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The Future of Governmental Ethics: Law and Morality

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Articles

The Future of Governmental Ethics: Law and Morality

Jon L. Mills*

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I. Introduction

The topic of ethics in government is hardly new, and yet it is far from maturity. From the Greek democracy of antiquity to the fledgling democracies of the current day, we have struggled to maintain morality and ethics in the governance of our societies and have failed to perfect a method. But that does not, and should not, prevent professors from trying. As Mark Twain once quipped, "To do good is noble, but to teach others how to be good is nobler—and no trouble."¹ It is always easier to tell others how to behave than to do so.

When we try to define character and ethics in public office, it may be easier to define corrupt actions than to define ethical conduct. Consequently, striving for ethical governance often entails determining what is bad conduct and then encouraging a less easily definable good conduct.

At least some of the difficulty lies in the tangle of considerations confronting the public official's decision-making in a democracy—the multiple duties, values, constitutions, and ethics codes. Equality, liberty, freedom of speech—although we profess these to be among our guiding lights, anyone who has been in public service any length of time knows that looking to general principles and values will not generate practical policy answers. And while citizens want integrity, honesty, and character in their public officials, even honest persons of integrity can reach different policy conclusions.

Though a positivist approach to ethics in governance currently prevails in the United States, the allure of black-letter rules of morality may just be the primary source of our present difficulty in maintaining truly ethical governance. Some believe modern ethics rules actually deter people of good character from government service and encourage those already "in the system" to care more about fastidiously complying with the rulebook, or at least the appearance thereof, than serving the public interest. The question remains, then: What role should ethics regulation play in a democracy?

1. MARK TWAIN, *FOLLOWING THE EQUATOR FLYLEAF* (1897), *quoted in* PETER W. MORGAN & GLENN H. REYNOLDS, *THE APPEARANCE OF IMPROPRIETY: HOW THE ETHICS WARS HAVE UNDERMINED AMERICAN GOVERNMENT, BUSINESS, AND SOCIETY* 73 (1997).

II. What is Ethical Conduct?

Any hope for a perfectly ethical government, arising from a utopian ideal of self-governance, is unrealistic and defies both the lessons of history and the reality of human nature. Thus, our goal should be to encourage, foster, and promote ethical public service to the highest degree possible, given the tools of democracy. Conceding that one's concept of ethics will vary from person to person, we first must look for some logical point of departure.

There is some agreement on what is legally ethical. For instance, two particular sins that are generally considered morally and legally wrong—the corrupt abuse of public office for private gain and the preservation of conflicts of interest in public decision-making. Moving from this point of common understanding, the current focus of laws in the United States can be placed into the following six categories:

1. *Prohibiting abuse of office.* Such laws bar government officials from using the power of their offices for improper purposes. We might generally define this category of conduct as corruption.²

2. *Controlling conflicts of interest.* A conflict of interest implies that motivations other than the public good affect an official's decisions. These laws define, prohibit, or require the reporting of conflicts.³

3. *Requiring disclosure of private interests.* Discouraging, or at the very least identifying, conflicts of interest is another method of deterring wrongful behavior.⁴

2. See, e.g., Standards for conduct of public officers, employees of agencies, and local government attorneys, FLA. STAT. § 112.313 (1997), at (6) (misuse of public position); *Gordon v. Commission on Ethics*, 609 So. 2d 126 (Fla. 1992) (holding that a city commission member violated section 112.313(6) of the Florida Statutes when he used city stationery to promote a symposium for which he received compensation).

3. See, e.g., FLA. STAT. § 112.313(7) (conflicting employment or contractual relationship); *Zerweck v. Commission on Ethics*, 409 So. 2d 57 (Fla. Dist. Ct. App. 1982) (holding that a city commission member's employment as a development coordinator with a proprietary business, which caused recurring conflicts of interest, violated section 112.313(7) of the Florida Statutes).

4. See, e.g., Disclosure of financial interests and clients represented before agencies, FLA. STAT. § 112.3145 (1997); *Goldtrap v. Askew*, 334 So. 2d 20 (Fla. 1976) (holding that a county commission member, as a "public officer," had a duty to file a financial disclosure as required by section 112.3145 of the Florida Statutes because the statute did not violate his right to privacy); *infra* Appendix A, at § IV.

4. *Regulating campaign financing.* These laws attempt to attenuate the impact of private campaign contributions and lobbying activities on the official's decision-making.⁵

5. *Restricting activities that create an appearance of impropriety.*⁶

6. *Creating institutions to oversee ethics.*⁷

Each of these areas will be discussed below as a component of the attempt to define ethical governance as a matter of law.

III. How is Ethical Conduct Achieved in the United States?

Three broad considerations may guide an evaluation of ethical governance: 1) The quality and enforceability of ethics laws; 2) the qualities of the governing system which deter corrupt conduct; and 3) the ability of the governing system to attract ethical individuals as public servants.

In the United States, the modern focus on governmental ethics began with the Watergate scandal of the early 1970s. That era spawned ethics commissions in virtually every state as well as the U.S. Office of Government Ethics.⁸ Multiple laws aimed at prohibiting conflicts of interest and requiring disclosure of gifts, contributions, personal income, and net worth were promptly enacted.⁹ Despite these efforts, the people of the United States now maintain one of the lowest levels of trust in their public servants throughout the nation's history.¹⁰

However, even if public ethics are currently held in low regard in the United States, its system of constitutional democracy is well designed to deter corruption. Indeed, competitive free elections, free speech, aggressive citizen oversight, and an independent judiciary—what might be called the tools of democracy—are the

5. See, e.g., FLA. CONST. art. II, § 8(b) ("All elected public officers and candidates for such offices shall file full and public disclosure of their campaign finances."); Campaign financing, limitations on contributions, FLA. STAT. § 106.08 (1997).

6. See, e.g., *Zerweck*, 409 So. 2d at 60 (reasoning that a primary objective of Florida's Code of Ethics is avoiding the appearance of impropriety).

7. See, e.g., Commission on Ethics; purpose, FLA. STAT. § 112.320 (1997) ("There is created a Commission on Ethics, the purpose of which is to serve as guardian of the standards of conduct for the officers and employees of the state . . . and to serve as the independent commission provided for in s. 8(f), Art. II of the State Constitution.").

8. See Title IV of the Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1855-62 (1978) (codified as amended at 5 U.S.C. app. §§ 401-408 (1994)).

9. See, e.g., *infra* Appendix A.

10. See MORGAN & REYNOLDS, *supra* note 1, at 40.

primary characteristics of the American system deterring corruption.

A. *Tools of Democracy*

Democracy, that is a representative government chosen by its citizens, has the inherent ability to provide the elements of a governmental system necessary to combat corruption. Thus, Philip Heymann has noted, "The more a government is responsive to its citizens' wishes, the more likely the agents of government will feel a counterbalance to the temptations of corruption."¹¹

Yet democracy *per se* is not a panacea. Freedom and liberty, forming the foundation of democracy, are the source from which flow the tools used to minimize the ability of governmental leaders to engage in unethical behavior.¹² Specifically, frequent elections, political competition, separate and independent branches of government, and independent institutions of vigilance are the essential components of a democratic system that discourages corruption in government.¹³

When a governmental system becomes corrupt, its authority and control are jeopardized by the concomitant loss of popular support. While established democracies are unlikely to crumble following discoveries of corruption, infant democracies may not survive.¹⁴ Ironically, in that unstable transitional setting, a replacement government may be just as corrupt as its predecessor. Of three countries that recently have shifted to democratic systems—namely, Brazil, South Africa, and Poland—all have been burdened by corrupt practices and have enacted measures to counter them. The situation in each country is distinct and will be further addressed in section IV.

B. *Political and Constitutional Structures*

When a public servant seeks some moral epistle, the law might well be the first stop. When defining what is legally unethical,

11. Philip B. Heymann, *Democracy and Corruption*, 20 FORDHAM INT'L L. J. 323, 329 (1996).

12. *See id.*

13. *See id.* at 334; accord Susan Rose-Ackerman, *Corruption and Democracy*, 90 AM. SOC'Y L. PROC. 83, 90 (1996) ("A democratic electoral system, standing alone, is an insufficient deterrent to corruption. Also important are vigorous outside checks, a division of power within the state and enforcement of the rule of law in commercial and political life.").

14. *See Heymann, supra* note 11, at 327.

lawmakers have distinguished between the different types of public officials. That is, there are different ethical codes for the judicial branch, for the executive or administrative branch, and for the legislative branch.

C. *Ethics Legislation*

As mentioned earlier, ethics legislation and regulations generally target abuse of office, conflicts of interest in public decision-making, unknown private concerns, and campaign finance.

1. *Abuse of Office*—It is recorded that the sculptor commissioned under public contract to create the great sculpture of Athena in the Parthenon was indicted for misuse of office because he adorned the goddess' shield with his own image.¹⁵ This particular corrupt act was not difficult to prove, and, unfortunately, such obvious misconduct continues in modern times.

Not long ago, for instance, a county commissioner in northeastern Florida used county road-grading equipment to repair roads to his watermelon fields and county trucks and county road personnel to load his watermelons and transport them to market.¹⁶ Reacting swiftly, the Florida Ethics Commission concluded that he had clearly abused his office.¹⁷ While these examples of misconduct appear to be self-evident, finding an abuse of office typically requires a showing of intent,¹⁸ often making it troublesome to prove this kind of misconduct.

2. *Conflicts of Interest in Public Decision-Making and Their Disclosure*—Conflicts of interest include taking public action in exchange for receiving something of personal value or for gain to friends or family members.¹⁹ The means used to attack conflicts of interest include simply making such improperly-motivated acts criminal or illegal, as well as requiring disclosure of situations such as receiving gifts, earning income from outside the public office,

15. See PLUTARCH, PERICLES 13:31.

16. See *In re Jack Vinson*, Fla. Comm'n on Ethics No. 83-08 (1983).

17. See *id.*

18. See *infra* Appendix A, at § I.B.

19. See, e.g., FLA. STAT. § 112.313(2) (solicitation or acceptance of gifts); Voting conflicts, FLA. STAT. § 112.3143 (1997), at (3)(a).

and owning property (real and personal)²⁰ that may indicate conflicts of interest.²¹

The law in Florida treats various public officials differently. For example, state officers—including legislators—need not abstain from voting in the face of certain conflicts;²² they must merely report it.²³ On the other hand, local officials may not vote when they would receive some “special benefit,” and they must publicly report such an abstention.²⁴

Financial disclosure has been referred to as “the ‘linchpin’ of the ethical enforcement system and the ‘disinfectant sunlight which makes possible the cleaning up of abusive practices.’”²⁵ Florida requires public officials to “file full and public disclosure of their financial interests” in order to uphold what its constitution refers to as “a public trust.”²⁶ Financial disclosure is a two-tiered system where reporting individuals comply with either the statutory financial-disclosure laws or the constitutional “ethics in government” provision.²⁷

a) Gifts.—One action which creates an apparent conflict of interest is when a public official accepts gifts from those who have a particular agenda before that official’s governmental agency or body. Many U.S. states have prohibited their public officials from accepting gifts or have severely limited the value of gifts their officials may accept.²⁸ The assumption, of course, is that a person taking inexpensive gifts will not be improperly influenced. Currently in Florida, public officials are prohibited from accepting

20. See *infra* Appendix A.

21. See, e.g., Full and public disclosure of financial interests, FLA. STAT. § 112.3144 (1997); FLA. STAT. § 112.3145.

22. See FLA. STAT. § 112.3143(2).

23. See *id.*

24. See FLA. STAT. § 112.3143(3).

25. Ann McBride, *Ethics in Congress: Agenda and Action*, 58 GEO. WASH. L. REV. 451, 476 (1990) (quoting REPORT OF THE PRESIDENT’S COMM’N ON FED. ETHICS LAW REFORM, TO SERVE WITH HONOR 5 (1989)).

26. FLA. CONST. art. II, § 8.

27. See *infra* Appendix A, at § V.

28. The Council on Governmental Ethics Laws (COGEL), created in 1978, publishes a compilation of data about existing ethics agencies, which includes information about statutory and regulatory functions, budgets, and the names of personnel. See generally BONNIE J. WILLIAMS, COUNCIL ON GOVERNMENTAL ETHICS LAWS, *Ethics Update: 20th Annual Conference* (1998) (collecting information from ethics agencies in the U.S. and Canadian federal, state, and provincial governments); <<http://www.cogel.org>>.

gifts valued greater than \$100, except under specified conditions, which then must be disclosed.²⁹

An entertaining quirk of Florida law is an exception which permits officials to accept gifts from relatives.³⁰ This concept, of course, seems rational: Why should a wife and husband not be able to exchange gifts without the intervention of state law?³¹ Gifts of food are also limited in an interesting fashion; the dollar limit does not apply to that which can be eaten at one sitting.³²

b) *Financial Holdings and Employment*—Given that public officials frequently exercise discretion in the performance of their duties, they are susceptible to charges of making decisions that favor some private interest. This dilemma is generally combated by mandating disclosure of the public official's personal interests and by prohibiting participation in particular cases of decisions.³³

3. *Campaign Contributions and Campaign Finance Reform*—According to the Supreme Court of the United States, “[P]reventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances.”³⁴ Clearly, one goal of campaign finance reform is to guard against the “buying” of elected officials. The Court also noted that campaign contributions differ only slightly from the common bribe.³⁵ If, however, that is the case, then why do campaign-finance laws permit contributions at all? The answer lies in the dimension of free speech (i.e.,

29. See *infra* Appendix A, at §§ II.C., II.D.

30. See Reporting and prohibited receipt of gifts . . . , FLA. STAT. § 112.3148 (1997), at (1).

31. The legal definition of “relatives” for this purpose includes, among others, those who are engaged to be married to the official and “any other natural person having the same legal residence as the public officer or employee.” Definitions, FLA. STAT. § 112.312 (1997), at (21); accord “Relative” defined, RULES OF THE FLA. COMM’N ON ETHICS § 34-13.260 (1998).

32. See *infra* Appendix A, at § II.F.

33. See FLA. STAT. §§ 112.3144, 112.3145.

34. Federal Election Comm’n v. National Conservative Political Action Comm., 470 U.S. 480, 496-97 (1985).

35. See *id.* at 497. One commentator draws a distinction: Bribery entails the conferring of unjust enrichment upon the elected official, whereas campaign contributions are specifically tendered to enhance the official’s chances for election. David A. Strauss, *What is the Goal of Campaign Finance Reform?*, 1995 U. CHI. LEGAL F. 141, 148.

political speech and association) implicated in campaign contributions, which is protected by the Constitution.³⁶

Others contend that the goal of campaign finance reform is to insure that every candidate has the same opportunity to participate in the electoral process.³⁷ As noted by one scholar, "The core problem in campaign finance is not corruption in the traditional sense. Rather, it is how far equity considerations can and should be carried in a democracy."³⁸

The final justification for such reforms may simply be to preserve the appearance of the legitimacy of the democratic system, if not the real thing itself. The recent trend in political campaigns seems to have been "he who raises the most money wins." Ostensibly, then, the power of the constituent's vote has been replaced by the power of the contributor's dollar. Installing limitations on campaign contributions provides a tangible response to the growing suspicions surrounding the electoral process. Given the looming distrust of government in general, campaign finance reforms seek to reassure the citizenry that the electoral process has not been infected.

4. *Creation of Institutions that Oversee Ethics*—Irrespective of specific regulatory provisions geared toward ensuring ethical behavior, just the opposite will persist absent a government's concomitant ability to enforce them. Clearly, "[w]ithout vigorous oversight and enforcement, even the best rules can be rendered meaningless."³⁹

The first step in effecting actual enforcement is the implementation of ethics oversight, which requires a measure of accurate financial disclosure. More importantly, however, the means of enforcement must exist independent of the institution enforced.⁴⁰ For example, the use of outside counsel by Congressional Ethics

36. See *Buckley v. Valeo*, 424 U.S. 1, 23-29 (declaring that campaign contributions are protected by the First Amendment but holding that the maximum caps on contributions enacted in the Federal Election Campaign Act of 1971 did not unconstitutionally interfere with contributors' freedom of political speech and association).

37. See Strauss, *supra* note 35, at 155-56.

38. Bruce E. Cain, *Moralism and Realism in Campaign Finance Reform*, 1995 U. CHI. LEGAL F. 111, 112.

39. McBride, *supra* note 25, at 479.

40. See *id.* at 480.

Committees has proven to be vital in providing independence and public credibility to ethical reform.⁴¹

The significance of structural and political independence for effective ethical governance was never more apparent than during the Watergate scandal. In what has come to be known as the "Saturday Night Massacre," President Richard Nixon exercised control over the Justice Department in order to hinder prosecution of several executive officials, including himself.⁴² Following President Nixon's resignation, Congress responded by creating an Independent Counsel through the Ethics in Government Act of 1978.⁴³ Its purpose was simple—"to '[r]emov[e] politics from the administration of justice.'"⁴⁴ Accordingly, the Independent Counsel operates free of political and budgetary restraints;⁴⁵ however, political independence is not necessarily the same as political impartiality.⁴⁶

In addition to the ethical institutions that oversee the acts of the federal government, every state has enacted laws providing for the creation of ethics committees.⁴⁷ In Florida, for example, a Commission on Ethics was created in 1974 to "serve as guardian of the standards of conduct for the officers and employees of the state."⁴⁸ In its role as an *independent* commission, it has the power to investigate sworn complaints of violations of Florida's Code of Ethics for Public Officers and Employees.⁴⁹ And, "[i]n

41. *See id.* "The 1985 Hastings Center report states that '[t]hroughout most of American history legislatures have been reluctant to discipline members for ethical offenses, preferring instead to see the voters weed out blatant corruption at the polls.'" *Id.* at 478 (quoting HASTINGS CENTER, *THE ETHICS OF LEGISLATIVE LIFE* 16 (1985)).

42. *See* MORGAN & REYNOLDS, *supra* note 1, at 75.

43. *See* Title VI of the Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824, 1867-75 (1978) (codified as amended at 28 U.S.C. §§ 591-599 (1994)).

44. Beth Nolan, *Removing Conflicts from the Administration of Justice: Conflicts of Interest and Independent Counsels Under the Ethics in Government Act*, 79 GEO. L.J. 1, 4 (1990) (quoting *Removing Politics From the Administration of Justice: Hearings on S. 2803 and S. 2978 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 93d Cong. I (1974)).

45. *See* MORGAN & REYNOLDS, *supra* note 1, at 76. The Independent Counsel is not appointed by the Attorney General. Rather, when appropriate, the Attorney General must petition the U.S. Court of Appeals for the District of Columbia for the appointment of an Independent Counsel, who serves until the investigation and prosecution of the specified matters are complete. *See id.* at 75-76.

46. *See id.* at 77.

47. *See supra* note 28.

48. FLA. STAT. § 112.320.

49. *See* Duties and powers of commission, FLA. STAT. § 112.322 (1997).

the event that a violation or breach is found to have been committed, the commission shall recommend appropriate action to the agency or official having power to impose any penalty”⁵⁰

5. *The Appearance of Impropriety*—One of the newer approaches to ethics is not only to punish corruption, conflicts of interest, and abuse of office, but also to avoid circumstances which provide even the appearance of impropriety.⁵¹ The goal is to increase public faith and, as some have suggested, avoid temptation.⁵²

However, one must question whether regulating appearances is a rational and worthwhile undertaking. “The most formal Appearance of Virtue, when it is only an Appearance, may perhaps, in very abstracted Considerations, seem to be rather less commendable than Virtue itself without this Formality; but it will however be always more commended”⁵³ Accordingly, commentators have long questioned the logic of exerting efforts to avoid the appearance of impropriety while actual impropriety remained extant.⁵⁴

Over the last two-dozen years, the United States has engaged in considerable efforts to increase public confidence in institutions—“to secure the public trust”—by creating agencies, enacting laws, and implementing rules of ethics that stress appearances.⁵⁵ However, the proliferation of such rules, attributed by many to the Watergate scandal, has done little in the way of bolstering public confidence in American government.⁵⁶

In *An Essay on the Knowledge of the Characters of Men*, Henry Fielding attributed corruption in government to the use of

50. FLA. STAT. § 112.322(2)(b).

51. See, e.g., *Zerweck v. Commission on Ethics*, 409 So. 2d 57, 60 (Fla. Dist. Ct. App. 1982) (noting that avoiding the appearance of impropriety is an ethical norm manifest in Florida’s Code of Ethics); Philip Shenon, *Helms Prods Holbrooke and Receives a Concession*, N.Y. TIMES, June 18, 1999, at A10 (“I knew the law and I was careful to follow it. But I should have been more sensitive, much more sensitive, to the appearances.”).

52. See *Zerweck*, 409 So. 2d at 60 (“A primary objective of the Code of Ethics is that government officials avoid recurring situations in which there is a temptation to place personal gain, economic or otherwise, above the discharge of their fiduciary duty to the public.”).

53. HENRY FIELDING, *THE HISTORY OF TOM JONES, A FOUNDLING* 615 (Fredson Bowers ed., Wesleyan Univ. Press 1975) (1749), quoted in MORGAN & REYNOLDS, *supra* note 1, at 7.

54. See MORGAN & REYNOLDS, *supra* note 1, at 72.

55. See *id.* at 1.

56. See *id.*

“appearance ethics,” charging that it leads officials “to conceal Vices, [rather] than to cultivate Virtues.”⁵⁷ It should therefore be of no surprise that public confidence in government has manifested itself as a level of distrust comparable to that of the Vietnam War era.⁵⁸ For example, in 1964, Americans trusted that the government would act ethically seventy-six percent of the time. By 1995, that figure had fallen to twenty-five percent.⁵⁹

So why, in the face of such obvious failure, has the appearance-based approach to ethics regulation persisted in government? Apparently, it benefits “participants in the system.”⁶⁰ Consequently, despite its societal disadvantages, the appearance-based approach appears to be entrenched in ethical tenets.⁶¹

Indeed, appearance-based ethics in the modern era⁶² has become a tool for political operatives who use the rules in an effort to impeach the opposition simply by alleging improper appearances.⁶³ This works because, while misconduct is ultimately difficult to prove, the process of public allegation and the resultant attempt at denial has an unquestionably debilitating effect on the accused. For example, in the 1970s several Democrats were elected to office in this fashion, amid the anti-GOP backlash following Watergate.⁶⁴

Other beneficiaries of the post-Watergate explosion of such rules included journalists, interest groups, and ethics consultants. The *Washington Post*, for example, “climbed aboard the public-interest rocket to become the nation’s third most important paper.”⁶⁵ In the meantime, self-appointed “ethics experts” profited from the proliferation of new rules and their attendant ambiguities.⁶⁶

As a result of the multiple layers of rules enacted by the ethics establishment, a complex and increasingly obscure rule structure

57. 1 HENRY FIELDING, *An Essay on the Knowledge of the Characters of Men*, in MISCELLANIES BY HENRY FIELDING, ESQ. 153, 154 (Henry Knight Miller ed., Wesleyan Univ. Press 1972) (1743), quoted in MORGAN & REYNOLDS, *supra* note 1, at 17.

58. See MORGAN & REYNOLDS, *supra* note 1, at 39-40.

59. See *id.* at 40.

60. See *id.* at 41.

61. See *id.*

62. By this I am referring to the “explosion” of appearance-based ethical rules following Watergate. See *id.* at 70-71.

63. See *id.* at 74.

64. See *id.* at 73.

65. *Id.*

66. See *id.* at 74.

has emerged.⁶⁷ "Ethics is in danger of becoming an elaborate legalistic ritual, in which the application of multi-part tests substitutes for the internalization of values"⁶⁸ And for the average citizen who, despite the great hue and cry for ethical reform, sees business as usual, the result is disillusionment and cynicism.⁶⁹ Nevertheless, new and increasingly elaborate rules of ethics continue to be enacted.⁷⁰

For example, although Florida common law had long provided for sanctions against public officials with conflicts between their personal interests and public duties, the statutory framework mandating financial disclosure "is a relative newcomer in Florida."⁷¹ Critics⁷² contend that such disclosure tends to erode the idea of "trust" contemplated in the Constitution.⁷³ According to Joseph Little, the abolition of financial disclosure "will redirect resources to more effective means of deterring corruption and bias in governmental decisionmaking and will reinvigorate the ranks of governmental officialdom with people of dignity and propriety"⁷⁴

Little argues that the Florida financial-disclosure requirements send a message to candidates and officials that they are not to be trusted.⁷⁵ "Such a measure harvests a crop grown from the seeds it sows."⁷⁶ Accordingly, many of those who expect to be trusted will take offense to the mistrust and refrain from entering public life.⁷⁷ As a consequence of this, Little says financial disclosure is

67. *See id.* at 98.

68. *Id.* (quoting CYNTHIA FARINA, ABA COMM. ON GOV'T STANDARDS, *Keeping Faith: Government Ethics and Government Ethics Regulation*, 45 ADMIN. L. REV. 287, 290 (1993)).

69. *See id.*

70. *See* Daniel L. Koffsky, *Coming to Terms with Bureaucratic Ethics*, 11 J.L. & POL. 235, 236 (1995) ("President Clinton's first Executive Order required his high-level appointees to pledge obedience to a new set of restrictions on the activities in which they may engage after leaving the government").

71. Joseph Little, *Abolishing Financial Disclosure to Improve Government*, 16 STETSON L. REV. 633, 642 (1987) (citing *Town of Boca Raton v. Raelerson*, 146 So. 576 (Fla. 1933) and *Lainhart v. Burr*, 38 So. 711 (Fla. 1905)).

72. *See infra* note 77.

73. *See* Little, *supra* note 71, at 633 n.1.

74. *Id.* at 633.

75. *See id.* at 634.

76. *Id.*

77. *See id.*; *see also* Kathleen Clark, *Do We Have Enough Ethics in Government Yet?: An Answer from Fiduciary Theory*, 1996 U. ILL. L. REV. 57, 68 (citing others who also believe existing ethics restrictions have diminished the government's ability to attract qualified candidates).

“not merely a farce, but is also a slow menace to good government.”⁷⁸

IV. Elements That Discourage Corruption

In addition to specific legal restrictions on conduct, overall political and constitutional structures may discourage corrupt activities. Examination of the international community offers examples of various systems of government, and irrespective of the system, there seems to be one inescapable fact—corruption is an inevitable by-product of any government.⁷⁹

While democracies are well-equipped to combat the conditions which make corruption possible, no government has eliminated the practice altogether. The emerging democracies of Central and Eastern Europe and Latin America, as well as South Africa, provide examples of countries in different phases of acquiring the tools which discourage corruption.

A. *Brazil*

In 1992, former Brazilian President Fernando Collor de Mello announced his plan to rejuvenate the economy and reduce inflation.⁸⁰ When the “Plano Collor” was realized, however, the country was neither invigorated nor prosperous.⁸¹ The implementation of the plan drained public funds, and federal investigations were hampered.⁸² Subsequently, other leading members of the Brazilian government called for the impeachment of President Collor.⁸³ Curiously, many of these same leaders are believed to have redirected over \$200 million designated for social programs into “charitable accounts” under their control.⁸⁴

Brazil, like many other Latin American nations, has only recently transitioned from a military dictatorship to a democratic-style government.⁸⁵ Subsequently, state enterprises and economic

78. Little, *supra* note 71, at 634.

79. See Nancy Zucker Boswell, *Combating Corruption: Focus on Latin America*, 3 SOUTHWESTERN J.L. & TRADE AM. 179, 182 (1996) (citing HERBERT H. WERLIN, UNDERSTANDING CORRUPTION: IMPLICATIONS FOR WORLD BANK STAFF 8).

80. See Luigi Manzetti, *Economic Reform and Corruption in Latin America*, 3 N.-S. ISSUES 1, 6 (1994); Boswell, *supra* note 79, at 181.

81. See Boswell, *supra* note 79, at 181.

82. See *id.* at 181-82.

83. See *id.* at 182.

84. See *id.*

85. See *id.* at 181.

markets have been privatized, deregulated, and decentralized.⁸⁶ This change, however, has not eliminated the existence of corruption in government.⁸⁷

So what is lacking in Brazil's democratic government? Many contend that even though the people have reacted to such practices by calling for the removal of corrupt leaders, the laws which regulate such immoral behavior are ambiguous, and in most accounts, ineffective.⁸⁸ Indeed, even though Brazil enacted the Rules of Behavior for Public Servants and the Law Against Illicit Enrichment in 1990, not until recently has the government indicated that such legislation will be enforced.⁸⁹

Merely enacting laws to control corruption will not suffice.⁹⁰ Ultimately, perhaps, the most potent shortcoming of Brazil's political system may be a combination of factors: the lack of true public outrage, an ineffective and dependent judicial power, and, finally, little political incentive to enforce the legislation already in place.⁹¹ Political systems without strong checks and balances on power are inherently more vulnerable to corruption. As one scholar notes about the fledgling Latin American democracies,

The main elements to control corruption—judges, legislators, auditors, and inspectors general who are independent and have integrity; a free press; a well-informed, activist public; and, well-paid and trained civil servants—have been weak. Coupled with the absence of strong political institutions and financial management systems, this provided the opportunity to manipulate the political system⁹²

The entire system of checks and balances on the exercise of power, including the ability and capacity of a government to enforce its laws, must exist before corruption in government will diminish.

86. *See id.*

87. *See id.*

88. *See id.* at 183 (citing WERLIN, *supra* note 79, at 8).

89. *See id.* at 186.

90. As Herbert Werlin noted about Peru, laws there “flow from the President and government departments that conceive them . . . with no interference, no debate, no criticism, and often enough, without the knowledge of those affected by them.” “[T]his results in a dualistic system, in which an ‘informal system’ of bribery is used to get around the complex and expensive formal legal system. Consequently, corruption may have even worsened with the democratization process that began in 1985.” WERLIN, *supra* note 79, at 22, 20, *quoted in* Boswell, *supra* note 79, at 183.

91. *See* George Henry Millard, *Drugs and Corruption in Latin America*, 15 DICK. J. INT'L L. 533, 542 (1997).

92. Boswell, *supra* note 79, at 183.

It should be mentioned that while President Collor did step down, the democracy of Brazil has survived and continues to progress. With every passing year, Brazil moves away from the dictators and military control which ruled her past, bringing an increased awareness among judges and prosecutors there that effective enforcement of anti-corruption laws is a crucial element to successfully completing the transition to democracy.⁹³

B. South Africa's Unique Position

In a 1996 survey of South Africans, over fifty-five percent of those questioned believed that people in government work in their own interest rather than in the public's interest.⁹⁴ Furthermore, 129 South African companies responded to a 1995 survey, reporting that over R5.2 million (approximately \$1.5 million) worth of kickbacks, bribes, and secret commissions occurred during that year.⁹⁵

Many contend that the emergence of a new democracy in South Africa has supported conditions necessary for government corruption, including Lala Camerer, who notes, "Corruption is likely to spread in periods of transition from authoritarian rule to democracy for various reasons, including vacuums of authority, conflicts of values and a new elite attempting to catch up with the old."⁹⁶

Moreover, Sahr John Kpundeh warns, "Democratization makes the public aware of corruption, but at the same time may further the institutionalization of corruption."⁹⁷ Kpundeh explains that three main factors combine to feed political corruption in many African countries: the lack of autonomous institutions to control corruption, an ineffective system of checks and balances resulting from a one-party system, and centralization of the decision-making process.⁹⁸ Installing a democratic-style government may provide the appearance of legitimacy, but without the active inclusion of the citizenry, official abuse will continue.⁹⁹

93. *See id.* at 179-80.

94. *See* Lala Camerer, *South Africa: Derailing the Gravy Train—Controlling Corruption*, 4 J. FIN. CRIME 364, 365 (1997).

95. *See id.*

96. *Id.* at 366.

97. Sahr John Kpundeh, Remarks on Kleptocracy and Democracy, in 90 AM. SOC'Y INT'L L. PROC. 95, 97 (1996).

98. *See id.* at 96.

99. *See id.* at 97.

In South Africa, the new democratic system has not been characterized as exhibiting political competition.¹⁰⁰ The resultant lack of scrutiny and accountability tend to allow corruption. If a truly effective multi-party system develops, and the democracy continues to evolve, then the existence of these protections against corruption should begin to minimize its incidence in that country.

C. *Central and Eastern Europe's New Dilemma*

Only last year did Poland's national prosecution chief, Henryk Pracki, declare that the Polish government is helpless against corruption.¹⁰¹ The head prosecutor stated that corruption among Polish officials had reached such an alarming point that Western countries dealing with Poland regard these pay-offs as "business costs."¹⁰²

Poland is enduring radical changes in both its political and economic systems; it has only recently experienced a significant redevelopment of its tools of democracy,¹⁰³ and the transition from socialism to capitalism has directly affected the nature of corruption. As one Polish citizen told me, "Officials used to be corrupt so they could gain power to get money. Now corruption is to get money so you can gain power." Naturally, the substitution of systems, alone, did not extinguish corruption.

Just as with military dictatorships and oligarchies, socialist governments have corruption. The systemic corruption now within Poland's government may be attributed to the norms created by past regimes.¹⁰⁴ As one observer notes, "Where there is systemic

100. For example, in the 1994 parliamentary election, the African National Congress won approximately sixty-two percent of the seats. See Bill Keller, *Mandela Picks Old Comrades to Fill His New Government*, N.Y. TIMES, May 7, 1994, § 1, at 1. Then in the 1999 election, the A.N.C. nearly captured a two-thirds majority of the 400-seat Parliament, falling one seat short. See Suzanne Daley, *Winner Almost Takes All*, N.Y. TIMES, June 7, 1999, at A3. "All told, thirteen parties are to have seats in South Africa's next Parliament, about twice as many as in 1994, though they will have fourteen fewer seats between them." *Id.*

101. See *National Prosecutor Helpless Against Corruption*, Polish Press Agency News Wire, May 7, 1998, available in Westlaw, 1998 WL 9729990.

102. See *id.*

103. See Mark F. Brzezinski, *Constitutional Heritage and Renewal: The Case of Poland*, 77 VA. L. REV. 49, 103 (1991). Brzezinski provides a comprehensive account of Poland's progression from a once democratic system of government, to a Communist system, and finally into its current democracy. The work traces Poland's development strictly in terms of its constitution and the effect of changes in that document.

104. Cheryl W. Gray & Daniel Kaufman, *Corruption and Development*, FIN. & DEV., Mar. 1998, at 7, available in Westlaw, 1998 WL 12034515.

corruption, the institutions, rules, and norms of behavior have already been adapted to a corrupt *modus operandi*, with bureaucrats and other agents often following the predatory examples of, or even taking instructions from, their principals in the political arena."¹⁰⁵ Corruption is actually more difficult to identify and punish now because of rapid change and new laws and institutions.

Poland must develop the kinds of ethics laws and rules well-suited to the forms of corruption accompanying capitalism. As a people, the Poles had only a relatively brief experience with socialism,¹⁰⁶ and reformers suggest energies be focused on increased citizen involvement and careful drafting to close gaps and resolve ambiguities in the legal system. In fact, fighting corruption appears easier in Poland than in other countries transitioning from socialism, such as Russia, because of the overt commitment to citizen involvement and democratic principles of free press and free speech.

Lessons derived from these countries' experiences emphasize that the mere enactment of democratic institutions is insufficient to deter corruption. The normally unstable transition to democracy creates opportunities for corruption, even inadvertently. What is needed is a citizenry energized to participate in and demand ethical governance, as well as competitive political parties and elections. New laws must be drafted carefully to deal with new conditions. And perhaps most importantly, these laws must be enforced through a steadfast public will and competent institutions.

V. What is Lacking?

Whatever the legal restrictions or political structures, human beings ultimately serve as the citizens' agents in public service, which can be seen as a fiduciary relationship. Looking once again to public office as "a trust,"¹⁰⁷ an analogy can be made to the law's imposition of a fiduciary duty on certain relationships where one party stands in a position of trust relative to another.¹⁰⁸

Ethical reform must do more than merely enact rules to eliminate the temptations of and opportunities for immoral behavior. It must encourage people of integrity to participate in government. Burke stated this fundamental truth when he said,

105. *Id.*

106. *See supra* note 103.

107. *See* FLA. CONST. art. II, § 8; *supra* note 73.

108. *See* Clark, *supra* note 77, at 69.

“There never was a bad man that had ability for good service.”¹⁰⁹ Accordingly, if one were to accept Oliver Wendell Holmes’ “bad-man theory”¹¹⁰ of the law, it is clear that practical ethics reform requires society to focus on the character of the candidate for office. The “bad man,” according to Holmes, does not concern himself with the rational or moral underpinnings of the law; he is concerned only with the parameters it sets for him.¹¹¹ The theory thus lends itself to the notion that rules of ethics by themselves do not encourage moral public service; they merely mandate compliance.

Thus the heart of the problem is, as it always has been, a conflict between philosophies of law.¹¹² Positivism reigns in modern society, but we refuse to completely turn away from the lessons of natural law. Martin Luther King once said, “An unjust law is a human law that is not rooted in eternal and natural law. . . . Any law that degrades human personality is unjust.”¹¹³ It would follow then, that from a natural-law perspective, a public officer is justified in refusing to comply with the law while in pursuit of moral public service.

The Greek philosophers concerned themselves “with the virtues of character, the traits that underlie or explain a disposition to act in the right way,” rather than standards of conduct.¹¹⁴ In line with this philosophy is the belief that people’s actions “depend[] first and foremost upon their character, not on any knowledge of moral or legal rules that they might possess.”¹¹⁵ Conse-

109. Edmund Burke, *Impeachment of Warren Hastings* (1788), quoted in JOHN BARTLETT, *BARTLETT’S FAMILIAR QUOTATIONS* 373 (Emily Morrison Beck ed., 15th ed., Little, Brown & Co. 1980).

110. See Oliver Wendell Holmes, *The Path of Law*, 10 HARV. L. REV. 457, 460-61 (1897).

111. See Peter Berkowitz, *On the Laws Governing Free Spirits and Philosophers of the Future: A Response to Nonet’s “What is Positive Law?”*, 100 YALE L. J. 701, 703-04 (1990).

112. See *id.* at 702 (citing PLATO, MINOS 314c, 315a, 321b, in *THE ROOTS OF POLITICAL PHILOSOPHY* 53, 54-55, 56, 66 (Thomas L. Pangle trans., ed., 1987)). Socrates once asked, “What is law (*nomos*)?” In the *Republic*, an issue of critical importance was whether justice is “whatever the strongest declare it to be,” or whether it is natural, independent of what society chooses. See *id.*

113. MARTIN LUTHER KING, JR., *Letter from the Birmingham City Jail* (1963), in *A TESTAMENT OF HOPE* 289 (J. Washington ed., 1986), quoted in Berkowitz, *supra* note 111, at 703.

114. GISELA STRIKER, *ESSAYS ON HELLENISTIC EPISTEMOLOGY AND ETHICS* 169 (1996).

115. *Id.*

quently, in order to achieve ethical governance, perhaps we should first analyze the essence of virtuous character.

Has, in fact, the zeal for legalistic remedies to ethical and moral questions driven individuals of good character away from public service? Some commentators think so.¹¹⁶ Their theory is that sufficient emphasis is not placed on the importance and honorable nature of public service. Rather, the new goal is bureaucratic compliance.

Others point to the emergence of "bureaucratic ethics" reform, a system whereby a comprehensive set of rules and procedures aimed at preventing conflicts between the private interests of government workers and their public duties, as the cause of what currently ails government ethics.¹¹⁷ Apparently, such reform causes government employees to view their duty to avoid conflicts of interest "as a matter of achieving formalistic compliance rather than serving the public good."¹¹⁸ While compliance is obviously a virtue, so is creativity and an overriding desire to do the public good, even when doing good may require challenging the system.

A quandary as difficult to resolve as over-legislated ethical restrictions are those public officials' transgressions that, while not illegal, are considered immoral. The conflict between positive and natural law is once again implicated. Even if we ignore any legal transgressions, are private acts which are deemed immoral debilitating to effective public service? Regardless, even if no legal issue is raised, the political consequences of immoral behavior can be devastating.

Ethical governance must be based on more than minimal legal compliance. This is because good government requires vision, energy, and character in addition to bureaucratic compliance. The normal chaos of pluralistic democratic systems requires moral leadership for stability. This suggests that our societies and educational systems must inculcate values and the importance of morality in public service, as our educational systems provide the fundamental opportunity to deliver the message to the next generation: Public service is a high calling.

116. See *supra* note 77.

117. See Koffsky, *supra* note 70, at 235.

118. *Id.*

VI. Conclusion

There is an understandable urge to eliminate all corruption. “Yet at some point the costs of vigilance outweigh the benefits.”¹¹⁹ As much as we are spurred by scandals to enact laws and jail thieves, we will never have a perfect government.¹²⁰ In other words, corruption will always be with us.

Some conclusions from general experience can be reached. First, democracy and its attendant open institutions deter corruption better than any other system. Second, a series of significant deterrents—frequent elections, competitive political parties, an independent judiciary, a free press, free speech, and an involved citizenry—combine to deter corruption by creating an environment hostile to it.

Even with these characteristics, though, democratic systems need effective laws and the institutions to vigorously enforce those laws. While older democracies successfully reduce corruption in government, corruption remains a threat to those newly born. They need to develop mature political and law-enforcement systems to fight corruption effectively.

The definition of ethical governance remains vexatious. It is quite possible to define moral and ethical government using impossibly high or illogical standards; that is, however, not our purpose. Instead, our purpose is to recognize that certain laws and institutions deter and curtail corrupt practices and to recognize that an ethical, effective government should be something more than governance in the absence of corruption.

Along with a duty to deter bad government, there is a duty to encourage good government and public service by good and ethical people. As discussed above, some believe that the torrent of reform legislation, much of it requiring increased disclosure of private concerns, discourages good people from entering the glass house of public service. Have the watch dogs become Peeping Toms?

Whether reform laws are a deterrent or not, in many democracies the positive incentive for public service seems wanting. While the Hellenistic and Platonic concepts are idealistic, we are foolish

119. MORGAN & REYNOLDS, *supra* note 1, at xi.

120. See 1 EDWARD GIBBON, HISTORY OF THE DECLINE AND FALL OF THE ROMAN EMPIRE ch. 21 at 706 (Modern Library 1932) (1776) (“Corruption, the most infallible symptom of constitutional liberty . . .”).

to believe that the quality of laws can replace the quality of people in public service. We need public servants who serve after checking with their conscience rather than consulting with their lawyer. As Edmund Burke said, "It is not, what a lawyer tells me I *may* do; but what humanity, reason, and justice, tell me I ought to do."¹²¹

121. Edmund Burke, *Second Speech on Conciliation with America* (1775), quoted in BARTLETT, *supra* note 109, at 372 (emphasis in original).

APPENDIX A

Rules of Ethics in Florida

I. Misuse of Public Position:

A. "No public officer, employee of an agency, or local government attorney shall corruptly use or attempt to use his or her official position or any property or resource which may be within his or her trust, or perform his or her official duties, to secure a special privilege, benefit, or exemption for himself, herself, or others."¹²²

B. For purposes of this section, "corruptly" is defined to mean "done with a wrongful intent and for the purpose of obtaining, or compensating or receiving compensation for, any benefit resulting from some act or omission of a public servant which is inconsistent with the proper performance of his or her public duties."¹²³

II. Gifts:

The following reveals some of the subtle differences in this area:

A. "No public officer, employee of an agency, local government attorney, or candidate for nomination or election shall solicit or accept *anything of value to the recipient . . . based upon any understanding that the . . . [recipient] would be influenced thereby.*"¹²⁴

B. "A reporting individual . . . is prohibited from *soliciting* any gift from a political committee or . . . a lobbyist . . ."¹²⁵

C. "A reporting individual . . . is prohibited from knowingly *accepting*, directly or indirectly, a gift from a political committee or . . . from a lobbyist . . . if he or she knows or reasonably believes that the gift has a value in excess of \$100; however, such a gift may be accepted by such person on behalf of a governmental entity or a charitable organization."¹²⁶

122. FLA. STAT. § 112.313(6).

123. FLA. STAT. § 112.312(9).

124. FLA. STAT. § 112.313(2) (emphasis added).

125. FLA. STAT. § 112.3148(3) (emphasis added).

126. FLA. STAT. § 112.3148(4) (emphasis added).

D. "Each reporting individual . . . shall file a statement . . . containing a list of gifts which he or she believes to be in excess of \$100" ¹²⁷

E. "The value of a gift provided to a reporting individual . . . shall be determined using actual cost to the donor, less taxes and gratuities" ¹²⁸

F. "Food and beverages which are not consumed at a single sitting or meal and which are provided on the same calendar day shall be considered a single gift, and the total value of all food and beverages provided on that date shall be considered the value of the gift." ¹²⁹

III. Doing Business with One's Agency:

"No . . . public officer acting in his or her official capacity, shall either directly or indirectly purchase, rent, or lease any realty, goods, or services for his or her own agency from any business entity of which the officer . . . or the officer's . . . spouse or child is an officer, partner, director, or proprietor" ¹³⁰

IV. Conflicting Employment or Contractual Relationship:

"No public officer . . . shall have or hold any employment or contractual relationship with any business entity or agency which is subject to the regulation of, or is doing business with, an agency of which he or she is an officer or employee" ¹³¹

V. Financial Disclosure:

In Florida, financial disclosure is a two-tiered system, although disclosure is not duplicitous:

No person who is required, pursuant to s. 8, Art. II of the State Constitution, to file a full and public disclosure of financial interests and who has filed a full and public disclosure of financial interests for any calendar or fiscal year shall be required to file a statement of financial interests pursuant to s.

127. FLA. STAT. § 112.3148(8)(a).

128. FLA. STAT. § 112.3148(7)(a).

129. FLA. STAT. § 112.3148(7)(f).

130. FLA. STAT. § 112.313(3).

131. FLA. STAT. § 112.313(7).

112.3145(2) and (3) for the same year or for any part thereof notwithstanding any requirement of this part¹³²

A. Statutory Financial Disclosure:

Florida law requires specified individuals to file a “statement of financial interests,”¹³³ to include:

1. “*All sources of income* in excess of five percent of the gross income received during the disclosure period by the person in his or her own name or by any other person for his or her use or benefit, excluding public salary. . . . The person reporting shall list such sources in descending order of value with the largest source first.”¹³⁴

2. “*All sources of income to a business entity* in excess of ten percent of the gross income of a business entity in which the reporting person held a material interest and from which he or she received an amount which was in excess of ten percent of his or her gross income during the disclosure period and which exceeds \$1,500.”¹³⁵

3. “The location or description of *real property* in this state, except for residences and vacation homes, owned directly or indirectly by the person reporting, when such person owns in excess of five percent of the value of such real property, and a general description of any *intangible personal property* worth in excess of ten percent of such person’s total assets. For the purposes of this paragraph, indirect ownership does not include ownership by a spouse or minor child.”¹³⁶

4. “Every *liability* which in sum equals more than the reporting person’s net worth.”¹³⁷

B. Constitutional “Full and Public” Financial Disclosure:

Full and public disclosure of financial interests shall mean filing with the secretary of state by July 1 of each year a sworn statement showing net worth and identifying each asset and liability in excess of \$1,000 and its value together with the following:

a. A copy of the person’s most recent federal income tax return; or

132. FLA. STAT. § 112.3144(1).

133. FLA. STAT. § 112.3145(3).

134. FLA. STAT. § 112.3145(3)(a) (emphasis added).

135. FLA. STAT. § 112.3145(3)(b) (emphasis added).

136. FLA. STAT. § 112.3145(3)(c) (emphasis added).

137. FLA. STAT. § 112.3145(3)(d) (emphasis added).

b. A sworn statement which identifies each separate source and amount of income which exceeds \$1,000.¹³⁸

138. FLA. CONST. art. II, § 8(h)(1).

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