prove that it involved a quid pro quo understanding and thereby constituted a "bribe" offense actionable under section 201(b).<sup>41</sup>

Again, the Department of Justice recognizes that Alice's campaign contribution would be felonious but advises prosecutors to "be careful." What standard is that? And where does the *quid pro quo* language come from? It is not an element of the federal bribery statute. Rather, its discretionary. Indeed, this Author has not found any Pattern Jury Instruction stating a clear standard as to what is a "good faith" campaign contribution. There is no standard governing what campaign contribution is illegal, and what is legal. This is fatal.

#### **Part IV. CRITICISMS**

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<sup>39</sup> See, Ludwig Von Wittenstein, *Philosophical Investigations* 357 (Cambridge 1983).

<sup>40</sup> *Kolender v. Lawson*, 461 U.S. 352 (1983).

<sup>41</sup> AUSA Manual at 2046.

There are two major criticisms to the approach taken in the article, namely that prosecutorial discretion moots any overbreadth challenges and second, that courts have already limited the federal bribery statute's application. The first is easily disposed of, as the Court has clearly addressed and refuted it. The second criticism, by its very explanation, illustrates the constitutional defects of the federal bribery statute as understood.

**A. What's the big Deal?**

One could argue that no prosecutor would ever file charges against Alice. Thus, the problems presented are at worst contrive; at best, devoid of any practical application.

The Author does not concede that no prosecutor would charge Alice. The treatment of Theodore Olson<sup>42</sup> and former President Clinton demonstrate that many investigations and prosecutions are core political attacks. Thus, although prosecutors might not exercise their discretion and charge Alice, the discretion remains. As a nation of written laws, and not of men, we must prefer clear rules, knowable in advance, that limit the discretion of one man or woman to ruin a person's life.

Second, the Supreme Court has recognized that given the special place of free speech in our society, laws criminalizing speech, even if only in theory, are invalid. Justice Brennan wrote: that First Amendment "freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potentially as

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<sup>42</sup> According to Douglas W. Kmiec's book, *The Attorney General's Lawyer: Inside the Meese Justice Department* (Praeger, 1992), Theodore Olson was the target of a politically motivated investigation that cost him over 3-million dollars in legal fees. Mr. Olson was ultimately cleared and went on to become Solicitor General.

the actual application of sanctions.”<sup>43</sup> Indeed, in *NAACP v. Button*, the Court held that a law could not stand even though the persons challenged in a declaratory action, and no actual or threat of criminal prosecution appeared apparent. Alice could be prosecuted. Under the First Amendment’s overbreadth and void-for-vagueness doctrines, the potentiality is enough to allow the actuality of a challenge to prevail.

**B. Courts have already limited the scope of the federal bribery statute sufficient to meet your concerns.**

A law is not substantially overbroad if a court can give it a limiting definition. This comports with the understanding that, where necessary, a court should construe a statute narrowly to avoid a constitutional question.<sup>44</sup> Indeed, the Supreme Court adopted this approach in Hobbs Act cases, and other circuits have addressed the intersection of bribery and campaign contributions.

The Fourth Circuit said that a defendant whose bribery charged is predicated upon a campaign contribution is entitled to “an instruction accurately stating the distinction between lawful goodwill expenditures and bribes made with criminal intent that the benefit be received by the official as a quid pro quo for some official act, pattern of acts, or agreement to act favorably to the donor when necessary.”<sup>45</sup> The Seventh Circuit had laid out a broader rule, stating that, “[A]ccepting a campaign contribution does not equal taking a bribe unless the payment is made

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<sup>43</sup> *NAACP v. Button*, 371 U.S. 415, 433 (1963) (citing *Smith v. California*, 361 U.S. 147 (1959)).

<sup>44</sup> *See, Jones v. United States*, 529 U.S. 848 (200) (construing federal arson statute narrowly, held that it did not cover the burning of a private residence in order to avoid post-*Lopez* federalism concerns).

<sup>45</sup> *United States v. Head*, 641 F.2d 174, 180 (4<sup>th</sup> Cir. 1981).

in exchange for an explicit promise to perform or not perform an official act.”<sup>46</sup> The Fifth Circuit adopted this reasoning, stating that “Intending to make a campaign contribution does not constitute bribery, even though many contributors hope that the official will act favorably because of their contributions.”<sup>47</sup>

Although these decisions might seem to dispose of the issue, they’re problematic for several reasons. Per the Second Circuit, “There is a line between money contributed lawfully because of a candidate’s positions on issues and money contributed unlawfully as part of an arrangement to secure or reward official action, though its location is not always clear.”<sup>48</sup>

In *United States v. Brewster*, the D.C. Circuit wrote of “the difference between guilt under either [the federal bribery statute] and normal innocent acts.”<sup>49</sup>

What is that line? What is a “normal” versus “illegal” campaign contribution? To avoid an overbreadth or vagueness challenge, there must be clear standards. No court has provided any.

Thus the overbreadth and vagueness problems are clear: The law’s coverage is sweeping, and there was no clear standards. As Justice Kennedy wrote, “a law imposing criminal penalties on protected speech is a stark example of speech suppression.”<sup>50</sup> In *Free Speech Coalition*, the overbreadth was fatal because of the capacity for the chilling of protected speech. “few legitimate movie producers or book publishers, or few other speakers in any capacity, would risk

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<sup>46</sup> *United States v. Allen*, 10 F.3d 405, 411 (7th Cir. 1993).

<sup>47</sup> *United States v. Tomblin*, 46 F.3d 1369, 1379 (5th Cir. 1995).

<sup>48</sup> *United States v. Biaggi*, 909 F.2d 662, 695 (2d Cir.1990), cert. denied, 499 U.S. 904 (1991).

<sup>49</sup> *United States v. Brewster*, 506 F.2d 62, 82 (D.C. Cir. 1974).

<sup>50</sup> *Free Speech Coalition*, at 244.

distributing images in or near the uncertain reach of this law.”<sup>51</sup> Indeed, all campaign contributions might be chilled if the word gets out that people, in good-faith but ignorantly, are committing felonies.

## **Part V. Solutions**

Courts would be justifiably reluctant to strike down the federal bribery statute under any circumstances. However, they would refuse to invalidate it absent an assurance that “blatant and specific attempts of those with money to influence governmental action”<sup>52</sup> could be reached. The good news is that anti-corruption enforcement may be vigorous, if we read in harmony BCRA bribery. There are a workable solution that would allow prosecutors to cast the net wide enough to fight anti-corruption, but no wider. I thus propose the following rule: *A campaign contribution is not a bribe if the donator contributes the money pursuant to campaign finance laws, and there is no quid pro quo.*

### **A. Is full disclosure pursuant to federal campaign finance laws enough?**

First, the courts could declare that a campaign contribution, if given pursuant to federal law, should not serve as the basis for a bribery prosecution. In other words, no person who complies with the maze of campaign finance regulations can later be held liable for not seeing how his conduct could implicate other, broader laws.

A major - and perhaps irrefutable - criticism to this approach is that Fish would not be criminally culpable if he disclosed his contribution, even though the contribution reeked of

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<sup>51</sup> *Id.* at 246.

<sup>52</sup> *Buckely v. Valeo*, 424 U.S. 1, 28 (1976).

criminality. Some might argue that money given in open removes the stench. As a society we recognize that politician my receive money. But we want full disclosure. For some, full disclosure is not enough. A stark example shows why full disclosure is inadequate:

“A millionaire who handed out \$10,000 checks on the [Texas] Senate floor while legislation that interested him was pending said the checks were political contributions, not an attempt to bribe lawmakers. ‘It would be difficult to make it into a bribery case,’ said [the district attorney], who believes it’s time to change Texas’s loose campaign finance laws. ‘In Texas, it’s almost impossible to bribe a public official as long as you report it. . . .’”<sup>53</sup>

I doubt that many people would think that the millionaire Texan and any person who received a \$10,000 check should avoid criminal prosecution. Thus, full disclosure is not enough. Although fully disclosing contributions is a step in the right direction, we need to add another element.

**B. Add a *Quid pro quo*.**

Thus, we should add that compliance with relevant campaign finance laws is inadequate to insulate the defendant from liability if the money is given as a *quid pro quo*. But we must draft the *quid pro quo* requirement while preventing the overcriminalization problems presented in this Article.

Thus, the defendant would have to receive a benefit, directly or indirectly, to be found liable under my approach. It would not be enough that he be part of a clear, identifiable class, e.g., a member of the ACLU or NRA. In other words, a person who gave a campaign contribution to encourage gun-rights legislation would not fall under my approach merely

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<sup>53</sup> The Atlanta Journal and Constitution (July 8, 1989). The Author credits Lowenstein & Hasen, Election Law: Cases and Materials at 683 for bringing this example to his attention.

because, as a gun owner, he would obtain some new rights. The analogy applicable would be taxpayer standing. If the criminal defendant “benefit” would be analogous to the “harm” he suffers merely as a taxpayer, then he would not be liable.

But a benefit to him or her, singularly, but directly or indirectly, would be criminal. Thus, a lobbyist (who obtains money from the ACLU or NRA) would be liable if he gave a campaign contribution in exchange for favorable legislation.

Although this Article can not possibly cover every solution, the Author hopes to encourage discussions on how to prevent corruption consistent with core First Amendment values. The above rule is an attempt to head in the right direction.

## **V. CONCLUSION**

The federal bribery statute covers garden-variety and constitutionally protected campaign contributions. Because it covers an important part of the American political process, it is overbroad and must pass closely drawn scrutiny. The law fails to pass this mid-level scrutiny because Congress has extensively regulated campaign contributions such that full compliance with the law means a citizen can not be punished under a broader law. There is a very workable solution that will allow for vigorous speech yet net corrupt politicians and citizens.