

ALBANY'S DECADE OF CORRUPTION: PUBLIC INTEGRITY
ENFORCEMENT AFTER *SKILLING V. UNITED STATES*, NEW
YORK'S DORMANT HONEST SERVICES FRAUD STATUTE,
AND REMEDIAL CRIMINAL LAW REFORM

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I. INTRODUCTION

The old gripe about legislative dysfunction in Albany has given way to something new.¹ “It has become something of a cliché to bemoan” Albany’s culture of corruption.² In the last decade, ten members of the New York State Legislature were indicted, convicted, or pleaded guilty to crimes involving corruption.³ United States Attorneys brought most of the cases based on violations of honest services fraud.⁴ The District Attorneys of Albany, New York, and Kings Counties were also active in prosecuting corruption over

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¹ See JEREMY M. CREELAN & LAURA M. MOULTON, THE NEW YORK STATE LEGISLATIVE PROCESS: AN EVALUATION AND BLUEPRINT FOR REFORM 1 (2004), http://brennan.3cdn.net/1f4d5e4fa546eaa9cd_fxm6iyde5.pdf (“It has become something of a cliché to bemoan Albany’s dysfunctional legislative process and the ‘three men in a room’ system of lawmaking.”).

² *Id.*

³ LAWRENCE NORDEN ET AL., MEANINGFUL ETHICS REFORMS FOR THE “NEW” ALBANY 5 (2011), http://brennan.3cdn.net/2c769a401f4d5e4fa546eaa9cd_48m6ibx6j.pdf. The report includes the misdemeanor assault conviction of former Senator Hiram Monserrate, but omits his two-count indictment in the Federal Court for the Southern District of New York for mail and wire fraud because those charges related to his acts as a New York City Councilman. See Sealed Indictment, *United States v. Monserrate*, CR 10-965 (S.D.N.Y. Oct. 19, 2010) (on file with author); Fernanda Santos & William K. Rashbaum, *Monserrate Is Indicted on Federal Corruption Charges*, N.Y. TIMES, Oct. 20, 2010, at A21.

⁴ See 18 U.S.C. § 1346 (2006), *invalidated by* *United States v. Pelisamen*, 641 F.3d 399 (9th Cir. 2011); see also NORDEN ET AL., *supra* note 3, at 15–16 tbl.1 (laying out the various charges against legislators).

the period, as was the State Attorney General more recently.⁵ More than three decades ago, Governor Mario M. Cuomo said of politicians, we “campaign in poetry” and “govern in prose.”⁶ By Cuomo’s standards, Albany’s contemporary prose reads as obscene.

In 2010, the Supreme Court of the United States decided *Skilling v. United States*,⁷ narrowing the scope of federal honest services fraud to include only kickbacks and bribes, thereby upending nearly twenty-five years of public corruption prosecutions.⁸ Prior to the *Skilling* decision, the fraud statute was employed by federal prosecutors to pursue breaches of the general duty of the public trust, but where the acts fell short of bribery.⁹ As a result of *Skilling*, a major weapon wielded by U.S. Attorneys against public corruption vanished. Fortunately, at least for New York, there is a state criminal statute similar to the honest services statute that does not likely suffer from the same infirmities as its federal counterpart: receiving reward for official misconduct in the second degree, Penal Law section 200.25.¹⁰

Perhaps not coincidentally, the current regime of state ethics laws was the consequence of ethics lapses by the majority leader of the State Senate more than half a century ago.¹¹ In 1954, Governor Thomas E. Dewey, in his annual message to the legislature, spurred

⁵ See, e.g., Press Release, Kings Cnty. Dist. Attorney, Kings County District Attorney Charles J. Hynes Announces Conviction of Assemblywoman Diane Gordon for Soliciting a \$500,000 Bribe, http://www.brooklynnda.org/press_releases/2008/pr_apr_08.htm#02, (describing the Assemblywoman’s criminal conduct and prosecution); Jordan Carleo-Evangelist, *Case Now in Scavo’s Favor*, TIMES UNION (Albany, N.Y.), Mar. 27, 2012, at B1 (describing recent developments in the prosecution of a former County Legislator which led the District Attorney to request dismissal of the case); Press Release, N.Y. Cnty. Dist. Attorney’s Office, District Attorney Vance Announces Guilty Plea of Corrupt City Employee in Parking Ticket Scam (Oct. 12, 2010), available at <http://manhattanda.org/press-release/district-attorney-vance-announces-guilty-plea-corrupt-city-employee-parking-ticket-sca> (reporting the successful prosecution of a New York City employee who retained portions of city money for personal use).

⁶ Maurice Carroll, *Cuomo, at Yale, Urges Democrats to Remain with Tested Principles*, N.Y. TIMES, Feb. 16, 1985, at 1 (“The truth is we campaign in poetry, but when we’re elected we’re forced to govern in prose.”) (internal quotation marks omitted).

⁷ *Skilling v. United States*, 130 S. Ct. 2896, 2931 (2010).

⁸ See *id.*

⁹ See, e.g., *United States v. Brumley*, 116 F.3d 728, 735–36 (5th Cir. 1997) (upholding the conviction of a government employee for deprivation of honest services due to violations of state penal law); *United States v. Weyhrauch*, 548 F.3d 1237, 1247 (9th Cir. 2008) [hereinafter *Weyhrauch I*] (upholding indictment of a state legislator based on an undisclosed conflict of interest), *vacated*, 130 S. Ct. 2971 (2010), *motion to dismiss granted by* 2011 U.S. Dist. LEXIS 27827, at *1 (D. Alaska Mar. 15, 2011).

¹⁰ See N.Y. PENAL LAW § 200.25 (McKinney 2012) (penalizing public servants who violate their duties and accept or solicit any benefit for such violations).

¹¹ See Leo Egan, *Wicks Resigns Post as Senate Leader in Compromise Step*, N.Y. TIMES, Nov. 19, 1953, at A1.

the reform that led to enactment of the Code of Ethics that is applicable to members of the state legislature today.¹² Unfortunately, some in Albany treat the Code as if it is written in foreign tongue.

For far too long, section 200.25 has been overlooked as a viable public integrity tool.¹³ Well-intentioned reforms creating the third investigatory and enforcement regime over state government in only five years are not nearly enough to dam the culture of corruption.¹⁴ State ethics enforcement promises more inaction due to the procedures to commence a full investigation by the new enforcement body that oversees the executive and legislative branches.¹⁵ If the tide of Albany corruption is to turn from flow to ebb, then section 200.25 should be vigorously enforced, and badly needed reforms of criminal public integrity statutes should be enacted.

Part II of this article details the acts of the state legislators who pleaded guilty to, or were convicted of, corruption during the prior decade. Part III explores relevant public corruption laws, federal honest services fraud, the State Code of Ethics, and state corruption statutes. Part IV applies the New York's Penal Law section 200.25 to recent convictions and alleged facts uncovered in recent corruption cases. Finally, Part V proposes necessary remedial measures—reforms to criminal public corruption laws as a means to deter the ethically challenged.

¹² See generally Thomas E. Dewey, Annual Message to the Legislature (Jan. 6, 1954), in N.Y. STATE LEGIS. ANNUAL: 1954 at 312–15 (1955) [hereinafter Dewey Annual Message] (declaring the need for integrity in government).

¹³ N.Y. PENAL LAW § 200.25 (McKinney 2012).

¹⁴ See Public Employee Ethics Reform Act of 2007, ch. 14, 2007 N.Y. Sess. Laws 3736 (McKinney) (codified at N.Y. LEG. LAW §§ 1(c), 80 (establishing a Commission on Public Integrity by combining the State Ethics Commission and the Temporary State Commission on Lobbying, and creating a Legislative Ethics Commission from the Legislative Ethics Committee)). The legislature recently passed the Public Integrity Reform Act of 2011. See Public Integrity Reform Act of 2011, ch. 399, 2011 N.Y. Sess. Laws 5679 (McKinney) (codified at N.Y. PUB. OFF. LAW § 73; N.Y. EXEC. LAW § 94; N.Y. LEG. LAW §§ 1, 80; N.Y. RETIRE. & SOC. SEC. LAW §§ 156–59; N.Y. CRIM. PRO. LAW § 220.51; N.Y. ELEC. LAW §§ 14-106, 14-126, 16-100, 16-120).

¹⁵ See Public Integrity Reform Act § 6 (allowing two members from a total of fourteen to “veto” an investigation against a member of the legislature). Specifically, the Act states:

Where the subject of such investigation is a member of the legislature . . . at least two of the eight or more members who so vote to authorize such an investigation must have been appointed by a legislative leader or leaders from the major political party in which the subject of the proposed investigation is enrolled if such person is enrolled in a major political party.

Id.; see also Danny Hakim & Thomas Kaplan, *Though Hailed, Albany Ethics Deal Is Seen as Having Weaknesses*, N.Y. TIMES, June 7, 2011, at A24 (highlighting existing problems that the deal would fail to remedy).

II. ALBANY'S DECADE OF CORRUPTION: 2001–2010

The decade began with a number of prosecutions of members of state legislatures by district attorneys in Albany, Brooklyn, and Manhattan, and ended with several more prosecutions by the U.S. Attorney.¹⁶ The Manhattan District Attorney secured guilty pleas for bribery from Assemblywoman Gloria Davis in 2003¹⁷ and Senator Guy Velella in 2004.¹⁸ Davis pleaded guilty for bribe receiving in the second degree for accepting \$24,000 as part of a scheme to arrange for a contractor to receive a lucrative construction contract from a not-for-profit that the Assemblywoman controlled.¹⁹ Assemblyman Green pleaded guilty to submitting false travel expenses and petty larceny in 2004.²⁰ In 2007, the Brooklyn

¹⁶ See NORDEN ET AL., *supra* note 3, at 15 tbl.1. In addition, Andrew Cuomo, as New York Attorney General, is responsible for a wide-ranging investigation into the state pension fund. See Press Release, Office of the N.Y. Attorney Gen., Cuomo Announces Felony Guilty Plea by Former Comptroller Alan Hevesi in Pay-to-Play Pension Fund Kickback Scheme (Oct. 7, 2010), <http://www.ag.ny.gov/press-release/cuomo-announces-felony-guilty-plea-former-comptroller-alan-hevesi-pay-play-pension>. In addition, the then-Attorney General filed a civil suit against former State Senator Pedro Espada, Jr. for siphoning off \$14 million from a healthcare non-profit corporation in violation of the Estates Powers and Trust Law, and Not-For-Profit Corporation Law. Press Release, Office of the N.Y. Attorney Gen., Attorney General Cuomo Charges Pedro Espada Jr. and 19 Executives with Looting His Bronx Not-for-Profit (Apr. 20, 2010), <http://www.ag.ny.gov/press-release/attorney-general-cuomo-charges-pedro-espada-jr-and-19-executives-looting-his-bronx-not>. The Attorney General has limited prosecutorial power when it comes to corruption of state legislators. See generally N.Y. EXEC. LAW § 63 (McKinney 2012) (establishing the Attorney General's prosecutorial authority). The Attorney General does have broad powers to "inquire into matters concerning the . . . public justice," however such investigations require approval and may require discrete funding by the legislature. *Id.* § 63(8). A recent agreement between the Attorney General and comptroller will allow for expanded investigations where state funds are convened, for example, legislative member items and contracts, and referral of possible criminal violations to the Attorney General for prosecution. See N.Y. EXEC. LAW §§ 43(1), 63(1) (McKinney 2012); N.Y. STATE FIN. LAW §§ 8(17), 9 (McKinney 2012); Nicholas Confessore, *Accord with Comptroller Will Help Attorney General Pursue Corruption Cases*, N.Y. TIMES, May 23, 2011, at A17. The outside income of state legislators and conflicts of interest generally are not within the scope of the powers of the state attorney general or comptroller. See *id.*

¹⁷ Press Release, N.Y. Cnty. Dist. Attorney, Manhattan District Attorney Robert M. Morgenthau Announced Today that New York State Assemblywoman Gloria Davis Has Pleaded Guilty to Bribery Charges (Jan. 7, 2003), <http://manhattanda.client.tagonline.com/whatsnew/press/2003-01-07.shtml> (last visited Apr. 4, 2012).

¹⁸ Dennis Hevesi, *Guy J. Velella, 66, A Force in Albany Until a Bribe Case*, N.Y. TIMES, Jan. 28, 2011, at B15.

¹⁹ N.Y. PENAL LAW § 200.11 (McKinney 2012); Manhattan District Attorney Robert M. Morgenthau Announced Today that New York State Assemblywoman Gloria Davis Has Pleaded Guilty to Bribery Charges, *supra* note 17. Davis's plea covered a second corrupt act involving free transportation between Albany and her New York City district in exchange for lobbying on behalf of a company before a state agency. *Id.*

²⁰ James C. McKinley, Jr., *Assemblyman Pleads Guilty to Faking Travel Expenses*, N.Y. TIMES, Feb. 6, 2004, at B4. In 2006, the Albany District Attorney also secured a guilty plea from then-Comptroller Alan Hevesi for defrauding the government and Hevesi resigned from

District Attorney won his third conviction of Clarence Norman, Jr., a former assemblyman and Kings County Democratic party chair, for extorting judicial candidates for party support.²¹ The following year the Brooklyn District Attorney successfully prosecuted Assemblywoman Diana Gordon for third-degree bribe receiving, among other corruption charges, stemming from a scheme to assist developers in acquiring public land in exchange for building her a home.²² Gordon was caught on a wire telling the developer, “One hand washes another hand.”²³

Contrary to the poetry of T.S. Eliot,²⁴ the decade ended with a bang, rather than a whimper, with six federal prosecutions of legislators in a three-year period beginning in 2008. The U.S. Attorney for the Southern District of New York obtained guilty pleas from four legislators, and the U.S. Attorney for the Northern District, won a guilty verdict against former Senate Majority Leader Joseph Bruno.²⁵ Senator Pedro Espada, Jr. was indicted in the Eastern District in December 2010 and convicted on four theft counts nearly two years later.²⁶

In 2008, Assemblyman Brian McLaughlin pleaded guilty to racketeering, which included bribes, and defrauding taxpayers and unions.²⁷ He was sentenced to ten years in prison.²⁸ The next year, Senator Efraín González Jr. pleaded guilty to fraud and conspiracy for using funds that he steered to a non-profit for personal

his office as part of the deal. See N.Y. PENAL LAW § 195.20 (McKinney 2012); Michael Cooper, *Hevesi Pleads Guilty to a Felony and Resigns*, N.Y. TIMES, Dec. 23, 2006, at B1.

²¹ See generally *People v. Norman*, No. 5588/03, 2005 WL 2358343, at *1 (Sup. Ct. Kings County Sept. 12, 2005) (considering the prosecution’s *Ventimiglia/Sandoval* application); Anemona Hartocollis, *Party’s Ex-Boss in Brooklyn is Convicted*, N.Y. TIMES, Feb. 24, 2007, at B1. The two prior convictions were for soliciting illegal campaign contributions and embezzling funds from his campaign account. Hartocollis, *supra*.

²² N.Y. Penal Law § 200.10 (McKinney 2012); Kareem Fahim, *Ex-Legislator Is Sentenced to 2 to 6 Years*, N.Y. TIMES, June 13, 2008, at B1.

²³ Fahim, *supra* note 22.

²⁴ T.S. ELIOT, *THE HOLLOW MEN* (1925), <http://poetry.poetryx.com/poems/784> (“This is the way the world ends[,] Not with a bang but a whimper.”). Robert Penn Warren is more appropriate: “Man is conceived in sin and born in corruption and he passeth from the stink of the didie to the stench of the shroud.” ROBERT PENN WARREN, *ALL THE KING’S MEN* 54 (Random House, Inc. 1953) (1946).

²⁵ The verdict against Joe Bruno was vacated and remanded by *United States v. Bruno*, 661 F.3d 733, 736 (2d Cir. 2011) in light of *Skilling v. United States*, 130 S. Ct. 2896 (2010). Honest services fraud and *Skilling* are discussed at length herein. See *infra* Part III.A.

²⁶ See Indictment, *United States v. Espada*, CR. 10-985 (E.D.N.Y. Dec. 14, 2010) [hereinafter *Espada Indictment*]; Mosi Secret, *Ex-Senator Guilty of Theft from Nonprofit*, N.Y. TIMES, May 15, 2012, at A1.

²⁷ Benjamin Weiser, *Ex-Labor Leader is Sentenced to 10 Years for Racketeering*, N.Y. TIMES, May 21, 2009, at A27.

²⁸ *Id.*

expenses.²⁹ He was sentenced to seven years.³⁰ And Assemblyman Anthony Seminerio pleaded guilty to honest services fraud for promoting the interests of clients that paid him in excess of \$1 million.³¹ He was sentenced to six years.³² In December 2010, Senator Vincent Leibel pleaded guilty to one count of failing to report \$43,000 of consulting income on his federal income tax return and one count of obstruction of justice.³³ He was sentenced to twenty-one months.³⁴

The same month, Senator Pedro Espada, Jr. was indicted by the U.S. Attorney for the Eastern District on five counts of embezzlement and one count of conspiracy, related to more than \$500,000 improperly taken from Bronx-based non-profit healthcare clinics that he founded.³⁵ The most notable corruption case of the decade was brought against the former Senate Majority Leader, who was indicted on eight count of honest services fraud.³⁶ In 2009, Bruno was convicted on two counts, acquitted on five, and no verdict was reached on one.³⁷ However, the conviction was reversed³⁸ in light of *Skilling v. United States*.³⁹ The U.S. Attorney will retry Bruno on a different, yet related, charge.⁴⁰

The new decade is off to no less an inauspicious start. Most

²⁹ Benjamin Weiser, *A Former Bronx Senator Gets 7 Years for Corruption*, N.Y. TIMES, May 26, 2010, at A22.

³⁰ *Id.*

³¹ See Indictment ¶ 21, *United States v. Seminerio*, No. S1 CR. 1238 (NRB), 2009 WL 6478285 (S.D.N.Y. Mar. 23, 2009); Colin Moynihan, *Ex-Assemblyman From Queens Gets Six-Year Term for Influence Peddling*, N.Y. TIMES, Feb. 5, 2010, at A19. Seminerio died in prison in January 2011. David M. Halbfinger & William K. Rashbaum, *Ex-Assemblyman from Queens Dies in Federal Prison*, N.Y. TIMES, Jan. 7, 2011, at A19.

³² Halbfinger & Rashbaum, *supra* note 31.

³³ See Letter from Preet Bharara, U.S. Attorney S. Dist. of N.Y., to David L. Lewis, attorney for Vincent L. Leibel (Nov. 23, 2010), <http://www.scribd.com/doc/44774400/Leibel-Vincent-Plea-Agreement>; Tom Bartley, *Obstruction of Justice, Tax Evasion Net Leibel Jail Time*, RIVERTOWNS PATCH (May 13, 2011), <http://rivertowns.patch.com/articles/leibel-sentenced-to-21-months>.

³⁴ Ashley Parker, *Ex-Senator Gets 21-Month Prison Term in Tax Evasion Case*, N.Y. TIMES, May 14, 2011, at A20.

³⁵ Espada Indictment, *supra* note 26, at 9, 15, 16.

³⁶ See Indictment, *United States v. Bruno*, 700 F. Supp. 2d 175 (N.D.N.Y. 2010) (No. 09-CR-29-(GLS)).

³⁷ Brendan J. Lyons, *Bruno Guilty*, TIMES UNION (Albany, N.Y.), Dec. 8, 2009, at A1.

³⁸ Letter from Richard S. Hartunian, U.S. Attorney N. Dist. of N.Y., to William S. Dreyer, attorney for Joseph Bruno, at 1–2 (Oct. 26, 2010), available at <http://web.timesunion.com/pdf/USAletter.pdf>; William Glaberson, *Appeals Court Allows New Trial for Bruno*, N.Y. TIMES, Nov. 17, 2011, at A26.

³⁹ *Skilling v. United States*, 130 S. Ct. 2896 (2010).

⁴⁰ Brief for Appellee at 2–4, *United States v. Bruno*, 2011 WL 1246655, at *22 (2d Cir. Mar. 24, 2011) (No. 10-1885); John Eligon, *New Bribery Charges Filed Against Ex-Senate Leader*, N.Y. TIMES, May 4, 2012, at A22.

recently, though likely not last, Senator Carl Kruger and Assemblyman William Boyland, Jr. were indicted in the Southern District for honest services fraud and money laundering related to \$1.5 million in bribes exchanged for various political favors; the former pleaded guilty and was sentenced to seven years and the latter was acquitted after a jury trial but was indicted anew for bribery only weeks later.⁴¹ Additional investigations of various members of the legislature roll on.⁴²

III. RELEVANT FEDERAL AND STATE PUBLIC CORRUPTION LAWS

A. *Federal Honest Services Fraud: McNally and Skilling*

Honest services fraud was enacted by Congress in reaction to the Supreme Court's 1987 decision in *McNally v. United States*.⁴³ In that case, the Court limited mail and wire fraud to include only tangible rights, i.e., money or property.⁴⁴ It excluded "the intangible right of the citizenry to good government" from the statute's purview.⁴⁵ The defendants in *McNally*, two Kentucky public officials and a figurehead of an insurance agency, were involved in a self-dealing kickback scheme involving ownership of the agency, an undisclosed conflict of interest.⁴⁶ The Court in *McNally* concluded that the mail and wire fraud statute only reached tangible rights.⁴⁷ The justices explained that the Court did so "[r]ather than construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials."⁴⁸ The Court declared: "If Congress desires to go further, it must speak

⁴¹ See *United States v. Rosen*, 809 F. Supp. 2d 263 (S.D.N.Y. 2011), *motion for severance denied by United States v. Kruger*, S1 11 Cr. 300 (JSR), 2011 U.S. Dist. LEXIS 115832 (S.D.N.Y. Oct. 23, 2011); Benjamin Weiser, *Ex-State Senator Receives 7-Year Term in Bribery Case*, N.Y. TIMES, Apr. 27, 2012, at A21 [hereinafter *Ex-State Senator is Sentenced to 7 Years*]; Benjamin Weiser, *Jury Acquits Assemblyman of Conspiring to Take Bribes*, N.Y. TIMES, Nov. 11, 2012, at A26 [hereinafter *Jury Acquits Assemblyman of Conspiring to Take Bribes*]; Benjamin Weiser & Mosi Secret, *2nd Bride Case for Lawmaker Just Acquitted*, N.Y. TIMES, Nov. 30, 2011, at A1.

⁴² See William K. Rashbaum, *Brooklyn Democrat is Said to Be Investigated*, N.Y. TIMES, Sept. 22, 2010, at A28 (describing two separate federal investigations of Assemblyman Vito Lopez, leader of the Kings County Democratic Committee); see also Isabel Vincent & Melissa Klein, *Charity Pol Probed*, N.Y. POST, Mar. 13, 2011, at 2.

⁴³ See *McNally v. United States*, 483 U.S. 350, 352 (1987).

⁴⁴ See *id.* at 356.

⁴⁵ *Id.*

⁴⁶ *Id.* at 352, 353, 354.

⁴⁷ *Id.* at 359–60.

⁴⁸ *Id.* at 360.

more clearly than it has.”⁴⁹ Thus, honest services fraud, codified at section 1346 of Title 18 of the U.S. Code, was born, practically using Justice Stevens’ dissenting words verbatim to establish more expansive rights to good government than the Court was willing to declare.⁵⁰

In 2010, the Supreme Court narrowed the application of section 1346 in *Skilling v. United States*⁵¹ due to vagueness concerns. *Skilling*, like its predecessor, *McNally*, curtailed the breadth of honest services fraud, this time, to reach only bribery and kickbacks.⁵² *Skilling* was one of three related cases that considered prosecution of private corporate executives and a public servant on the basis of honest services fraud.⁵³ The facts of *Skilling* involved the catastrophic collapse of the Enron Corporation in 2001.⁵⁴ Defendant Jeffrey Skilling, the former chief executive officer, was convicted of depriving Enron and its shareholders of the intangible right to honest services through private manipulations and in public statements about the company’s performance.⁵⁵

The related honest services fraud case before the Court in 2010 involved a member of the Alaska state legislature.⁵⁶ Defendant Bruce Weyhrauch was a member of the Alaska House of Representatives while the body considered legislation to alter the state oil production tax.⁵⁷ An oil field services company took an active interest in the proposed legislation, meeting with Weyhrauch on several occasions.⁵⁸ Weyhrauch was indicted on the theory that he took favorable actions benefiting the company on the

⁴⁹ *Id.*

⁵⁰ Compare *id.* at 375 (Stevens, J., dissenting) (“[A]pplying this very statute to schemes to defraud a State and its citizens of their intangible right to honest and faithful government.”), with 18 U.S.C. § 1346 (2006) (“[T]he term ‘scheme or artifice to defraud’ includes a scheme or artifice to deprive another of the intangible right of honest services.”). For a compressive summary of the history wire and mail fraud and honest services fraud statutes, see Elizabeth R. Sheyn, *Criminalizing the Denial of Honest Services after Skilling*, 11 WIS. L. REV. 27, 29–36 (2011).

⁵¹ See *Skilling v. United States*, 130 S. Ct. 2896, 2907 (2010).

⁵² See *id.* at 2931.

⁵³ See *Black v. United States*, 130 S. Ct. 2963, 2966 (2010) (indicting executives of Hollinger International, Inc. for mail fraud); *Weyhrauch I*, 548 F.3d 1237, 1239 (9th Cir. 2008) (regarding federal honest services mail fraud prosecution), *vacated and remanded*, 130 S. Ct. 2971 (2010), *motion to dismiss granted by* 3:07-cr-056-JWS-JDR, 2011 U.S. Dist. LEXIS 27827, at *1 (D. Alaska Mar. 15, 2011).

⁵⁴ *Skilling*, 130 S. Ct. at 2907.

⁵⁵ See *id.* at 2907, 2911.

⁵⁶ *Weyhrauch I*, 548 F.3d at 1239.

⁵⁷ *Id.*

⁵⁸ *Id.*

understanding that he would be hired for legal services later.⁵⁹ Even though Weyhrauch did not receive any actual benefit from the company and was not required to make disclosures under state law, the government argued that he had a duty to disclose the supposed conflict of interest based on official acts.⁶⁰ Despite oral arguments before the Court, the case was remanded back to the Ninth Circuit for consideration in light of *Skilling*.⁶¹ On remand, the circuit court held that “nondisclosure of a conflict of interest is no longer a basis for prosecution under 18 U.S.C. § 1346.”⁶²

The government argued in its *Weyhrauch* brief, prior to Supreme Court oral arguments, that the elements of proof of honest services fraud as applied to an undisclosed conflict of interest included a breach of the duty of loyalty, intent to deceive, and materiality.⁶³ The first element, duty of loyalty was equated with “[s]chemes to deprive others of ‘the intangible right to honest services’ [which] require that a public official, agent, or someone who owes a comparable duty of loyalty breaches that duty by secretly acting in his own interests while purporting to act in the interests of his principal.”⁶⁴ The second element was a specific intent mens rea, “intentional, fraudulent conduct” related to nondisclosure.⁶⁵ Finally, the government argued that materially meant something more than “insignificant misrepresentations or omissions.”⁶⁶

After the Court’s *Skilling* decision, the federal government can no longer prosecute undisclosed self-dealing by a public servant (or corporate officer) through honest services fraud⁶⁷—an important tool to fight corruption at all levels of government.⁶⁸ The Court

⁵⁹ *Id.*

⁶⁰ *See id.* at 1240.

⁶¹ *Weyhrauch v. United States*, 130 S. Ct. 2971 (2010) [hereinafter *Weyhrauch II*].

⁶² *United States v. Weyhrauch*, 623 F.3d 707, 708 (9th Cir. 2010) [hereinafter *Weyhrauch III*]. The question presented before the Court in *Weyhrauch* was whether the government was required to prove a violation of state law disclosure duty for a federal honest service fraud prosecution of a *state official* for non-disclosure of material information. *See Weyhrauch I*, 548 F.3d at 1243.

⁶³ Brief for the United States at 44–50, *Weyhrauch I*, 548 F.3d 1237 (9th Cir. Oct. 29, 2009) (No. 08-1196).

⁶⁴ *Id.* at 44 (citing *United States v. Rybicki*, 354 F.3d 124, 141–42 (2d Cir. 2003)).

⁶⁵ Brief for the United States at 46–48, *Weyhrauch I*, 548 F.3d 1237 (9th Cir. Oct. 29, 2009) (No. 08-1196).

⁶⁶ *Id.* at 48–49.

⁶⁷ *Skilling v. United States*, 130 S. Ct. 2896, 2933 (2010).

⁶⁸ *See generally* Thomas Rybarczyk, Comment, *Preserving a More Perfect Union: Melding Two Circuits’ Approaches to Save a Valuable Weapon in the Fight Against Political Corruption*, 2010 WIS. L. REV. 1119, 1120–22, 1138–53 (arguing pre-*Skilling* for melding two circuit court approaches to require proof of a private gain was the result of a public servant’s corrupt use of office or position).

echoed *McNally*, and declared once again, “[i]f Congress desires to go further . . . it must speak more clearly than it has.”⁶⁹ The *Skilling* Court, however, unlike the *McNally* opinion, offered guidance for drafting another honest services statute.⁷⁰ The Court advised that in order to criminalize undisclosed self-dealing to withstand constitutional scrutiny, a statute would need to answer the following questions: “How direct or significant does the conflicting financial interest have to be? To what extent does the official action have to further that interest in order to amount to fraud? To whom should the disclosure be made and what information should it convey?”⁷¹

A forty-six-year-old New York statute adequately answers all these questions.⁷²

B. New York State Public Corruption Laws

1. Code of Ethics of the Public Officers Law

a. Scandal as Impetus for Development of a State Code

The Code of Ethics applicable to state public servants was adopted in 1954 following twin scandals.⁷³ The first, which will not come as a surprise to current Albany watchers, involved Arthur H. Wicks, the Senate Majority Leader.⁷⁴ In 1953, the *New York Times* revealed that Wicks, among other public servants, visited Joseph Fay, a convicted union extortionist, in Sing Sing prison.⁷⁵ Governor Dewey called for the senate leader’s resignation.⁷⁶ Wicks took to the

⁶⁹ *Skilling*, 130 S. Ct. at 2933 (quoting *McNally v. United States*, 483 U.S. 350, 360 (1987)); see Elizabeth R. Sheyn, *Criminalizing the Denial of Honest Services After Skilling*, 2011 WIS. L. REV. 27 (summarizing honest services reform efforts and recommending language for a post-*Skilling* statute).

⁷⁰ See *Skilling*, 130 S. Ct. at 2933 n.44. Congress did spin the Court’s own words in *McNally* into a statute, but it was hardly the drafting guidance contained in *Skilling*. See *McNally*, 483 U.S. at 375.

⁷¹ *Skilling*, 130 S. Ct. at 2933 n.44.

⁷² See discussion *infra* Part III.C; see also N.Y. CRIM. PROC. LAW § 200.25 (McKinney 2012).

⁷³ See Leo Egan, *State G.O.P. Seeks to Repair Prestige*, N.Y. TIMES, Nov. 15, 1953, at E4; see also Warren Weaver, Jr., *Dewey Considering a ‘Czar’ For Harness Racing in State*, N.Y. TIMES, Dec. 18, 1953, at 1, 35 [hereinafter *Dewey Considering a ‘Czar’*].

⁷⁴ Egan, *supra* note 73, at E4.

⁷⁵ *Id.*; *Sketches of Some Who Called on Fay: Wicks State Senate Majority Head—Condon a Member of Legislature Since 1927*, N.Y. TIMES, Oct. 3, 1953, at 11 [hereinafter *Sketches of Some Who Called on Fay*].

⁷⁶ Warren Weaver, Jr., *Wicks Spurns Call by Dewey to Quit: Issue Put to Senate*, N.Y. TIMES, Oct. 13, 1953, at 1 [hereinafter *Wicks Spurns Call by Dewey to Quit*]. Making matters

public airwaves to defend himself, incredibly, and incredulously, analogizing his willingness to meet with an imprisoned labor extortionist to conducting foreign policy:

[W]as it any more lamentable than it is in our national foreign policy to seek peace and society's welfare by audience with a Premier Stalin, or a Marshal Tito—meeting with them, not because they are Communists, not in order to compromise our truth with errors, but meeting with them because they are, good or bad, the accepted leaders of their people who are making demands on our society?⁷⁷

The second scandal focused on corruption at harness racing tracks following the murder of a union boss.⁷⁸ A state investigation revealed evidence of “labor extortion, kickbacks and heavy financial holdings by political leaders at the trotting ovals.”⁷⁹ The report uncovered payments to Fay's successor for a no-show job.⁸⁰ Wicks, even after his resignation as senate leader, remained the chair of a special legislative committee investigating horse racing.⁸¹

The following year, Dewey, in his annual message to the legislature, declared that:

[The] problem of ethical standards is not the simple issue of bribery and corruption on which there is no difference of opinion; it involves a whole range of borderline behavior, questions of propriety, and the question of conflict of interests. . . . What we do seek are better definitions of that sensitive devotion to the public trust which you and I believe is an essential part of the obligation of public service. . . . [T]he guiding principles seem clear: the public is entitled to expect from its servants a set of standards far above the

somewhat more complicated, Wicks was sworn in as acting lieutenant governor, an unnecessary designation and a post that does not even exist. See N.Y. CONST. art. 4, § 6; see also *Wicks is Acting Lieutenant Governor*, N.Y. TIMES, Oct. 2, 1953, at 22.

⁷⁷ *Text of the Broadcast by Senator Wicks Regarding His Dealings with Fay*, N.Y. TIMES, Oct. 19, 1953, at A12. Albany's cast of potentially corrupt characters has an apparent affinity for foreign affairs as well as audacious public statements. Following his guilty plea, former Senator Vincent Leibell suggested to a federal judge that he serve his sentence as a diplomat in the Middle East. William K. Rashbaum, *Ex-Senator Said to Have Paid Contractors at Discount*, N.Y. TIMES, May 12, 2011, at A26.

⁷⁸ See A. H. Raskin, *Track Inquiry Finds Graft in Union Funds*, N.Y. TIMES, Dec. 16, 1953, at A1.

⁷⁹ Warren Weaver, Jr., *Dewey Considering a 'Czar' for Harness Racing in State*, N.Y. TIMES, Dec. 18, 1953, at A1.

⁸⁰ See Raskin, *supra* note 78, at A1.

⁸¹ Leo Egan, *Wicks Resigns Post as Senate Leader in Compromise Step*, N.Y. TIMES, Nov. 19, 1953, at A1.

morals of the market place.⁸²

Dewey proposed a special committee of the legislature to develop legislation for business and professional activities for government, “question[s] of private practice before State agencies” and a code of ethics for conflicts of interests.⁸³ A few days later, the Senate and Assembly passed a joint resolution, without a single dissenting vote, to create the Special Legislative Committee on Integrity and Ethical Standards in Government.⁸⁴ The Committee members acted quickly. Within two months after the appointment of its membership, it released its report including draft legislation that was ultimately adopted.⁸⁵

While the committee does not state its source for the code, Dewey noted in his 1954 annual address that “[t]here is precedent in the similar codes for members of the bar and for the judiciary.”⁸⁶ In addition, the 1954 committee report also notes the work of a subcommittee of the U.S. Senate Committee on Labor and Public Welfare.⁸⁷ The report of the Special Subcommittee on the Establishment of a Commission on Ethics in Government recommended a code of official conduct for public servants, including a bar on “engag[ing], directly or indirectly, in any personal business transaction or private arrangement for personal profit which accrues from or is based upon his official position or authority.”⁸⁸ In 1958, both houses of Congress adopted a “Code of Ethics for Government Service.”⁸⁹ The notable portions of the code include:

5. Never discriminate unfairly by the dispensing of special

⁸² Dewey Annual Message, *supra* note 12, at 312–13.

⁸³ *Id.* at 314.

⁸⁴ S.J. Res. 4, 1954 Leg., 177th Sess. (N.Y. 1954), in NEW YORK LEGISLATIVE RECORD AND INDEX 605 (1954); *see also* REP. OF THE SPEC. LEGIS. COMM. ON INTEGRITY & ETHICAL STANDARDS IN GOV'T 3, 5 (1954) [hereinafter 1954 REPORT] (listing the first appointed members of the committee).

⁸⁵ *See generally* 1954 REPORT *supra* note 84, at 5, 9, 14–15, 19–35 (noting the passage of the joint resolution a few days after January 6, 1954, and the committee's publication of the report on March 9, 1954); *see also* Warren Weaver, Jr., *12 Picked to Write State Ethics Code*, N.Y. TIMES, Jan. 11, 1954, at A1 (noting that a week after Governor Dewey proposed the special legislative committee, all twelve members were appointed).

⁸⁶ Dewey Annual Message, *supra* note 12, at 315; *see also* AM. BAR ASS'N, CANONS OF JUDICIAL ETHICS 762, 767–69, § 4 (Avoidance of Impropriety), § 26 (Personal Investments and Relations), § 29 (Self-Interest), § 34 (A Summary of Judicial Obligation), in REPORT OF THE FORTY-SEVENTH ANNUAL MEETING OF THE AM. BAR ASS'N (1924).

⁸⁷ 1954 REPORT, *supra* note 84, at 10.

⁸⁸ S. 2293, 82d Cong. (1951) in ETHICAL STANDARDS IN GOV'T, SUBCOMM. OF THE COMM. ON LABOR & PUB. WELFARE, U.S. SENATE, 82D CONG. app. B 71 [hereinafter ETHICAL STANDARDS IN GOVERNMENT].

⁸⁹ H.R. Con. Res. 175, 85th Cong., 72 Stat. B12 (1958).

favors or privileges to anyone, whether for remuneration or not; and never accept, for himself or his family, favors or benefits under circumstances which might be construed by reasonable persons as influencing the performance of his governmental duties.

6. Make no private promises of any kind binding upon the duties of office, since a Government employee has no private word which can be binding on public duty. . . .

10. Uphold these principles, ever conscious that public office is a public trust.⁹⁰

Unlike the state Code of Ethics, the federal code is not legally binding because it is a congressional resolution, and not a public law.⁹¹

b. Section 74 of the Public Officers Law: Code of Ethics Applicable to State Public Servants

The New York Special Legislative Committee's proposed language was adopted in 1954 and codified at section seventy-four of the Public Officers Law.⁹² The statute's declaration of intent explains the purpose and application of the code: "[s]ome conflicts of material interests which are improper for public officials may be prohibited by legislation."⁹³ Section seventy-four, applicable to officers or employees of state agencies, members of the legislature, and legislative employees, i.e., state public servants, begins with a general rule against conflicts of interests and is followed by nine specific duties: "[n]o [state public servant] should have any interest, financial or otherwise, direct or indirect, or engage in any business or transaction or professional activity or incur any obligation of any nature, which is in substantial conflict with the proper discharge of his duties in the public interest."⁹⁴ In his approval message, Dewey called this the "basic tenet" of the Code of Ethics.⁹⁵ Some of the

⁹⁰ *Id.*

⁹¹ JACOB R. STRAUS, CONG. RES. SERV., ENFORCEMENT OF CONGRESSIONAL RULES OF CONDUCT: AN HISTORICAL OVERVIEW 2–3 (2011); see *infra* Part II.B.1.b.

⁹² 1954 N.Y. Laws 1616 (codified at N.Y. PUB. OFF. LAW § 74 (McKinney 2012)). Several other recommendations of the committee were adopted and codified into law. See, e.g., 1954 N.Y. Laws 1615 (codified at N.Y. PUB. OFF. LAW § 73 (McKinney 2012)). The report also spurned the legislature, for the first time, to adopt a Committee on Ethics and Guidance for each chamber. S. Res. 131, 1954 Leg., 177th Sess. (N.Y. 1954).

⁹³ 1954 N.Y. Laws 1616.

⁹⁴ N.Y. PUB. OFF. LAW § 74(2); see also 1954 REPORT, *supra* note 84, at 15 (recommending the establishment of the Code of Ethics with proposed language).

⁹⁵ N.Y. STATE LEGIS. ANN. 412 (1954).

paragraphs of the code read as general guiding principles:

a. No officer or employee of a state agency, member of the legislature or legislative employee should accept other employment which will impair his independence of judgment in the exercise of his official duties. . . .

f. An officer or employee of a state agency, member of the legislature or legislative employee should not by his conduct give reasonable basis for the impression that any person can improperly influence him or unduly enjoy his favor in the performance of his official duties, or that he is affected by the kinship, rank, position or influence of any party or person. . . .

h. An officer or employee of a state agency, member of the legislature or legislative employee should endeavor to pursue a course of conduct which will not raise suspicion among the public that he is likely to be engaged in acts that are in violation of his trust.⁹⁶

Other paragraphs are more detailed, describing prohibitions on more specific behavior:

d. No officer or employee of a state agency, member of the legislature or legislative employee should use or attempt to use his or her official position to secure unwarranted privileges or exemptions for himself or herself or others, including but not limited to, the misappropriation to himself, herself or to others of the property, services or other resources of the state for private business or other compensated non-governmental purposes.

e. No officer or employee of a state agency, member of the legislature or legislative employee should engage in any transaction as representative or agent of the state with any business entity in which he has a direct or indirect financial interest that might reasonably tend to conflict with the proper discharge of his official duties.⁹⁷

This section of law, except for the addition of a penalty provision and other minor changes has remained the same since enactment.⁹⁸

⁹⁶ N.Y. PUB. OFF. LAW § 74(3)(a), (f), (h).

⁹⁷ *Id.* § 74(3)(d), (e). Of the remaining four paragraphs of the code, two apply to state public servants and deal with disclosure of confidential information. *Id.* § 74(3)(b), (c). The other two paragraphs apply specifically to officers and employees of state agencies and deal with personal investments and selling goods or services where conflicts are present. *Id.* § 74(3)(g), (i).

⁹⁸ Compare 1954 N.Y. Laws 1616, with N.Y. PUB. OFF. LAW § 74. Subdivision four,

The governor's message of approval declared that "where the issues are simple, the bills set forth absolute prohibitions. In the areas where distinctions are close, and the differences between right and wrong not always easily ascertainable, they establish broad standards of conduct, leaving to advisory committees the process of developing a body of rules and precedents."⁹⁹ Dewey's message applied to four related but separate bills enacted into law; there is no way to know which issues he believed were "absolute" and which were "not always easily ascertainable."¹⁰⁰ One thing is certain: "the Code of Ethics is a statutory recognition of the principle that public office is a public trust."¹⁰¹

A specialized legislative committee acknowledged that the Code of Ethics established duties.¹⁰² In 1957, the Senate Committee on Ethics and Guidance noted that paragraphs (f) and (h) of the code (quoted above) "are concerned with the *duty* of a State officer or a member of the Legislature."¹⁰³ Two years later, the same committee described the Code of Ethics as applicable to "state officers and employees with respect to conflicts between private interests and *official duties*."¹⁰⁴

containing penalties, was later added. 1965 N.Y. Laws 2296 § 4. The original paragraph (j) was repealed by the 2007 N.Y. Laws 159 § 30, and paragraph (d) was amended by the 2010 N.Y. Laws 1.

⁹⁹ N.Y. STATE LEGIS. ANN., *supra* note 95, at 412.

¹⁰⁰ *Id.*

¹⁰¹ STATE OF N.Y., REP. OF THE S. COMM. ON ETHICS & GUIDANCE, S. 18–29, 184th Sess., at 7 (1961).

¹⁰² This lack of clarity or notice of a duty where a criminal penalty is applied may bring about claims of due process violations. *See* *People v. Garson*, 6 N.Y.3d 604, 617, 848 N.E.2d 1264, 1273, 815 N.Y.S.2d 887, 896 (2006) (holding that the Rules of Judicial Conduct provide sufficient notice to overcome a claim for violation of due process *via* lack of notice). In fact, the Rules of Judicial Conduct, which impart duties, do not always use the term "duty." *Compare* N.Y. COMP. CODES R. & REGS. tit. 22, § 100.2(C) (2012) ("A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others . . ."), *with* N.Y. COMP. CODES R. & REG. tit. 22, § 100.3(A) ("The judicial *duties* of a judge take precedence over all the judge's other activities. . . . In the performance of these *duties*, the following standards apply.") (emphasis added).

¹⁰³ STATE OF N.Y., REP. OF THE S. COMM. ON ETHICS & GUIDANCE, S. 46–58, 180th Sess., at 8 (1957) (emphasis added).

¹⁰⁴ STATE OF N.Y., REP. OF THE S. COMM. ON ETHICS & GUIDANCE, S. 1–17, 182nd Sess., at 7 (1959) (emphasis added). *But see* STATE OF N.Y., REP. OF THE ASSEMB. COMM. ON ETHICS & GUIDANCE, 9–25, 185th Sess., at 8 (1962) (proclaiming that the Code of Ethics does not control over a provision of the state constitution dealing with qualification of members of the legislature). Although the report cites article III, section eight, for the time of election of members, the correct reference was probably the next section: "[e]ach house shall determine the rules of its own proceedings, and be the judge of the elections, returns and qualifications of its own members . . ." N.Y. CONST. art III, § 9, cl. 2. Still, that section deals with elections and the seating of members. *See* *Scaringe v. Ackerman*, 119 A.D.2d 327, 330, 506 N.Y.S.2d 918, 920 (App. Div. 3d Dep't 1986) (noting that power has been delegated to the judiciary under article 16 of the Election Law). The Assembly committee's declaration was likely mere

As originally adopted, the Code of Ethics did not contain a penalty provision.¹⁰⁵ In 1965, however, a general provision was added: “[i]n addition to any penalty contained in any other provision of law any such officer, member or employee who shall knowingly and intentionally violate any of the provisions of this section may be fined, suspended or removed from office or employment in the manner provided by law.”¹⁰⁶ In 2007, the penalty provision was amended to add a civil penalty for knowing and intentional violations of up to ten thousand dollars and/or the value of a benefit received, depending on the nature of the act.¹⁰⁷

c. Views of the Code Following Enactment

In 1964, another special committee was created by the legislature to study ethics standards applicable to members of the legislature and legislative employees and to make recommendations.¹⁰⁸ The three-member committee was chaired by Cloyd Laporte, head of the New York City Board of Ethics.¹⁰⁹ In a bizarre twist, public hearings produced far more opposition than support for a tougher code of ethics for state lawmakers.¹¹⁰ The 1964 committee report noted that “[t]he Legislature cannot legislate morals and the resolution of ethical problems must indeed rest largely in the individual conscience. The Legislature may and should, however, define ethical standards, as most professions have done, to chart the areas of real or apparent impropriety.”¹¹¹

bluster, a reference to the Speech or Debate Clause of both the federal and state constitutions. See U.S. CONST. art. 1, § 6, cl. 2; N.Y. CONST., art III, § 11. The clause of both constitutions has been unsuccessfully invoked as a shield against criminal prosecution for corruption. See *United States v. Brewster*, 408 U.S. 501, 516 (1972) (“We would not think it sound or wise . . . to doubly insure legislative independence, to extend the privilege beyond its intended scope, its literal language, and its history, to include all things in any way related to the legislative process.”); see also *Straniere v. Silver*, 218 A.D.2d 80, 83, 637 N.Y.S.2d. 982, 985 (App. Div. 3d Dep’t 1996) (quoting *Brewster*, 408 U.S. at 512) (“The line separating protected from unprotected legislative activity is ultimately one between ‘purely legislative activities’ and ‘political’ matters.”).

¹⁰⁵ Compare 1954 N.Y. Laws 1616, with 1965 N.Y. Laws 2296 § 4. The 1965 chapter law was a wholesale reorganization of the Penal Law. See 1965 N.Y. Laws 2296.

¹⁰⁶ N.Y. PUB. OFF. LAW § 74 (McKinney 2012).

¹⁰⁷ *Id.*

¹⁰⁸ STATE OF N.Y., REP. OF THE SPECIAL COMM. ON ETHICS 3 (1964) [hereinafter 1964 REPORT].

¹⁰⁹ *Laporte to Study State Ethics Code: Head of City Panel Named By Mahoney and Carlino*, N.Y. TIMES, Dec. 3, 1963, at 1.

¹¹⁰ Laymond Robinson, *Puzzle in Ethics Battle: Opponents of Stiffer Legislators’ Code Outnumber Advocates at State Hearings*, N.Y. TIMES, Feb. 10, 1964, at 18.

¹¹¹ 1964 REPORT, *supra* note 108, at 3.

The report's recommendations included amendments to section seventy-three of the Public Officers Law for a prohibition of compensated appearances by legislators before state agencies and the Court of Claims, a bar on solicitation and acceptance of gifts, a disclosure of financial interests related to state-regulated activities, and a state ethics commission to advise, not to punish, state public servants.¹¹² The recommendations were not welcomed by legislators.¹¹³ The result was a "watered-down" bill that then-Governor Nelson A. Rockefeller was urged to veto.¹¹⁴ The following year, under pressure from the public and Albany watchers, the legislature passed a law that contained the 1964 recommendations, which included a new penalty provision for the Code of Ethics.¹¹⁵

Governor Mario M. Cuomo and New York City Mayor Edward I. Koch established the sixteen-member State-City Commission on Integrity in Government in 1986, headed by the president of Columbia University.¹¹⁶ The commission issued a wide-ranging report recommending changes to the conflicts of interest provisions of sections seventy-three and seventy-four of the Public Officers Law, and new disclosure requirements.¹¹⁷

The 1986 report criticized inconsistent construction and ambiguous provisions of the Code of Ethics.¹¹⁸ The language of the code, which for the most part begins with "No" state public servant, is modified by "should not," which the report authors concluded

¹¹² *Id.* at 3–7.

¹¹³ John Sibley, *Albany is Cool to Ethics Report*, N.Y. TIMES, Mar. 10, 1964, at 34. Most controversial was the bar against practice before the Court of Claims. *Id.*

¹¹⁴ Charles Grutzner, *New Ethics Bill of State Scored: Citizens Committee Urges Veto and Special Session*, N.Y. TIMES, Mar. 25, 1964, at 45; *see also* 1964 N.Y. Laws 2445. The law created a separate Code of Ethics for members of the legislature and legislative employees that mirrored the provisions applicable to state officers and employees. 1964 N.Y. Laws at 2451–54.

¹¹⁵ 1965 N.Y. Laws 2301. The law reunited the code provisions under one section of law. *See id.*; Sydney H. Schanberg, *Ethics Code Gets Additional Curbs: Governor Signs Restriction on Court Practice*, N.Y. TIMES, July 22, 1965, at 18.

¹¹⁶ Josh Barbanel, *State-City Panel Appointed to Seek End to Corruption*, N.Y. TIMES, Mar. 12, 1986, at B4.

¹¹⁷ *See generally* Memorandum from Frank P. Grad, Dir. of Res., on Conflict of Interest and Financial Disclosure Law in New York to Members of the State-City Commission on Integrity in Government 20–26 (Oct. 8, 1986) [hereinafter 1986 Report] (stating the provision then providing a staff recommendation to fix the ambiguities). One notable recommendation was not and has not been adopted: "[a] [single] independent [ethics enforcement] commission would probably serve the needs of New York best." *Id.* at 28. Among the notable and accepted recommendations were detailed financial disclosure statements by state public servants. *Id.* at 22–23; 1987 N.Y. Laws 3022, 3031–39 (codified at N.Y. PUB. OFF. LAW § 73-a(3) (McKinney 2012)).

¹¹⁸ 1986 Report, *supra* note 117, at 24–26.

“does not indicate whether it is mandatory or advisory.”¹¹⁹ The report thus recommends that the code apply mandatory language,¹²⁰ whereas section seventy-three of the Public Officers Law, adopted at the same time as the code, contain prohibitions with “shall.”¹²¹ There is nothing in the code’s original 1954 legislative intent to suggest that it was meant to be permissive rather than mandatory.¹²² In fact, the declaration of intent reads: “[s]ome conflicts of material interests which are improper for public officials *may be prohibited by legislation.*”¹²³ That is precisely what the code is—a list of prohibitions, some more specific than others. The argument offered by the 1986 report fails because “should” is the past tense of “shall.”¹²⁴

Another criticism in the 1986 report, concerning the subjective nature of some of the code, is more on point.¹²⁵ The report singled out paragraphs (f) and (h), quoted above, as “basically unenforceable.”¹²⁶ The report notes that, as of 1986, according to State Attorney General Robert Abrams, there had been no attempts to enforce those two prohibitions.¹²⁷ Accordingly, the report recommended removing the two paragraphs from the code.¹²⁸ While these provisions may be enforced where civil penalties apply, the report is likely correct that they are too vague for criminal law standards.

2. State Criminal Public Corruption Statutes

The criminal law cousins to the duties of the Code of Ethics are bribery related statutes, which apply to public servants at large.¹²⁹ New York’s bribery statutes date back to 1806 when the crime was

¹¹⁹ *Id.* at 24.

¹²⁰ *Id.*

¹²¹ Compare 1954 N.Y. Laws 1615 (“No officer or employee of a state agency, member of the legislature or legislative employee *shall* receive, or enter into any agreement”) (emphasis added), with 1964 N.Y. Laws 2453 (“No officer or employee of a state agency, member of the legislature or legislative employee *should* use or attempt to use his [or her] official position to secure unwarranted privileges”) (emphasis added).

¹²² See 1954 N.Y. Laws 1616.

¹²³ *Id.* (emphasis added).

¹²⁴ See MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 1153 (11th ed. 2005).

¹²⁵ See 1986 Report, *supra* note 117, at 25.

¹²⁶ *Id.*

¹²⁷ *Id.* at 26.

¹²⁸ *Id.* The issues of notice of criminal penalties as a due process issue are discussed herein. See *infra* Part IV.C.2.

¹²⁹ See N.Y. PENAL LAW §§ 200.00–200.55 (McKinney 2012).

punished by a fine of \$5000, ten years' hard labor, or both.¹³⁰ The elements of the modern bribery statute, however, are traced back to the Penal Code of 1881.¹³¹ The law applied to any elected or appointed executive officer "who ask[ed], receive[d] or agree[d] to receive any bribe, upon an agreement or understanding that his vote, opinion or action upon any matter then pending or which may by law be brought before him in his official capacity, shall be influenced."¹³² Violations were punishable by ten years in prison, a \$5000 fine, or both, and forfeiture of office and permanent disqualification of any public office in the state.¹³³ In addition, another bribery statute punished executive officers who "ask[ed] or receive[d] any emolument, gratuity or reward . . . except such as may be authorized by law for doing any official act" and was punished as a misdemeanor.¹³⁴ In 1909, the code was renamed the Penal Law, and bribery and related statutes were transferred to article one hundred seventy.¹³⁵

The 1960s began a revolution in both substantive criminal law and criminal procedure with the New York Commission on Revision of the Penal Law and Criminal Code.¹³⁶ The Penal Law was revised in 1965 per the commission's recommendations for reorganization, as well as new statutes.¹³⁷ Public corruption statutes in the Penal Law have remained stable since, with minor exceptions.¹³⁸ Today

¹³⁰ 1806 N.Y. Laws 634 ("An ACT for the Prevention of Bribery, and for the better carrying into Effect the Statutes therein mentioned.") (emphasis omitted). Bribery statutes were also enacted in 1829. See 2 N.Y. REV. STAT. tit. 4, art. 2, §§ 9, 10 (1829).

¹³¹ See PENAL LAW §§ 44, 45 (1881). The sections were respectively titled "[g]iving or offering bribes" and "[a]sking or receiving bribes." *Id.*

¹³² *Id.* § 45.

¹³³ *Id.*

¹³⁴ *Id.* § 48. The law was amended nine years later, expanding the reach of the bar to public officers and their subordinates, and the benefit to include "money, property or thing of value or of personal advantage," and increasing the punishment to ten years in prison, a four thousand dollar fine, or both. 1890 N.Y. Laws 671.

¹³⁵ See PENAL LAW §§ 1822, 1823, amended by 1965 N.Y. Laws 2343.

¹³⁶ N.Y. TEMP. COMM'N ON REVISION OF THE PENAL LAW AND CRIM. CODE, INTERIM REP. 7 (1962). The commission's charge was to study existing law and "accurately define substantive provisions of law relating to crimes and offenses by adding or amending language where necessary so as to improve substantive content and remove ambiguity and duplication." 1961 N.Y. LAWS 1275, amended by 1962 N.Y. Laws 2513.

¹³⁷ See 1965 N.Y. LAWS 2343; N.Y. TEMP. COMM'N ON REVISION OF THE PENAL LAW AND CRIM. CODE, COMM'N STAFF COMMENTS ON THE PROPOSED PENAL LAW 9 (1964) (recommending new Penal Law sections 205.15 and 205.20) (codified at N.Y. PENAL LAW §§ 200.20, 200.25 (McKinney 2012)) [hereinafter STAFF COMMENTS ON THE PROPOSED PENAL LAW].

¹³⁸ See, e.g., 2010 N.Y. Laws 1 (codified at PENAL LAW § 195.20; N.Y. PUB. OFF. LAW § 74(3)(d) (McKinney 2012)). The senate sponsor is fond of misguidedly describing ethics bills, one of which was signed into law, as filling the "Bruno gap." See Press Release, Sen. Daniel L. Squadron, Senator Squadron Applauds Governor for Signing "Bruno Gap" Bill Into Law, Pushes for Immediate Progress On Comprehensive Reform (Feb. 12, 2010),

article two hundred of the Penal Law contains public corruption statutes like bribery.¹³⁹

The Court of Appeals has held that “[b]ribery is offering to a public servant a benefit to induce him ‘to act or refrain from acting in a matter over which he may be assumed to have power.’”¹⁴⁰ The basic elements of bribe receiving are: (1) solicitation, acceptance or agreement to accept; (2) by a public servant; (3) any benefit; (4) upon agreement or understanding; and (5) that his or her “vote, opinion, judgment, action, decision or exercise of discretion as a public servant will thereby be influenced.”¹⁴¹ While bribe receiving in the third degree does not contain a pecuniary threshold, bribe receiving in the second degree sets the value of the benefit in excess of \$10,000.¹⁴² The former is punished as a class D felony and the latter as a class C felony.¹⁴³ The core act of both bribery and bribe receiving is a *quid pro quo*, a benefit given for an influenced act, and a relationship between the two in the form of an agreement or understanding.¹⁴⁴

“Public servant” is construed broadly¹⁴⁵ and includes those who

<http://www.nysenate.gov/press-release/senator-squadron-applauds-governor-signing-bruno-gap-bill-law-pushes-immediate-progres>. In fact, the bill made meaningless changes to the law. The law amended defrauding the government to bar taking “services or other resources,” in addition to property, acts which were already prohibited. The pre-amended law allowed the prosecution of State Comptroller Alan G. Hevesi to proceed, for providing a state driver for his wife for personal use, thereby defrauding the state of property. See Cooper, *supra* note 20. The law also amended portions of the “unwarranted privileges” provision of the Code of Ethics, which was statutory window dressing. The acts were already covered by defrauding the government and tying Code of Ethics violations to receiving a reward for official misconduct was never contemplated.

¹³⁹ See PENAL LAW §§ 200.00–200.55. Bribery statutes that are specifically applicable to the state legislature also exist in the Public Officers Law. See N.Y. PENAL LAW §§ 200.00, 200.10, 200.30, 200.35; N.Y. PUB. OFF. LAW §§ 75, 76, 77. Both the third degree bribery and bribe receiving statutes, which do not have a monetary threshold, are punishable as a class D felony. PENAL LAW §§ 200.00, 200.10. The bribery provisions of the Public Officers Law, which do not have monetary thresholds, are also punishable as a class D felony. PUB. OFF. LAW §§ 75, 76. Perhaps ironically, the sections of the Public Officers Law were enacted the same year as the new Penal Law. See 1965 N.Y. Laws 2296; 1965 N.Y. Laws 2343.

¹⁴⁰ *People v. Graham*, 57 A.D.2d 478, 482, 394 N.Y.S.2d 982, 985 (App. Div. 4th Dep’t 1977) (quoting *People v. Chapman*, 13 N.Y.2d 97, 101, 192 N.E.2d 160, 161, 242 N.Y.S.2d 200, 202 (1963)).

¹⁴¹ PENAL LAW § 200.11.

¹⁴² *Id.* There are analogous statutes for bribery, and the one who offers or confers the bribe. See *id.* §§ 200.00, 200.03.

¹⁴³ *Id.* §§ 70.00(2)(c), (d), 200.10 (stating that the sentence of imprisonment shall not exceed seven years), 200.11 (stating that the sentence of imprisonment shall not exceed fifteen years).

¹⁴⁴ See, e.g., *United States v. Sun-Diamond Growers*, 526 U.S. 398, 404–05 (1999) (distinguishing between bribery, which requires a *quid pro quo*, and an illegal gratuity, which merely involves a reward for a past or future act).

¹⁴⁵ See, e.g., *In re Onondaga County Dist. Attorney’s Office to File a Sealed Grand Jury*

are elected to their position.¹⁴⁶ Benefit, which is defined as “any gain or advantage to the beneficiary and includes any gain or advantage to a third person pursuant to the desire or consent of the beneficiary,”¹⁴⁷ is similarly liberally construed. For example, “[t]he benefit accruing to the public official need not be tangible or monetary to constitute a bribe.”¹⁴⁸ The vote or opinion is the act that is influenced in exchange for the benefit, i.e., the necessary remaining half of the *quid pro quo* paired with the benefit. This fulfills the crucial element of an “agreement or understanding.”¹⁴⁹ Bribe receiving is contrasted with receiving unlawful gratuities, which is punishable by class A misdemeanor.¹⁵⁰ An unlawful gratuity involves the solicitation or acceptance of a benefit by a public servant “for having engaged in official conduct’, and does not require a finding of the possibility or probability of preferential treatment.”¹⁵¹ The elements of receiving unlawful gratuities are: (1) a public servant; (2) solicits, accepts, or agrees to accept; (3) any benefit; (4) “for having engaged in official conduct which he was required or authorized to perform, and for which he was not entitled to any special or additional compensation.”¹⁵² Bribery punishes “official conduct to be performed, while giving an unlawful gratuity is rewarding official conduct *already* performed.”¹⁵³

Report as a Public Record, 92 A.D.2d 32, 36, 459 N.Y.S.2d 507, 510 (App. Div. 4th Dep’t 1983) (citing *People v. Ebuzome*, 107 Misc. 2d 464, 466, 435 N.Y.S.2d 243, 244 (Sup. Ct. Queens County 1981)) (“The definition of ‘public servant’ should not be narrowly viewed as applying only to New York State employees, but is also aimed at every person specially retained to perform some government service.”).

¹⁴⁶ See PENAL LAW § 10.00(15)(b).

¹⁴⁷ *Id.* § 10.00(17).

¹⁴⁸ *People v. Hochberg*, 62 A.D.2d 239, 246–47 404 N.Y.S.2d 161, 167 (App. Div. 3d Dep’t 1978) (citing *People v. Hyde*, 156 A.D. 618, 624141 N.Y.S. 1089, 1093 (App. Div. 1st Dep’t 1913); *People ex rel. Dickinson v. Van De Carr*, 87 A.D. 386, 390 84 N.Y.S. 461, 464 (App. Div. 1st Dep’t 1903)).

¹⁴⁹ See PENAL LAW § 200.00.

¹⁵⁰ *Id.* §§ 70.15, 200.35 (enacting a sentence not to exceed one year for a class A misdemeanor).

¹⁵¹ *People v. Graham*, 57 A.D.2d 478, 482, 394 N.Y.S.2d 982, 985 (App. Div. 4th Dep’t 1977) (quoting *People v. La Pietra*, 64 Misc. 2d 807, 809, 316 N.Y.S.2d 289, 291 (Sup. Ct. Suffolk County 1970)).

¹⁵² PENAL LAW § 200.35.

¹⁵³ *Graham*, 57 A.D.2d at 482, 394 N.Y.S.2d at 985 (emphasis added). Unlawful gratuity is not a lesser crime of bribery because of the fifth element above: a lack of entitlement to additional compensation, which is not included in the bribery statute. See *id.* at 483, 394 N.Y.S.2d at 986.

*C. New York's Constitutional Honest Service Fraud Statute:
Receiving Reward for Official Misconduct*

In 1965, the Commission on Revision of the Penal Law and Criminal Code introduced a new public corruption statute within article two hundred, receiving reward for official misconduct, which has remained the same except that it is now called a second degree offense:

A public servant is guilty of receiving reward for official misconduct *in the second degree* when he solicits, accepts or agrees to accept any benefit from another person for having violated his duty as a public servant. Receiving reward for official misconduct *in the second degree* is a class E felony.¹⁵⁴

The elements of the crime are: (1) a public servant; (2) solicitation, acceptance or agreement to accept; (3) any benefit from another person; and (4) for violation a duty as a public servant.¹⁵⁵ The duty owed is not defined in the statute or the Penal Law.¹⁵⁶ This is the New York version of federal honest services fraud, even if it predated 18 U.S.C. § 1346 by more than two decades.¹⁵⁷ But unlike the federal law the lack of definition of the duty is not fatal to the statute.¹⁵⁸

The elements of section 200.25 are similar to unlawful gratuities, but the two diverge over a benefit for violating a duty, on one hand, and a benefit for engaging in official conduct where no such entitlement existed, on the other. Section 200.25 is distinguished from bribery because the former requires the violation of a duty, e.g., the Code of Ethics, and the latter requires an “agreement or understanding” that influences an act involving a “vote, opinion, judgment, action, decision or exercise of discretion.”¹⁵⁹

Thus, a public servant could, acting *alone*, violate section 200.25 by breaching a duty, and then by accepting any benefit, which falls short of fulfilling an element of bribe receiving. Of course, whether

¹⁵⁴ 1965 N.Y. Laws 2296, *amended by* 1973 N.Y. Laws 1040. Originally, the statute was a single degree. Later, a first degree was added that specifically addresses a public servant who violates a duty in the investigation, arrest or prosecution of class A felony. See PENAL LAW §§ 200.22, 200.25, 200.27.

¹⁵⁵ PENAL LAW § 200.25.

¹⁵⁶ *Id.*; *People v. Garson*, 6 N.Y.3d 604, 612, 848 N.E.2d 1264, 1269, 815 N.Y.S.2d 887, 892 (2006).

¹⁵⁷ Section 200.25 was enacted in 1965. 1965 N.Y. Laws 2296. Federal honest services fraud was enacted in 1988. Act of Nov. 18, 1988, Pub. L. No. 100-690, 102 Stat. 4508 (codified as amended at 18 U.S.C. § 1346 (2006)).

¹⁵⁸ *Garson*, 6 N.Y.3d at 612, 848 N.E.2d at 1269, 815 N.Y.S.2d at 892.

¹⁵⁹ Compare PENAL LAW § 200.11, with *id.* § 200.25.

one or two people are party to a corrupt act depends on the duty in question. The conduct punished by section 200.25 depends on the actor and the laws relevant to such actor because the duty is not defined in the Penal Law.

The first rule of statutory interpretation is that legislative intent is paramount; however, what the body had in mind when enacting section 200.25 is not certain.¹⁶⁰ There is scant information from which to discern the legislative intent behind this section of the law. The only known relevant pre-enactment comment was by the staff of the Commission on Revision of the Penal Law and Criminal Code: “Whereas proposed [bribery and bribe receiving] contemplate an act to be performed in the future, [rewarding official misconduct and receiving reward for official misconduct] cover the situation where the improper act has already been accomplished by the public servant.”¹⁶¹ The textual differences between section 200.25 and bribe receiving belie the notion that the former statutory section encompasses only a nuanced temporal difference. If the intent was indeed simply to create an after-the-fact bribery statute, then why are the elements different, specific classes of acts in comparison to violating a duty as a public servant?¹⁶² At least one state appellate court gave effect to the commission’s temporal claim in the unlawful gratuity statutes.¹⁶³ Regardless, the staff comments cannot be viewed as legislative intent because they were not submitted for approval to the commission.¹⁶⁴ Thus, “the Commission staff notes do not necessarily represent the official position of the Commission.”¹⁶⁵

The simplest explanation for legislative intent—or the meaning of a law—is often found by looking at the plain words of a statute. This is the rule adopted by the Court of Appeals: “As the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof.”¹⁶⁶ The Penal Law itself contains aids to interpretation. Criminal statutes “must be construed according to the fair import of their terms to promote

¹⁶⁰ N.Y. STAT. § 92 (McKinney 2012).

¹⁶¹ STAFF COMMENTS ON THE PROPOSED PENAL LAW, *supra* note 137, at 371–72.

¹⁶² Compare PENAL LAW § 200.11, with *id.* § 200.25.

¹⁶³ See *People v. Graham*, 57 A.D.2d 478, 482, 394 N.Y.S.2d 982, 986 (App. Div. 4th Dep’t 1977).

¹⁶⁴ Note, *The Proposed Penal Law of New York*, 64 COLUM. L. REV. 1469, 1469 n.4 (1964).

¹⁶⁵ *Id.*

¹⁶⁶ *Majewski v. Broadalbin-Perth Cent. Sch. Dist.*, 91 N.Y.2d 577, 583, 696 N.E.2d 978, 980, 673 N.Y.S.2d 966, 968 (1998).

justice and effect the objects of the law.”¹⁶⁷ This controlling provision has been interpreted as “authoriz[ing] a court to dispense with hyper-technical or strained interpretations of [a] statute. . . . Thus, conduct that falls within the plain, natural meaning of the language of a Penal Law provision may be punished as criminal.”¹⁶⁸

In its 2006 foundational decision in *People v. Garson*,¹⁶⁹ the Court of Appeals upheld the application of section 200.25 as valid. At issue was a challenge to a six-count indictment of a state supreme court judge for receiving a reward for official misconduct in the second degree.¹⁷⁰ One count stemmed from violating the bar on *ex parte* communications and five counts were based on client referrals made by the judge, coupled with the acceptance of cigars.¹⁷¹ The court held that the lack of definition of duty was hardly fatal to the law:

The Legislature’s decision not to further define the duty element is understandable given the hundreds of different types of public officials and employees whose misconduct was intended to be covered under the statute. The duty of a Department of Motor Vehicles clerk is not the same as that of a Health Department inspector or, for that matter, a judge. It would therefore have been difficult if not impossible for the Legislature to construct a definition of “duty” that would have encompassed all the derelictions of duty it sought to proscribe.¹⁷²

The *Garson* opinion distinguished the holding of a 1979 Court of Appeals decision by drawing a line between “ethical improprieties” and “tangible duties.”¹⁷³ The issue in *People v. La Carrubba*¹⁷⁴ involved a Suffolk County District Court judge who was indicted for official misconduct under section one hundred ninety-five of the Penal Law: “knowingly refrain[ing] from performing a duty which is imposed upon him by law or is clearly inherent in the

¹⁶⁷ PENAL LAW § 5.00.

¹⁶⁸ *People v. Ditta*, 52 N.Y.2d 657, 660 422 N.E.2d 515, 517, 439 N.Y.S.2d 855, 857 (1981) (citing *People v. Abeel*, 182 N.Y. 415, 420, 75 N.E. 307, 309 (1905)).

¹⁶⁹ *People v. Garson*, 6 N.Y.3d 604, 848 N.E.2d 1264, 815 N.Y.S.2d 887 (2006).

¹⁷⁰ *Id.* at 606, 848 N.E.2d at 1265, 815 N.Y.S.2d at 888.

¹⁷¹ *Id.* at 610, 848 N.E.2d at 1267–68, 815 N.Y.2d at 891 (citing violations of judicial duties located at N.Y. COMP. CODES R. & REGS. tit. 22, § 100.3(B)(6) (2012) (“A judge shall not initiate, permit, or consider *ex parte* communications.”) and *id.* § 100.2(C) (“A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others.”)).

¹⁷² *Garson*, 6 N.Y.2d at 612, 848 N.E.2d at 1269, 815 N.Y.S.2d at 892.

¹⁷³ *Id.* at 618, 848 N.E.2d at 1273, 815 N.Y.S.2d at 896 (quoting *People v. La Carrubba*, 46 N.Y.2d 658, 664, 389 N.E.2d 799, 802, 416 N.Y.S.2d 203, 206 (1979)).

¹⁷⁴ *La Carrubba*, 46 N.Y.2d 658, 389 N.E.2d 799, 416 N.Y.S.2d 203.

nature of his office.”¹⁷⁵ The indictment charged that the judge failed to perform duties under the canons of judicial ethics by dismissing a friend’s traffic ticket.¹⁷⁶ The court dismissed the indictment because the canons of judicial ethics, rules promulgated by the American and New York Bar Associations, were not incorporated or adopted by the legislature.¹⁷⁷ Even if the Second Department incorporated the rules, “neither the bar associations nor the Appellate Division is empowered to discharge the legislative responsibility to define the elements of a crime.”¹⁷⁸

The different outcomes in *Garson* and *La Carrubba* are due to the source of the duties, the rules of judicial conduct, which are embodied in the state administrative code, and the code of judicial conduct, which are propounded by private associations, even if adopted by appellate divisions.¹⁷⁹ The administrative rules relevant to judges are promulgated under the state constitution: “[j]udges and justices of the courts . . . shall also be subject to such rules of conduct as may be promulgated by the chief administrator of the courts with the approval of the court of appeals.”¹⁸⁰ The code is framed in encouraging and suggestive terms.¹⁸¹ In addition, *La Carrubba* involved a prosecution which was “a vehicle to pursue claims of ‘ethical improprieties.’”¹⁸² Alternatively, *Garson* rested on a violation of a legal duty and the acceptance of a benefit.¹⁸³ The *Garson* opinion distinguished between duties codified in law, which are “tangible,” and not merely “ethical duties” adopted elsewhere.¹⁸⁴ Similarly, the Code of Ethics contains tangible duties that are codified in law.¹⁸⁵

¹⁷⁵ *Id.* at 661, 389 N.E.2d at 800, 416 N.Y.S.2d at 204 (quoting N.Y. PENAL LAW § 195.00(2) (McKinney 2012)).

¹⁷⁶ *Id.* at 668–73, 389 N.E.2d at 805–08, 416 N.Y.S.2d at 209–12 (quoting the canons in full in an appendix, “A Judge Should Avoid Impropriety and the Appearance of Impropriety in All His Activities” and “A Judge Should Perform the Duties of His Office Impartially and Diligently”).

¹⁷⁷ *Id.* at 665, 389 N.E.2d at 803, 416 N.Y.S.2d at 207.

¹⁷⁸ *Id.* at 663, 389 N.E.2d at 802, 416 N.Y.S.2d at 206. The court also cited the state constitution and the Judiciary Law as express delegations of the enforcement of judicial ethics. *Id.* (citing N.Y. CONST. art. VI, § 22; N.Y. JUD. LAW §§ 40–48 (McKinney 2012)).

¹⁷⁹ *People v. Garson*, 6 N.Y.3d 604, 616, 848 N.E.2d 1264, 1271–72, 815 N.Y.S.2d 887, 895 (2006).

¹⁸⁰ *Id.* at 616, 848 N.E.2d at 1272, 815 N.Y.S.2d at 895 (quoting N.Y. CONST. art VI, § 20(b)(4)). The decision cites N.Y. CONST. art VI, § 20(b), but the section was amended after the decision in 2001. *See* N.Y. CONST. art VI, § 20(b).

¹⁸¹ *Id.*

¹⁸² *Id.* at 618, 848 N.E.2d at 1273, 815 N.Y.S.2d at 896.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *See* N.Y. PUB. OFF. LAW § 74 (McKinney 2012).

*D. Pre-Skilling Honest Services Fraud and New York Receiving
Reward for Official Miscount Contrasted*

There are textual differences between federal honest services fraud and New York's section 200.25, which, of course, yield different recipes for the respective crimes. Federal honest services fraud is elliptical in its declaration that a "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.¹⁸⁶ The statute at once creates a duty, "intangible right of honest services," and punishes breaches of that duty by incorporating the term into the definition of "scheme or artifice to defraud" in the mail and wire fraud statutes.¹⁸⁷ This intangible right was and is not defined by Congress; federal prosecutors interpreted the phrase as a general duty of loyalty.¹⁸⁸ Section 200.25, in contrast, does not presume a duty element. It punishes violations of a "duty as a public servant,"¹⁸⁹ wherever such duties may lie in law. Thus, the federal law takes a general, one-size-fits-all approach, and the state law is simultaneously specific and yet quite flexible because the precise duties exist in other areas of law relevant to specific classes of public servants.¹⁹⁰

Another key difference between the federal and state statutes is the inclusion of the term "any benefit"¹⁹¹ in the latter. Prior to the *Skilling* decision, the omission of the benefit element in federal law allowed prosecutors to pursue claims of undisclosed self-dealing, even without a benefit accruing to the accused.¹⁹²

Section 200.25 is not violated unless there is a benefit for a public servant.¹⁹³ Therefore, section 200.25 could not be applied to the mode of undisclosed self-dealing that the government pursued

¹⁸⁶ 18 U.S.C. § 1346 (2006).

¹⁸⁷ *Id.* §§ 1341, 1343, 1346.

¹⁸⁸ See Brief for the United States, *Weyhrauch v. United States*, No. 08-1196, 2009 WL 3495337 at *44-46 (U.S. Oct. 29, 2009).

¹⁸⁹ N.Y. PENAL LAW § 200.25 (McKinney 2012).

¹⁹⁰ See, e.g., *People v. Garson*, 6 N.Y.3d 604, 618, 848 N.E.2d 1264, 1273-74, 815 N.Y.S.2d 887, 897 (2006) (upholding the indictment of a judge under section 200.25 for a violation of duties contained in administrative law).

¹⁹¹ PENAL LAW § 200.25; see *People v. Blumenthal*, 55 A.D.2d 13, 15, 389 N.Y.S.2d 579, 580-81 (App. Div. 1st Dep't 1976) (dismissing an indictment against the former state Assembly deputy minority leader because there was no benefit and it was doubtful that he had power to achieve the corrupt result of the charge).

¹⁹² See, e.g., *Weyhrauch I*, 548 F.3d 1237, 1239 (2008), *vacated per curiam*, 130 S. Ct. 2971 (2010), *motion to dismiss granted* by 3:07-cr-056-JWS-JDR, 2011 U.S. Dist. LEXIS 27827 (D. Ala. Mar. 15, 2011).

¹⁹³ See, e.g., *Garson*, 6 N.Y.3d at 618, 848 N.E.2d at 1273, 815 N.Y.S.2d at 896 (2006) (noting that a benefit is a crucial element to the crime).

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against the defendant in *Weyhrauch* and its antecedents. Both statutes are similar in one regard: each has a specific intent element.¹⁹⁴ The honest services element is incorporated into “scheme or artifice to defraud,”¹⁹⁵ which must involve false statements or omissions for the purpose of deception.¹⁹⁶ Similarly, section 200.25 requires a benefit “for having violated [a] duty as a public servant.”¹⁹⁷ Unlike bribery statutes, an agreement or understanding is not an element.¹⁹⁸

Therefore, a state public servant could receive a reward for official misconduct *acting alone* and without the criminal intent of the party conveying the benefit. The lack of an agreement or understanding element in section 200.25 obviates the requirement for prosecutors to prove criminal intent by the conveyor of a benefit. Mere acceptance (or solicitation) of the benefit is the entirety of the element.¹⁹⁹ The specific intent element requires the benefit to be related to the violation of a duty.²⁰⁰ This falls short of bribery’s *quid pro quo*.

IV. NEW YORK HONEST SERVICES APPLIED TO STATE PUBLIC SERVANTS

A. *N.Y. Penal Law Section 200.25 and the Public Officer’s Law Code of Ethics Harmonized*

Prosecutions of an officer or employees of a state agency, a member of the legislature, or legislative employee²⁰¹ based on section 200.25 are not farfetched. A possible violation would result from outside employment by a member of the State Assembly or Senate that violates the Code of Ethics. Unlike Congress, the state legislature is considered part-time employment; members are allowed to have unlimited non-state income.²⁰² The relevant duties

¹⁹⁴ See Brief for the United States, *supra* note 63, at 44–49 (discussing intent to deceive as an element of Section 1346); PENAL LAW § 200.25.

¹⁹⁵ 18 U.S.C. § 1346 (2006).

¹⁹⁶ See Brief for the United States, *supra* note 63, at 46–47.

¹⁹⁷ PENAL LAW § 200.25.

¹⁹⁸ See, e.g., *id.* § 200.10 (requiring “an agreement or understanding that [a] vote, opinion, judgment, action, decision or exercise of discretion as a public servant will thereby be influenced”).

¹⁹⁹ See *id.* § 200.25.

²⁰⁰ *Id.*

²⁰¹ See N.Y. PUB. OFF. LAW § 74 (McKinney 2012).

²⁰² See 5 U.S.C.A. app. 4 § 501(a)(1) (limiting outside earned income to fifteen percent of the pay for level II of the executive schedule, \$26,955 in 2010 based on a pay rate of \$179,700 in 2010). The recently enacted ethics law created six categories of value related to income,

that may be violated in the case of outside employment are Dewey's basic tenet,²⁰³ the prohibitions against securing "unwarranted privileges,"²⁰⁴ and any transactions where there is a "direct or indirect financial interest."²⁰⁵ Albany's "decade of corruption" offers several examples.²⁰⁶

In such cases, the benefit arrives as purported *bona fide* income for a state public officer, which follows an act that is a violation of a duty conducted within the scope of the public official's outside employment.²⁰⁷ This would likely occur when the outside employment involves acts or transactions with those who have business before the state, as lobbyists, clients of lobbyists, or recipients of state aid or a grant. To reiterate, the intent of the payer of the compensation may be irrelevant because he or she may believe that the state public servant is performing legitimate services.

The key elements in the "basic tenet" are first, a "professional activity" and, second "in *substantial* conflict with the proper discharge of [] duties in the public interest."²⁰⁸ This sets a relatively high bar for the nature of the conflict because it is qualified by the term "substantial," which is defined as "significantly great."²⁰⁹ For example, state legislator L receives income from an outside employer and L's duties involve acts with persons or entities that have business or interests before the state or even before L. A substantial conflict of interest would result if L has the authority of

which ends at least \$10 million. N.Y. PUB. OFF. LAW § 73-a(3). Governor Cuomo incorrectly claims that the constitution dictates that the state legislature is part time. See *Ethics Reform Message*, Governor Andrew M. Cuomo (May 10, 2011), http://www.livestream.com/newyorkstateofficeofthegovernor/video?clipId=pla_fa54200c-0f8d-49cf-acd8-969dbc6932a7 ("Our state legislature is by our constitution, a part-time legislature."). The state constitution does not address the length of the legislative session and is silent on the employment status of legislators. See N.Y. CONST. art. XIII, § 4 ("The political year and legislative term shall begin on the first day of January."). The length of the legislative session, which usually ends in late June, is dictated by custom. Section seventy-three of the Public Officers Law regulates the business and professional activities of state public servants, but is similarly silent. N.Y. PUB. OFF. LAW § 73. However, in New York all sources of income of state public servants are required to be reported on annual statements of financial disclosure. See *id.* § 73-a(3). The reporting requirements did not stop the then-Senate Majority Leader from masking the true source of consulting income by, first reporting consulting income from an entity that did not exist, and then creating a shell corporation to receive income from another employer. See *United States v. Bruno*, No. 09-CR-29, 2009 WL 153814 at *1 (N.D.N.Y. Jan. 23, 2009).

²⁰³ See N.Y. PUB. OFF. LAW § 74(2) (McKinney 2012).

²⁰⁴ *Id.* § 74(3)(d).

²⁰⁵ *Id.* § 74(3)(e).

²⁰⁶ See *supra* Part II.

²⁰⁷ See *supra* Part III.C.

²⁰⁸ N.Y. PUB. OFF. LAW § 74(2) (emphasis added).

²⁰⁹ MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1245 (11th ed. 2005).

power to influence decisions that are beneficial to the outside employer or if L's income were dependent in any degree upon acts with those who have business before the state.

The definition of a "privilege" is "a right . . . granted as a peculiar benefit, advantage, or favor."²¹⁰ Therefore, an "unwarranted privilege" is a privilege that a state public servant would not be entitled to *but for* his or her position. The simple test to distinguish between a warranted and unwarranted privilege is if a state public servant would receive different treatment than an average citizen in the same situation. In order to apply a criminal penalty to violations of this duty, the difference in treatment would likely need to be substantial or gross.²¹¹ The duty against securing unwarranted privileges has a broad application.²¹²

For example, state legislator L receives an income from an outside employer, who has direct or indirect business or interests before the state, for stated employment responsibilities. If the average citizen would receive income that is grossly less than L for the same responsibilities, then the state public servant's income is an unwarranted privilege.

The final duty noted above is similar to a "substantial conflict;" a derivative of a duty of loyalty violation or literal self-dealing, where one who stands on both sides of a transaction receives a benefit.²¹³ Here, a state public servant is barred from "engag[ing] in *any* transaction" in an official position with "*any* business entity in which [such state public servant] has a direct or indirect financial interest that might reasonably tend to conflict with the proper discharge of his official duties."²¹⁴

The definition of "transaction" is "[s]omething performed or

²¹⁰ *Id.* at 988.

²¹¹ For example, the difference between negligence where criminal penalties apply and vanilla tort negligence is "a *gross* deviation from the standard of care that a reasonable person would observe in the same situation." 35 N.Y. JUR. 2D *Criminal Law* § 31 (2010) (emphasis added).

²¹² SEE ANDREW LANZA, IN RE BOYLAND, NOTICE OF REASONABLE CAUSE, N.Y.S. LEGIS. ETHICS COMM'N. 1 (May 31, 2011) [hereinafter BOYLAND NOTICE], available at http://www.legethics.state.ny.us/Files/Public_Documents/NORCboyland.pdf (finding reasonable cause of an ethics violation by a member of the assembly for accepting consulting income from a hospital and taking official action to benefit the hospital); N.Y. Ethics Comm'n., Advisory Op. 00-1, 2000 WL 33965661 at *1 (Feb. 3, 2000) (advising a state commissioner that he is barred from representing private clients where proceedings involve agencies that appear before him); N.Y. Ethics Comm'n., Advisory Op. 95-39, 1995 WL 836337 at *1 (Dec. 19, 1995) (advising a state agency employee to recuse herself from serving in a disciplinary capacity over matters arising from an entity where her spouse is a senior employee).

²¹³ See N.Y. JUR. 2D *Agency* § 218 (2008).

²¹⁴ PUB. OFF. LAW § 74(3)(e) (emphasis added).

carried out” or “[a]ny activity involving two or more persons.”²¹⁵

As in the first example, state legislator L’s outside employment may depend on transactions with persons or entities that have business or interests before the state or L. In this case, L’s financial interest would be indirect because the outside income is independent of the performance of these outside employment duties. In all of these scenarios, whether L is acting in the interests of the state, or himself or herself in exchange for outside income is wholly unclear.

*B. Federal Prosecutions that Reveal Violations of N.Y. Penal Law
Section 200.25*

The various federal indictments of former and even current legislators offer a *smörgåsbord* of alleged violations of the Code of Ethics that are combined with benefits, in some cases measuring in the hundreds of thousands of dollars. Most of the violations are for outside employment in the face of obvious, substantial conflicts of interest. In other cases, there is evidence of bribery resulting in acceptance of unwarranted privileges.

1. Joe Bruno: Charged Conflicts of Interest and Unwarranted Privileges for a Senate Majority Leader

A jury found Joe Bruno guilty of two counts of honest services fraud for receiving \$360,000 in consulting fees from companies controlled by Jared Abbruzzese, an Albany-area businessman.²¹⁶ No verdict was reached on another count involving approximately \$468,000 in consulting payments from companies controlled by Westchester businessman Leonard Fassler and an interest Bruno held in one of the companies.²¹⁷

The indictment alleged that the payments to Bruno were inconsistent with his responsibilities, and he “did not perform legitimate work commensurate with the payments from . . . Abbruzzese through the Abbruzzese Companies and, as a result, the payments were, in whole or in part, gifts.”²¹⁸ The indictment claims the same for payments from Fassler.²¹⁹ The indictment further

²¹⁵ BLACK’S LAW DICTIONARY 1535 (8th ed. 2004).

²¹⁶ Indictment, *supra* note 36, ¶ 50; Lyons, *supra* note 37.

²¹⁷ Lyons, *supra* note 37.

²¹⁸ Indictment, *supra* note 36, ¶ 51.

²¹⁹ *Id.* ¶ 44.

alleged that Abbruzzese paid Bruno \$80,000, half in cash, half in debt forgiveness for a worthless horse. All the while, Abbruzzese and Fassler, and other companies or entities they each controlled or were pursuing a financial interest in, were “pursuing interests requiring official action by New York State officials including defendant . . . Bruno.”²²⁰ In addition, Fassler and Bruno held an ownership interest in a company with state contracts.²²¹

These charged acts detail alleged violations of both the “substantial conflict”²²² and “unwarranted privileges”²²³ provisions of the Code of Ethics. The test, as explained above, is whether a public servant would receive grossly higher compensation than the average citizen for the same responsibilities, whatever those responsibilities may—*or may not*—have been.²²⁴ In this case, the answer is likely in the negative.

The indictment also alleges that “the payments from the Fassler [and] Abbruzzese . . . Companies to defendant . . . Bruno gave [them] greater access to the Senate Majority Leader than was available to other citizens of the State of New York.”²²⁵ If those financial interests Abbruzzese pursued from the state involved action or discretion by Bruno, such decisions would place him well within a “substantial conflict with the proper discharge of his duties in the public interest.”²²⁶ The consulting income received after the violation of any of these duties is a benefit for the purposes of section 200.25.²²⁷ Here, all of the conflicts are heightened because the legislator in question was the Senate Majority Leader, a position that wields significant power among public officials at the highest level of state government.²²⁸

2. Former Senator Hiram Monserrate: Notice of Reasonable Cause Reveals Possible Code Violations

That in over thirty-five combined years of its existence the Legislative Ethics Commission and its predecessor entity took only

²²⁰ *Id.* ¶¶ 45, 53.

²²¹ *Id.* ¶¶ 46–47.

²²² N.Y. PUB. OFF. LAW § 74(2) (McKinney 2012).

²²³ *Id.* § 74(3)(d).

²²⁴ 35 N.Y. JUR. 2D *Criminal Law* § 31 (2010).

²²⁵ Indictment, *supra* note 36, ¶ 58.

²²⁶ PUB. OFF. LAW § 74(2).

²²⁷ N.Y. PENAL LAW § 200.25 (McKinney 2012).

²²⁸ See CREELAN & MOULTON, *supra* note 1, at vii–xiv (describing the influence and control the majority leader has over specific lawmaking activities within the senate).

two enforcement actions is likely an anticlimactic statement.²²⁹ The only two notices of reasonable cause²³⁰ issued recently by the commission are against former Senator Monserrate for a legal defense fund that he controlled²³¹ and Assemblyman Boyland for multiple violations of the Code of Ethics and false statements made on his annual financial disclosure.²³² Monserrate presumably established the trust fund to defray the costs of his assault trial.²³³ The commission discovered that the fund was established as a revocable living trust with Monserrate as trustee.²³⁴ The fund received total contributions of \$128,945, including a portion from Monserrate's direct solicitation of registered lobbyists and their clients "or those otherwise interested in [his] position as a State Senator."²³⁵

The commission concluded that the contributions amounted to an illegal gift in violation of section 73 of the Public Officers Law, but not a violation of the Code of Ethics.²³⁶ Oddly, the commission did not find that the solicitation or receipt of contributions from those who have interests or business before the senate constituted a conflict of interest.²³⁷

²²⁹ See generally Casey Hynes & Sarah Clyne Sundberg, *Little Bite in Ethics Rules*, TIMES UNION (Albany, N.Y.), Dec. 30, 2007, at A5 (noting that changes in the ethics structure did not yield additional financial disclosure related to conflicts of interest); Irene Jay Liu, *Ethics Panel Works in Secret*, TIMES UNION (Albany, N.Y.), May 11, 2008, at A1 (explaining that despite claims of independence by legislators, the entity that oversees the legislature is hardly so).

²³⁰ The commission sends such notices "when [it] determines that there is reasonable cause to believe a violation [of sections seventy-three, seventy three-a or seventy-four of the Public Officers Law] has occurred." N.Y. LEGISLATIVE ETHICS COMM'N, IN THE MATTER OF HIRAM MONSERRATE, FORMER NEW YORK STATE SENATOR: NOTICE OF REASONABLE CAUSE 2 (2010) [hereinafter MONSERRATE NOTICE], available at http://www.legethics.state.ny.us/Files/Public_Documents/FINAL%20NORC.pdf (citing N.Y. LEGIS. LAW § 80(10)(b) (McKinney 2012)). "Reasonable cause" is significantly lesser than the criminal standard of beyond a reasonable doubt. See, e.g., N.Y. CRIM. PROC. LAW § 70.10(2) (McKinney 2012).

²³¹ See MONSERRATE NOTICE, *supra* note 230, at 1, 4. The control of a trust for legal defense or any other purpose should be irrelevant. If any benefit accrues to a public servant it is a gift, which is the reasoning of the commission in the case of Monserrate. See *id.* If legal defense fund as *irrevocable* trusts are acceptable to the commission, would funds established for the college education for the children of legislators be similarly acceptable? What about for my transportation in a Rolls Royce between a legislator's district and Albany?

²³² See BOYLAND NOTICE, *supra* note 212.

²³³ See Jeremy W. Peters, *Indicted Senator May Get Help*, N.Y. TIMES, Mar. 27, 2009, at A24.

²³⁴ MONSERRATE NOTICE, *supra* note 230, at 3. Interestingly, the commission did not disclose the name of the trustee. See *id.*

²³⁵ *Id.* at 4.

²³⁶ *Id.* (citing N.Y. PUB. OFF. LAW § 73(5) (McKinney 2012)).

²³⁷ MONSERRATE NOTICE, *supra* note 230, at 4. But see BOYLAND NOTICE, *supra* note 212, at 1, 3 (finding violations for conduct involving outside income and official similar acts).

The alleged acts recited by the commission, if true, reveal clear violations of the general principle of the code: “engag[ing] in [a] . . . transaction . . . which is in substantial conflict with the proper discharge of his duties in the public interest.”²³⁸ According to the commission’s findings, Monserrate himself made solicitations. In addition, the receipt of funds for the trust is an unwarranted privilege because some sources—the “individuals and entities that lobbied the senate or had business interests in . . . Monserrate’s work as a member of the senate”²³⁹—would have treated an average citizen far differently. Presumably the only reason some sources contributed was because of Monserrate’s official position. If the funds of the trust were used by Monserrate to pay legal fees or for any other private purpose, their receipt would be an impermissible benefit for the purposes of section 200.25.²⁴⁰

3. Former Senator Vincent Leibell: Conflicts and Unwarranted Privileges Related to \$43,000 in Unreported “Consulting” Income

The information that resulted in Vincent Leibell’s guilty plea and government filings since raised as many questions as the filings answered.²⁴¹ According to the information, Leibell received more than \$43,000 in consulting fees from two attorneys and a law firm that was not reported on his federal income tax return.²⁴² Leibell steered millions of dollars to a non-profit that developed and funded senior housing in his district.²⁴³ The information alleges that Leibell demanded half of the fees for legal services billed to the non-profit from another attorney.²⁴⁴ In addition, since the plea agreement, prosecutors disclosed that Leibell received discounted services from contractors who were awarded projects from the non-profit.²⁴⁵ Leibell was charged \$5,000 for services “valued at many times the amount [he] actually paid.”²⁴⁶

At the very least, a demand of an apparent kickback is an unwarranted privilege. Leibell’s income was because of his official

²³⁸ PUB. OFF LAW § 74(2).

²³⁹ MONSERRATE NOTICE, *supra* note 230, at 4.

²⁴⁰ N.Y. PENAL LAW § 200.25 (McKinney 2012).

²⁴¹ See *United States v. Leibell*, CR 10-1198 (S.D.N.Y. Dec. 6, 2010), available at <http://www.scribd.com/doc/44766604/Leibell-Vincent-Information>.

²⁴² *Id.* at 6.

²⁴³ *Id.* at 1–2.

²⁴⁴ *Id.* at 2–3.

²⁴⁵ Government’s Sentencing Memorandum at 12, *United States v. Leibell*, CR 10-1198 (S.D.N.Y. Apr. 14, 2011) (on file with author).

²⁴⁶ *Id.*

position. The revelation of the possible discounted services received by Leibell raises similar issues. Furthermore, Leibell's decision to steer money to a non-profit, a portion of which he demanded, constitutes a substantial conflict of interest; the discharge of his duties in the public interest was far from proper. Once again, the \$43,000 in this case constitutes a benefit, providing the necessary element to satisfy section 200.25.²⁴⁷

4. Senator Carl Kruger and Assemblyman William Boyland, Jr.: The First Post-Skilling Honest Services Fraud Indictment, More Conflicts of Interest and Unwarranted Privileges²⁴⁸

The most recently alleged corrupt shoes to drop were those of current state Senator Carl Kruger and state Assemblyman William Boyland, Jr.²⁴⁹ Kruger pleaded guilty after an incitement alleged that he had accepted "a stream of bribes totaling at least \$1 million in exchange for taking official actions on behalf of the bribe payers as opportunities arose."²⁵⁰ Kruger allegedly shared fees paid to a lobbyist to take official action on behalf of the lobbyist's clients, and in one case was paid directly by a client.²⁵¹

The senator also allegedly directed payments through an intermediary in exchange for official action.²⁵² For example, one lobbyist was retained to lobby the legislature to permit grocery stores to sell wine, the so-called wine in grocery stores bill.²⁵³ Subsequently, Kruger co-sponsored a bill to do just that, and issued a public statement favorable to his legislation.²⁵⁴

Boyland, who was acquitted by a jury, was accused of similar behavior, receiving consulting payments "perform[ing] little, if any, actual consulting services, but rather [taking] official actions in exchange for receiving the sham consulting payments."²⁵⁵ The

²⁴⁷ N.Y. PENAL LAW § 200.25 (McKinney 2012).

²⁴⁸ At the time of this writing, William Boyland, Jr. remains an Assemblyman representing the 55th district in Kings County. In December 2011, Carl Kruger resigned from his position as State Senator for the 27th district, Kings County, and pleaded guilty to accepting bribes. William K. Rashbaum, *After Resigning, a Tearful Senator Pleads Guilty to Accepting Bribes*, N.Y. TIMES, Dec. 21, 2011, at A30. A special election was held in March 2012 to fill Kruger's former seat through the end of 2012, at which point legislative redistricting will eliminate the district. See *Brooklyn Vote for State Senate Vacancy*, N.Y. TIMES, Mar. 20, 2012, at A25.

²⁴⁹ *United States v. Kruger*, CR 11-648 at 1-6, 11-12 (S.D.N.Y. 2011).

²⁵⁰ *Id.* at 9; *Ex-State Senator is Sentenced to 7 Years*, *supra* note 41.

²⁵¹ *Kruger*, CR 11-648, at 9.

²⁵² *Id.*

²⁵³ *Id.* 16-17.

²⁵⁴ *Id.* at 17.

²⁵⁵ *Id.* at 9.

Legislative Ethics Commission concluded that Boyland violated several duties of the code, including the substantial conflict and unwarranted privileges provisions.²⁵⁶

The indictment detailed overwhelming evidence against Kruger, including information gathered from cell phones by wiretap and oral communications by bug.²⁵⁷ The overt acts alleged in the indictment present a viable post-*Skilling* honest services fraud prosecution, allegations of bribes and kickbacks rather than undisclosed conflicts of interest without benefits.²⁵⁸ Similarly, these alleged overt acts would present a best-case scenario under state law.²⁵⁹ In addition to the alleged *quid pro quo*, there may be compatible violations of the code. No explanation is necessary how a bribe results in a substantial conflict or unwarranted privilege—*res ipsa loquitur*.

C. Possible Barriers to Prosecution Under Receiving Reward for Official Misconduct

There are at least two defensive claims that would be raised against prosecutions of state public servants based on section 200.25. The first involves possible ambiguities of duties in the Code of Ethics as elements and the application of the rule of lenity.²⁶⁰ The second issue involves the state protections against follow up prosecutions against previous federal defendants, which provisions are similar to double jeopardy.²⁶¹

1. Key Provisions of the Code Are Not Unconstitutionally Vague and the Rule of Lenity Does Not Apply

The general rule is that “[a] statute is unconstitutionally vague when it does not give ‘fair notice to those to whom [it] is directed’

²⁵⁶ See BOYLAND NOTICE, *supra* note 212, at 4; *Jury Acquits Assemblyman of Conspiring to Take Bribes*, *supra* note 41.

²⁵⁷ See *Kruger*, CR 11-648, at 6.

²⁵⁸ See *Skilling v. United States*, 130 S. Ct. 2896, 2931 (2010) (narrowing the scope of section 1346 to include only bribes and kickbacks).

²⁵⁹ See N.Y. PENAL LAW § 200.11 (McKinney 2012). However, the state double jeopardy bar prevents state prosecutors for indicting for the *same* offense. See *infra* Part III.C.2.

²⁶⁰ See *Bell v. United States*, 349 U.S. 81, 83 (1955) (holding ambiguities in criminal statutes enacted by Congress “should be resolved in favor of lenity”); *People v. Green*, 68 N.Y.2d 151, 153, 497 N.E.2d 665, 666, 506 N.Y.S.2d 298, 299 (1986) (quoting *People v. Jackson*, 106 A.D.2d 93, 96, 484 N.Y.2d 725, 729 (App. Div. 2d Dep’t 1984)).

²⁶¹ See, e.g., N.Y. CRIM. PROC. LAW §§ 40.10–40.50 (McKinney 2012) (creating a general bar, as well as exceptions to the bar, against second prosecutions when a defendant is previously prosecuted).

that their behavior may subject them to criminal prosecution.”²⁶² The Court of Appeals adopted the Supreme Court’s two-part test to determine if a statute should be struck down as unconstitutionally vague.²⁶³ First, the statute must be sufficiently definite “to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute.”²⁶⁴ Next, a statute “must provide explicit standards for those who apply them’ so as to avoid ‘resolution on an *ad hoc* and subjective basis,’ with the attendant dangers of arbitrary and discriminatory application.”²⁶⁵ This arises out of a concern surrounding overbroad application of the statute law enforcement and juries²⁶⁶ especially when an ambiguous statute is enforced by police²⁶⁷ or wielded against “the poor or unpopular on a whim.”²⁶⁸

In addition, the rule of lenity affords a complimentary principle to resolve the meaning of a statute that may fall short of invalidation, but where more than one interpretation is possible. “[W]hile the substantive power to prescribe the punishment for a criminal offense is exclusively legislative . . . and, if two constructions of a criminal statute are plausible, the one more favorable to the defendant should be adopted in accordance with the rule of lenity”²⁶⁹ The question in resolving ambiguities, as is the case in statutory construction generally, is the legislative intent.²⁷⁰ The Supreme Court applied this rule in *Skilling*, rejecting the government’s broad interpretation of federal honest services fraud.²⁷¹

The advantage in interpreting the receiving reward for official

²⁶² *People v. Garson*, 6 N.Y.3d 604, 631, 848 N.E.2d 1264, 1282, 815 N.Y.S.2d 887, 905 (2006) (Smith, J., dissenting in part) (second alteration in original) (quoting *Am. Commc’ns Assoc. v. Douds*, 339 U.S. 382, 412 (1950)).

²⁶³ *People v. Smith*, 44 N.Y.2d 613, 618, 378 N.E.2d 1032, 1034, 407 N.Y.S.2d 462, 465 (1978).

²⁶⁴ *Id.* (quoting *United States v. Harriss*, 347 U.S. 612, 617 (1954)).

²⁶⁵ *Smith*, 44 N.Y.2d at 613, 378 N.E.2d at 1034, 407 N.Y.S.2d at 465 (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972)).

²⁶⁶ *People v. Nelson*, 69 N.Y.2d 302, 307, 506 N.E.2d 907, 909, 514 N.Y.S.2d 197, 199 (1987).

²⁶⁷ *People v. Stuart*, 100 N.Y.2d 412, 420–21, 797 N.E.2d 28, 34–35, 765 N.Y.S.2d 1, 8–9 (2003) (“If a statute is so vague that a potential offender cannot tell what conduct is against the law, neither can a police officer.”).

²⁶⁸ *Nelson*, 69 N.Y.2d at 307, 506 N.E.2d at 909, 514 N.Y.S.2d at 199.

²⁶⁹ *People v. Green*, 68 N.Y.2d 151, 153, 497 N.E.2d 665, 666, 506 N.Y.S.2d 298, 299 (1986) (quoting *People v. Jackson*, 106 A.D.2d 93, 96, 506 N.Y.S.2d 298, 729 (App. Div. 2d Dep’t 1984)).

²⁷⁰ *Green*, 68 N.Y.2d at 153, 497 N.E.2d at 666, 506 N.Y.S.2d at 299 (quoting *Jackson*, 106 A.D.2d at 96, 506 N.Y.S.2d at 729).

²⁷¹ *Skilling v. United States*, 130 S. Ct. 2896, 2905–06 (2010).

misconduct statute is that *Garson* is a recent case *directly* on point.²⁷² The Court of Appeals upheld five counts based on a violation of an administrative rule²⁷³ that read: “A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others.”²⁷⁴ The provisions of the Code of Ethics discussed above are no less specific.²⁷⁵ The court considered, and rejected, the notion that its holding would lead to “‘unreasonable or absurd’ application of the law”²⁷⁶ or “‘produce absurd and fundamentally unfair results.’”²⁷⁷ The *sine qua non* of the *Garson* opinion may be: “The law binds all men equally, the Judges no less than the judged.”²⁷⁸ Similarly, the law binds all men and women equally, including the very authors of those laws.²⁷⁹

Apart from their status as legislators, there is no question that members of the legislature have notice of their laws governing conflict of interests. Members of the legislature, like other state public servants, are required to file a certificate acknowledging receipt of ethics laws, including the Code of Ethics, and “that he [or she] has read the same and undertakes to conform to the provisions, purposes and intent thereof and to the norms of conduct for members, officers and employees of the legislature and state agencies.”²⁸⁰ A claim to the contrary would not be credible. In fact, there is authority to hold some public servants, e.g., judges, “to a higher standard of conduct than the public at large.”²⁸¹ Legislators should not be treated differently.

The second prong of the test for ambiguity is also satisfied. Section 200.25 is not applied arbitrarily to state public officers; it is presently not applied at all. Furthermore, members of the legislature are not a repressed or disadvantaged group in society. Finally, alleviating concerns about arbitrary enforcement by police, prosecutors—who are admittedly part of the law enforcement

²⁷² See *People v. Garson*, 6 N.Y.3d 604, 606, 848 N.E.2d 1264, 1265, 815 N.Y.S.2d 887, 888 (2006).

²⁷³ *Id.* at 611, 848 N.E.2d at 1268, 514 N.Y.S.2d at 891.

²⁷⁴ *Id.* at 625, 848 N.E.2d at 1278, 815 N.Y.S.2d at 901 (Smith, J., dissenting) (quoting N.Y. COMP. CODES R. & REG. tit. 22 §100.2 (2012)).

²⁷⁵ See *supra* Part II.B.1.b.

²⁷⁶ *Garson*, 6 N.Y.3d at 614, 848 N.E.2d at 1270, 815 N.Y.S.2d at 893 (quoting *Williams v. Williams*, 23 N.Y.2d 592, 599, 246 N.E.2d 333, 337, 298 N.Y.S.2d 473, 479 (1969)).

²⁷⁷ *Garson*, 6 N.Y.3d at 614, 848 N.E.2d at 1270, 815 N.Y.S.2d at 894.

²⁷⁸ *Id.* (quoting *Stern v. Morgenthau*, 62 N.Y.2d 331, 339, 465 N.E.2d 349, 352–35, 476 N.Y.S.2d 810, 813 (1984)).

²⁷⁹ *Garson*, 6 N.Y.3d at 614, 848 N.E.2d at 1270, 815 N.Y.S.2d at 894.

²⁸⁰ N.Y. PUB. OFF. LAW § 78 (McKinney 2012).

²⁸¹ *Garson*, 6 N.Y.3d at 614, 848 N.E.2d at 1271, 815 N.Y.S.2d at 894 (quoting *In re Mason*, 100 N.Y.2d 56, 60, 790 N.E.2d 769, 771, 760 N.Y.S.2d 394, 396 (2003)).

regime—typically enforce white-collar crime statutes following an investigation not as the result of whim.

If the statute is unambiguous, as in the case with section 200.25, then the rule of lenity does not apply. The elements and the words of the statute are clear. The key elements in the crime are the undefined violation of a duty and a benefit, the meanings of which are clear and well settled. The *Garson* court was not troubled by the lack of definition of a duty.²⁸² On the contrary, the court saw the wisdom of not doing so: “It would therefore have been difficult if not impossible for the Legislature to construct a definition of ‘duty’ that would have encompassed all the derelictions of duty it sought to proscribe.”²⁸³ The terms “substantial conflict” and “unwarranted privilege,” with the caveat that the result of the test articulated above would yield substantially different results for an average citizen, do not require interpretation; the words are unambiguous.²⁸⁴

Several states have a code of ethics with similar provisions.²⁸⁵

²⁸² *Garson*, 6 N.Y.3d at 612, 848 N.E.2d at 1269, 815 N.Y.S.2d at 892.

²⁸³ *Id.*

²⁸⁴ See *People v. Green*, 68 N.Y.2d 151, 153, 497 N.E.2d 665, 666, 506 N.Y.S.2d 298, 299 (1986) (citing *People v. Jackson*, 106 A.D.2d 93, 96, 506 N.Y.S.2d 298, 729 (App. Div. 2d Dep’t 1984)) (discussing that the legislative intent behind an ambiguous statute is always the “core question”); see also *Groener v. Or. Gov’t Ethics Comm’n*, 651 P.2d 736, 741–42 (Or. Ct. App. 1982) (discussing the implications of general or vague laws).

²⁸⁵ ALASKA STAT. § 39.52.120(a) (2010) (“A public officer may not use, or attempt to use, an official position for personal gain, and may not intentionally secure or grant unwarranted benefits or treatment for any person.”); ARK. CODE ANN. § 21-8-1002 (2004) (“No member of a state board or commission or board member of an entity receiving state funds shall use or attempt to use his or her official position to secure unwarranted privileges or exemptions for himself or herself or others.”); FLA. STAT. § 112.313(6) (2008) (“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.”); HAW. REV. STAT. § 84-13 (1996) (“No legislator or employee shall use or attempt to use the legislator’s or employee’s official position to secure or grant unwarranted privileges, exemptions, advantages, contracts, or treatment, for oneself or others.”); MASS. ANN. LAWS ch. 268A, § 23(b)(2)(ii) (LexisNexis 2010) (“No current officer or employee of a state, county or municipal agency shall knowingly, or with reason to know use or attempt to use such official position to secure for such officer, employee or others unwarranted privileges or exemptions which are of substantial value and which are not properly available to similarly situated individuals.”); NEV. REV. STAT. ANN. § 281A.400(2) (LexisNexis 2008) (“A public officer or employee shall not use the public officer’s or employee’s position in government to secure or grant unwarranted privileges, preferences, exemptions, or advantages for the public officer or employee, any business entity in which the public officer or employee has a significant pecuniary interest, or any person to whom the public officer or employee has a commitment in a private capacity to the interests of that person.”); OR. REV. STAT. § 244.040(1) (2012) (“[A] public official may not use or attempt to use official position or office to obtain financial gain or avoidance of financial detriment for the public official, a relative or member of the household of the public official, or any business with which the

Court decisions of two states, Florida and Oregon, show doubts about the constitutionality of general ethics provisions; however, New York law and court decisions are distinguishable. In addition, Massachusetts recently enacted criminal penalties for violations of its prohibition against unwarranted privileges slightly exceeding that of section 200.25.²⁸⁶

In 1978, the Florida Supreme Court dismissed an information based on a provision of the prior code that was unconstitutionally vague: “No officer or employee of a state agency, or of a county . . . shall use, or attempt to use, his official position to secure special privileges or exemptions for himself or others, except as may be otherwise provided by law.”²⁸⁷ There, the defendant, a county commissioner, was charged with using his position to secure a public road next to another’s property, thereby increasing the property’s value.²⁸⁸ The alleged benefit did *not* accrue to the public servant. The court held that the statute failed both parts of the vagueness test for criminal penalties.²⁸⁹ The court reasoned that locating roads was within the customary duties of the commissioner.²⁹⁰

The Florida legislature amended the statute to remove the criminal penalty and to include the term “corruptly,” i.e., “corruptly use or attempt to use.”²⁹¹ In addition, “corruptly” was defined as “done with a wrongful intent . . . 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.”²⁹² Thereafter a Florida appellate court upheld a civil penalty enforced against a city commissioner who used his position to gain a meeting with a member of Congress and to obtain removal of opponents’ political

public official or a relative or member of the household of the public official is associated, if the financial gain or avoidance of financial detriment would not otherwise be available but for the public official’s holding of the official position or office.”); 46 PA. STAT. ANN. § 143.4(3) (West 1969) (“No member shall [u]se or attempt to use his official position to secure unwarranted privileges or exemptions for himself or others.”).

²⁸⁶ 2009 Mass. Acts 615, § 84 (codified at MASS. GEN. LAWS ch. 268A, § 26 (West 2009)). The violation may be punished by up to five years in prison. *Id.* New York’s section 200.25 is punished by a class E felony, a sentence not exceeding four years. N.Y. PENAL LAW §§ 70.00(2)(e), 200.25 (McKinney 2010).

²⁸⁷ *State v. Rou*, 366 So. 2d 385, 385 (Fla. 1978) (quoting former FLA. STAT. § 112.313(6) (2008)).

²⁸⁸ *Rou*, 366 So. 2d at 385.

²⁸⁹ *Id.* Violation of the statute was punishable by misdemeanor. *See Tenney v. State*, 395 So.2d 1244, 1246 (Fla. Dist. Ct. App. 1981).

²⁹⁰ *See Rou*, 366 So. 2d at 385.

²⁹¹ FLA. STAT. § 112.313(6) (2008).

²⁹² FLA. STAT. § 112.312(9) (2009).

signs.²⁹³ In that case, the court held that removing the criminal penalty and adding “corruptly” cured the deficiency.²⁹⁴ Quoting the U.S. Supreme Court, the Florida court conceded: “There are areas of human conduct where, by the nature of the problems presented, legislatures simply cannot establish standards with great precision.”²⁹⁵ An Oregon appellate court reached a similar conclusion with an analogous statute²⁹⁶ and facts that are similar to examples in New York. A state senator, who was chair of the Labor Committee, received \$16,500 in consulting income from entities controlled by a businessman seeking contracts related to workers compensation.²⁹⁷ The court held that the former senator violated the statute, using “his office for personal financial gain by not making a clear and unequivocal distinction between his office and his private consulting service, and by using his official position to advance his consulting business.”²⁹⁸ Even if the penalties were civil in nature,²⁹⁹ the court opined, “the plain meaning of the words . . . as defined generally in dictionaries and otherwise defined specifically by [Oregon law], does not require ‘men of common intelligence [to] guess at [the] meaning.’”³⁰⁰

At the outset, the proposition advocating for enforcement of section 200.25 yields different concerns than the state cases noted above because it is punished by a criminal penalty, where due process protections are obligatory. Still, the texts of the duties owed are similar in all three states.³⁰¹ In *Garson*, which is explained above, the Court of Appeals upheld an indictment based on a duty containing elements that are absolutely and relatively more ambiguous than provisions of the New York code.³⁰² What exactly

²⁹³ See *Tenney*, 395 So. 2d at 1245. Florida punishes violations of the statute in question by public servants with one of more of a civil penalty of up to \$10,000, impeachment, suspension, censure or restitution. FLA. STAT. § 112.317(6).

²⁹⁴ *Tenney*, 395 So. 2d at 1246.

²⁹⁵ *Id.* (quoting *Smith v. Goguen*, 415 U.S. 566, 581 (1974)).

²⁹⁶ See OR. REV. STAT. § 244.040(1) (2012).

²⁹⁷ See *Groener v. Or. Gov't Ethics Comm'n*, 651 P.2d 736, 737–39 (Or. Ct. App. 1982).

²⁹⁸ *Id.* at 739.

²⁹⁹ See OR. REV. STAT. ANN. §§ 244.350, 244.360 (West 2012).

³⁰⁰ *Groener*, 651 P.2d at 742 (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)) (second and third alterations in original).

³⁰¹ Compare FLA. STAT. ANN. § 112.313(6) (West 2012) (prohibiting public officers, employees, and attorneys from using their official positions for corruption), and OR. REV. STAT. ANN. § 244.040(1) (prohibiting public officials from using their positions to secure financial gains), with N.Y. PUB. OFF. LAW § 74(2), (3)(d) (McKinney 2012) (directing public officers and employees to avoid transactions that involve conflicts of interest and prohibiting the same from using their positions to gain improper privileges).

³⁰² See *People v. Garson*, 6 N.Y.3d 604, 611, 848 N.E.2d 1264, 1268, 514 N.Y.S.2d 887, 891 (2006) (quoting N.Y. COMP. CODES R. & REGS. tit. 22, § 100.2(C) (2012)).

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constitutes “lend[ing] the prestige of judicial office?”³⁰³ What is the test for the specific intent “to advance the private interests of the judge or others[?]”³⁰⁴ The duties noted in the code are clear by comparison.

The facts of the 1978 Florida case are not applicable to New York because to fulfill an element of receiving reward, the benefit must be accepted by a public servant and not by a third party.³⁰⁵ And while the revisions to the Florida statute added specific intent of a corrupt purpose, section 200.25 already contains such an element. The legislative declaration of the New York Code of Ethics is to regulate corruption *via* conflicts of interest.³⁰⁶ When a state public servant accepts a benefit for violating a duty as a public servant such an act, by its very nature, is corrupt. The Oregon court’s interpretation of the statute—and the facts—are in line with New York, notwithstanding the civil penalty. The Oregon court applied common sense and looked to the plain, simple words of the statute.³⁰⁷ Oregon’s statute is a bar against unwarranted privileges, expressed in similar words.³⁰⁸

2. New York’s Bar Against Previous Prosecutions Does Not Apply to Federal Corruption Cases of State Legislators

The Supreme Court has held that a subsequent state trial where a defendant was acquitted in federal court does not violate the Due Process Clause.³⁰⁹ However, for more than a century New York bars a second prosecution if a defendant has been tried in another jurisdiction, whether by the federal government or another state, for the same conduct.³¹⁰ The protections against previous prosecutions

³⁰³ COMP. CODES R. & REGS. tit. 22, § 100.2(C).

³⁰⁴ *Id.*

³⁰⁵ See N.Y. PENAL LAW § 200.25 (McKinney 2012).

³⁰⁶ 1954 N.Y. Laws 1616.

³⁰⁷ *Groener v. Or. Gov’t Ethics Comm’n*, 651 P.2d 736, 742 (Or. Ct. App. 1982).

³⁰⁸ OR. REV. STAT. ANN. § 244.040(1) (West 2012).

³⁰⁹ See *Bartkus v. Illinois*, 359 U.S. 121, 132–33, 36 (1959).

³¹⁰ See N.Y. CRIM. PROC. LAW §§ 40.10–40.50 (McKinney 2012) (creating a general bar and exceptions against second prosecutions when a defendant was previously prosecuted); see also *People v. Abbamonte*, 43 N.Y.2d 74, 82, 371 N.E.2d 485, 488–89, 400 N.Y.S.2d 766, 769 (1977). The code provision was enacted in 1881. 1881 N.Y. Laws 601. The bar in the Penal Law was enacted in 1909. See 1909 N.Y. Laws 32–33. *Bartkus* was decided prior to the codification of the present-day state Criminal Procedure Law, which replaced the Code of Criminal Procedure. See 1970 N.Y. Laws 3117. The new chapter was adopted per the recommendations of the Commission on Revision of the Penal Law and Criminal Code. See N.Y. TEMP. COMM’N ON REVISION OF THE PENAL LAW & CRIMINAL CODE, PROPOSED NEW YORK CRIMINAL PROCEDURE LAW V–VII (1969). In the main, the difference between the prior law and code and current law are the exceptions to the general bar. See CRIM. PROC. LAW § 40.20.

attach upon a conviction, guilty plea, or, in the case of trial, when a jury is impaneled and sworn.³¹¹

Section 40.20 establishes a broad protection against previous prosecutions with eight specific exceptions: “A person may not be separately prosecuted for two offenses based upon the same act or criminal transaction unless”³¹² To ascertain if the section applies, the first inquiry is whether a second prosecution arises out of “the same act or criminal transaction” as the prior prosecution.³¹³ The same transaction test applies to a state corruption prosecution based on the same acts involved in a previous federal prosecution. The next consideration is if any of the exceptions to the statute apply.³¹⁴ One exception is particularly relevant to the federal prosecutions noted above: “[e]ach of the offenses as defined contains an element which is not an element of the other, and the statutory provisions defining such offenses are designed to prevent very different kinds of harm or evil.”³¹⁵

Several New York cases, most notably in narcotic prosecutions, illustrate the operation of the exception.³¹⁶ New York’s Appellate Division, Third Department held that a prosecution in county court for possession of marijuana in the first degree was not barred by an earlier prosecution and guilty plea for growing marijuana without a license in town court.³¹⁷ The former is a Penal Law crime³¹⁸ and the latter a violation of the Public Health Law.³¹⁹ The appellate court held that there were different elements for the two offenses because

New York allows a litany of exceptions to the second bar against prosecution. *See id.* § 40.20(2)(c)–(i). In fact a recent amendment spearheaded by the Office of the District Attorney of New York, now allows for state prosecution of income tax evasion after a federal prosecution. *See* 2011 N.Y. Sess. Laws A. 8247-A (McKinney) (codified at CRIM. PROC. LAW §§ 40.20(2)(i)). Of course the section of the Criminal Procedure Law could be amended to allow an explicit exception for a state prosecution for Receiving Reward for Official Misconduct in the Second Degree that follows a federal honest services law prosecution.

³¹¹ CRIM. PROC. LAW § 40.30(1). In a bench trial, the statute applies when the first witness is sworn. *Id.* § 40.30(1)(b).

³¹² *Id.* § 40.20(2).

³¹³ *Abbamonte*, 43 N.Y.2d at 82, 371 N.E.2d at 488, 400 N.Y.S.2d at 769. Criminal transaction is defined in the prior section of the chapter. CRIM. PROC. LAW § 40.10(2). The definition does not warrant explanation because all of the examples of federal indictments *infra* and *supra* arise out of the same criminal transaction.

³¹⁴ CRIM. PROC. LAW § 40.20(2)(a)–(h).

³¹⁵ *Id.* § 40.20(2)(b).

³¹⁶ *See* *Robinson v. Snyder*, 259 A.D.2d 280, 281, 686 N.Y.S.2d 392, 393–94 (App. Div. 1st Dep’t 1999); *Parmeter v. Feinberg*, 105 A.D.2d 886, 888, 482 N.Y.S.2d 78, 79–80 (App. Div. 3d Dep’t 1984).

³¹⁷ *Parmeter*, 105 A.D.2d at 888, 482 N.Y.S.2d at 79–80.

³¹⁸ N.Y. PENAL LAW § 221.30 (McKinney 2012).

³¹⁹ N.Y. PUB. HEALTH LAW § 3382 (McKinney 2012).

the Penal Law requires a weight of the drug and the Public Health Law does not.³²⁰ More significant, despite the fact that both crimes involve the same marijuana and the same act, the court ruled that “the two transgressions are designed to prevent very different kinds of unlawful activity.”³²¹ The court distinguished between the kinds of evil in the two statutes: the Public Health Law aimed at “prevent[ing] the propagation of the plant within this State”³²² and, the Penal Law aimed at, “controlling availability and use of the substance in quantities sufficient to indicate an intent to distribute.”³²³

The First Department denied a claim of previous prosecution where defendant was convicted of criminal possession of a controlled substance and criminal possession of marijuana in the second degree and later indicted for “conspiracy in the second degree, allege[ing] that on the same date and at the same location defendant possessed a quantity of . . . cocaine and marijuana.”³²⁴ The court concluded that conspiracy and narcotics possession have different elements and prevent different harms, even if the two prosecutions were based in part on the same narcotics.³²⁵

The protection against previous prosecution for honest services fraud, before and after *Skilling*, does not apply to later state prosecutions based on violations of section 200.25.³²⁶ Prior to *Skilling*, honest services fraud was wielded against undisclosed self-dealing.³²⁷ The crime hinged on a failure to disclose material information whether or not a benefit was received by the public servant.³²⁸ After *Skilling*, honest services fraud applies to bribery and kickbacks, where a *quid pro quo* exists.³²⁹

³²⁰ *Parmeter*, 105 A.D.2d at 887–88, 482 N.Y.S.2d at 79.

³²¹ *Id.* at 888, 482 N.Y.S.2d at 79.

³²² *Id.*

³²³ *Id.* at 888, 482 N.Y.S.2d at 79–80.

³²⁴ *Robinson v. Snyder*, 259 A.D.2d 280, 281, 686 N.Y.S.2d 392, 393 (App. Div. 1st Dep’t 1999).

³²⁵ *Id.* But see *Schmidt ex rel. McNell v. Roberts*, 74 N.Y.2d 513, 522, 548 N.E.2d 1284, 1289, 529 N.Y.S.2d 633, 638 (1989) (holding that the statutory exception did not apply to a state prosecution for stolen property when defendant was previously prosecuted in federal court for “interstate transportation of stolen property” because both statutes serve “to punish thieves and to protect property owners”).

³²⁶ The guilty plea of Leibell does not apply to a possible prosecution under section 200.25 because the charges were for obstruction of justice and tax evasion, both far removed from the elements and evil protected against by section 200.25. See discussion *supra* Part III.B.3. Neither does the notice of reasonable cause against Monserrate apply because he was not prosecuted for the purposes of the statute. See discussion Part III.B.2.

³²⁷ See *Weyhrauch I*, 548 F.3d 1237, 1239 (9th Cir. 2008), *vacated*, 130 S. Ct. 2971 (2010).

³²⁸ *Id.*

³²⁹ *Skilling v. United States*, 130 S. Ct. 2896, 2928, 2933–34 (2010).

The evils to be prevented by the federal honest services statute—previously undisclosed self-dealing, bribery, or kickbacks—and those evils targeted by section 200.25 are quite different. In the context of state public servants, the duties contained in the Code of Ethics are an element that only applies to the state law. Whereas, prior to *Skilling*, the intangible right to honest services was a non-specific duty of loyalty and did not require a benefit, an element of section 200.25.³³⁰ After *Skilling* the federal statute requires a benefit and a *quid pro quo*.³³¹ Section 200.25 does not require bribery’s “agreement or understanding,” and thus the statute may be violated by a state public servant’s own actions, irrespective of the intent of the person who confers a benefit.³³²

Similarly, the specific evil sought to be protected by the federal and state statutes are, for the purposes of previous prosecution, very different even if they both punish corruption generally. The state statute seeks to prevent public servants from taking advantage of their position or gaining employment where there is a serious *and* specific conflict, resulting in a benefit.³³³ Prior to *Skilling* the evil sought to be prevented was the general violation of a duty intangible right to honest services.³³⁴ Today, that interest is an explicit agreement where a public servant acts blatantly and corruptly to his or her own benefit.³³⁵ This is no different than state appellate court holdings that bar narcotics evidence from not applying to successive prosecutions for narcotics, even when the same narcotics are elements in each prosecution.³³⁶

V. PUBLIC CORRUPTION PREVENTION THROUGH REMEDIAL

³³⁰ See Brief for the United States, *supra* note 63, at *44–49 (listing the three elements of honest-services fraud as a breach of the duty of loyalty, an intent to deceive, and materiality).

³³¹ See *United States v. Sun-Diamond Growers of Ca.*, 526 U.S. 398, 404–05 (1999) (explaining that for bribery, there must be an exchange of something of value for an official act).

³³² See N.Y. PENAL LAW §§ 200.10, 200.25 (McKinney 2012); N.Y. PUB. OFF. LAW § 74(2), (3)(d) (McKinney 2010).

³³³ PUB. OFF. LAW § 74(2), (3)(d).

³³⁴ 18 U.S.C. § 1346 (2006).

³³⁵ See *Skilling v. United States*, 130 S. Ct. 2896, 2933–34 (2010) (explaining that the *mens rea* requirement in section 1346 leaves no vagueness concerning the fact that bribes and kickbacks violate the statute).

³³⁶ See *Robinson v. Snyder*, 259 A.D.2d 280, 281, 686 N.Y.S.2d 392, 393 (App. Div. 1st Dep’t 1999) (holding that defendant could be charged and convicted of both possession of illicit drugs and conspiracy even if the same narcotics are an element of each of the crimes); *Parmeter v. Feinberg*, 105 A.D.2d 886, 887, 482 N.Y.S.2d 78, 79 (App. Div. 1st Dep’t 1984) (holding that a defendant can be charged for violating a Penal Law and a Public Health Law where elements of each violation are the same criminal transaction because each involves elements which are not elements of the other).

CRIMINAL LAW REFORM

Even if the state's honest services fraud statute is enforced, per the recommendation herein, serious remedial measures are necessary to change the culture of Albany. Criminal law reform should be a powerful deterrent and include revising an element of bribery, removing certain statutes from the definition of previous prosecution, eliminating the bar on criminal prosecution for false filing of an annual statement of financial disclosure, and requiring reporting of sources of income where there are business acts involving those who "do business."

A. Degrees of Receiving Reward for Official Misconduct

Currently there is only one degree of receiving reward that is relevant to members of the legislature.³³⁷ The second degree, which is actually a first degree relevant that applies outside the context of arrests and prosecutions, does not have a monetary threshold to fulfill the element of the benefit.³³⁸ Larceny statutes exemplify an ideal regime for grading benefits under receiving reward for official misconduct:³³⁹

- Larceny in the fourth degree applies to property in excess of \$1,000, a class E felony³⁴⁰
- Larceny in the third degree is in excess of \$3,000, a class D felony³⁴¹
- Larceny in the second degree is in excess of \$50,000, a class C felony³⁴²
- Larceny in the first degree is in excess of \$1 million, a class B felony³⁴³

In line with the larceny degrees, receiving reward for official misconduct and the counterpart rewarding official misconduct should reflect three additional degrees with the same monetary thresholds and the same penalties. Thus, current sections 200.20 and 200.25 would each become a new fifth degree. And new second, third and fourth degrees would be added to article two hundred of the Penal Law.

³³⁷ N.Y. PENAL LAW § 200.25 (McKinney 2012).

³³⁸ *Id.*

³³⁹ *See id.* §§ 155.30, 155.35, 155.40, 155.42.

³⁴⁰ *Id.* § 155.30.

³⁴¹ *Id.* § 155.35.

³⁴² *Id.* § 155.40.

³⁴³ *Id.* § 155.42.

The new degrees would reflect punishments that suit the crimes. As in larceny statutes, property—or a benefit, in the case of a public servant—that is wrongfully obtained at a value of one thousand and one dollars should not be punished the same as property valued at fifty thousand or one million dollars.

B. Penalties for False Annual Financial Disclosure Statements and Disclosure of “Doing Business with the State” Business Acts

When the required annual statement of financial disclosure was enacted into law, the chapter contained a limit on prosecutions for failure to file and false filing, an ill-advised “gift” to state public servants that survived even in the recent ethics reforms.³⁴⁴

Only the Legislative Ethics Commission, which, following the reform, has jurisdiction over enforcement of penalties against members of the legislature and legislative employees, has jurisdiction to impose a civil penalty of up to \$10,000.³⁴⁵ The commission may refer a violation related to annual statements to a prosecutor to be punished as a class A misdemeanor.³⁴⁶ Even though a knowing false statement on an annual financial disclosure is a violation of the Penal Law,³⁴⁷ the act cannot be prosecuted because of the statutory bar.³⁴⁸

Governor Dewey’s 1954 annual message bears repeating: “the

³⁴⁴ See N.Y. GEN. MUN. LAW § 812(19)(6) (McKinney 2012) (“Notwithstanding any other provision of law to the contrary, no other penalty, civil or criminal may be imposed for a failure to file, or for a false filing, of such statement, except that the appointing authority may impose disciplinary action as otherwise provided by law.”); 2011 N.Y. Sess. Laws S. 5679 (McKinney).

³⁴⁵ N.Y. LEGIS. LAW § 80(9)(a) (McKinney 2012), amended by 2011 N.Y. Sess. Laws S. 5679 (McKinney) (relocating the penalty provision to subdivision nine of section 80 of the Legislative Law).

³⁴⁶ *Id.*

³⁴⁷ N.Y. PENAL LAW § 175.30 (McKinney 2012).

³⁴⁸ See LEGIS. LAW § 80(9)(a); N.Y. EXEC. LAW § 94(1) (McKinney 2012). For example, it is unclear if Leibell, who failed to report income to the federal government, reported his ill-gotten income. Examination of Leibell’s annual statements of financial disclosure for 2003 to 2006, the relevant calendar years, is inconclusive. See, e.g., LEG. ETHICS COMM., VINCENT L. LEIBELL III, ANNUAL STATEMENT OF FINANCIAL DISCLOSURE FOR CALENDAR YEAR 2004 (May 16, 2005) (on file with author). The statement lists “[s]ee question 5(a) Law Practice” for question thirteen, which requires “the nature and amount of any income in EXCESS of \$1,000 from EACH SOURCE.” *Id.* at 7. Leibell lists two positions as “attorney” described as “Individual Private Practice” and of counsel to Curtiss, Leibell & Schilling. *Id.* at 3 attachment. Today, the exception to the exemption from previous prosecution likely applies here. Failure to report income tax, thereby depriving a government of just revenue, and failure to report income under a conflict of interest regime, are likely to be interpreted as very different evils and the scope of information required by the annual statement is not required of tax filings, thereby yielding different elements.

public is entitled to expect from its servants a set of standards far above the morals of the market place.”³⁴⁹ The opposite is the case in light of the bar on prosecutions for filing false annual statements of financial disclosure. The immunity of legislators, or state public servants *writ large* is an exception that should not stand. Although false instrument in the second degree, punishable as a class A misdemeanor, today applies to the annual statements of financial disclosure, the first degree, punishable by class E felony,³⁵⁰ should be amended as follows:

or a person, *who is a public servant*, knowing that a written instrument that is required to be filed under official duty contains a false statement or false information, he or she offers or presents it to a public office or public servant with the knowledge or belief that it will be filed with, registered or recorded in or otherwise become a part of the records of such public office or public servant.³⁵¹

The recent ethics reforms go a long way to increasing disclosure, especially in the categories of value, which were allowed to be redacted upon public release.³⁵² There are now 108 categories of value in narrow ranges.³⁵³ In addition, the reform introduced a new question on the annual statements of financial disclosure for legislators who provided services that require a license, like attorneys or real estate brokers.³⁵⁴ The disclosure wholly ignores non-licensed professions, at the peril of the pattern of recent convictions and indictments based on payments for consulting services.³⁵⁵ Moreover, the trigger to the new disclosure does not include acts involving those who have business before the state but from whom income is not received.³⁵⁶

Short of dictating a full-time legislature, banning, or severely limiting outside sources of income along the lines of the restrictions placed upon members of the U.S. Congress,³⁵⁷ disclosure should be

³⁴⁹ Dewey Annual Message, *supra* note 12, at 313.

³⁵⁰ See PENAL LAW § 175.35.

³⁵¹ Emphasis is added to distinguish between the second degree and the additional elements in the draft amendment.

³⁵² See LEGIS. LAW § 80(9)(b).

³⁵³ *Id.* § 80.

³⁵⁴ 2011 N.Y. Sess. Laws S. 5679 (McKinney) (modifying N.Y. PUB. OFF. LAW § 73(a)(3)).

³⁵⁵ See *supra* Part I.

³⁵⁶ For example, Bruno’s consulting work would not trigger the disclosure because payment was received by an entity that did not have business before the state. See *supra* Part III.B.1. Rather, his responsibilities included soliciting business on behalf of his employer from those who had business before the state.

³⁵⁷ See 5 U.S.C. app. 4 § 501(a)(1) (2012).

patterned on New York City's "doing business" campaign contribution restrictions.³⁵⁸ The city severely limits contributions from those who have been deemed to do business with the city or those who participate in the voluntary system of public campaign finance, quite obviously, to limit the corruptive force of money in politics and government.³⁵⁹ A report prior to the enactment of the restrictions concluded: "[L]imiting contributions from *doing business* donors would help restore public confidence in City government and the way it does business."³⁶⁰ The "doing business" restrictions limit contributions from a broad array of persons and entities including: lobbyists, contractors, and those who conduct business transactions with the city—including grants, economic development, or pension fund agreements and applications for land use approvals.³⁶¹ The law applies to individuals, executive officers, and those with a high level of supervisory capacity within covered entities.³⁶²

In the vein of the city's restrictions, heightened disclosure of legislators' outside income should be triggered by any business act involving any person or entity who is "doing business" with the state. This would ensure complete disclosure concerning conflicts of interest by requiring the source of the income *and* the nature of the acts in consideration of the income. For example, Bruno circumvented the spirit, if not the letter, of disclosure requirements for reporting "any occupation" and "source" of any income.³⁶³

The former Senate Majority Leader earned more than \$1.3 million from Wright Investors Services, a Connecticut-based investment adviser that serves unions.³⁶⁴ As part of his duties, Bruno "contacted, directly or indirectly, officials at [sixteen] unions for the purpose of soliciting them to hire Wright as an investment

³⁵⁸ See N.Y.C., N.Y. ADMIN. CODE § 3-702(18).

³⁵⁹ *Id.* § 3-703(1-a) (limiting contributions to those who have business dealings with the city to \$400 for a citywide candidate and \$250 for a council candidate, which are both less than ten percent of the non-doing business limits for candidates participating in the public finance system). New York City also features a strict ban on personal use of campaign funds, something the state Election Law could use. Compare *id.* § 3-702(21)(b), with N.Y. ELEC. LAW § 14-130 (McKinney 2012) (banning conversion of campaign funds to "personal use" without defining what the term means).

³⁶⁰ INTERIM REPORT ON "DOING BUSINESS" CONTRIBUTIONS, N.Y. CITY CAMPAIGN FINANCE BD. 41 (2006), http://www.nycfb.info/PDF/issue_reports/Doing-Business-White-Paper.pdf.

³⁶¹ See N.Y. CITY ADMIN. CODE § 3-702(18), (20), available at <http://www.nycfb.info/act-program/CFACT.htm>.

³⁶² *Id.* § 3-702(20).

³⁶³ N.Y. PUB. OFF. LAW § 73-a(3), (5)(a), (13) (McKinney 2012).

³⁶⁴ Indictment, *supra* note 36, paras. 21, 30.

adviser for their benefit funds.”³⁶⁵ These unions, eleven of which hired Wright, had business before the state.³⁶⁶ Bruno listed the work on his annual disclosure as “consultant” under the name of the parent entity of Wright.³⁶⁷ Bruno also listed income from a similarly conflicted entity as “consultant” under an entity he did incorporate.³⁶⁸

A new question thirteen-b should be added to the annual statements of financial disclosure, with current question thirteen becoming thirteen-a to cover lobbyists, lobbying clients, those who are or seek to become contractors, and those who receive or seek to receive state aid or grants:

For every source of income listed under thirteen-a, list below any act performed or agreed to be performed by the reporting individual or such reporting individual’s spouse, and the identity of any party to such agreement, in connection with securing such income involving any: (1) individual or entity required to be listed on a statement of registration under article 1-A of the Legislative Law or any agent of any such individual or entity; (2) individual or entity that has received or has attempted to secure in excess of twenty-five thousand dollars through contracts from the state or any state-appointed entity with contracting power within the twelve months prior to the reporting date; or (3) individual or entity that has received or has attempted to secure a state or state agency appropriation, in the form of aid, grant or other financial resources, in excess of twenty-five thousand in the twelve months prior to the reporting date. For the purposes of this subparagraph the term “act” is defined as any act, transaction or solicitation performed by the reporting individual or such reporting individual’s spouse in

³⁶⁵ *Id.* ¶ 22.

³⁶⁶ *Id.* ¶¶ 23, 28. Bruno, in 1993, received an advisory opinion from the Legislative Ethics Commission. Request from Senator Joseph L. Bruno, N.Y.S. Legis. Ethics Comm. Op. 93-03 (Mar. 9, 1993), <http://www.scribd.com/doc/22676225/Ethics-Advisory-Opinion-1993-GA-09>. Bruno merely sought “advice concerning his proposed private business relationship with an investment banking firm.” *Id.* He did *not* disclose that his duties would include soliciting investments from unions that had business before the state. *See id.* The committee, approaching the issue as if the proverb see no evil, hear no evil, speak no evil were its guiding principle, merely recited the general rule against conflicts of interest. *Id.* (quoting PUB. OFF. LAW § 74(2)). Such advisory opinions may be used as a defense in criminal or civil actions. N.Y. LEGIS. LAW § 80(7)(i) (McKinney 2012). But, the efficacy of such opinions is dependent upon the disclosure and accuracy of all material facts. *See id.*

³⁶⁷ Indictment, *supra* note 36, ¶ 33.

³⁶⁸ *Id.*

consideration for the income reported herein.

This type of explicit and comprehensive disclosure, combined with the freedom to enforce criminal penalties against false filers, would be an effective prophylactic against conflicts of interest. It would be far more difficult, if not impossible, to mask the activities giving rise to conflicts with doing business with the state as the trigger. The consequence for non-disclosure should be a felony penalty.

C. The Bac Tran “Agreement or Understanding” Fix³⁶⁹

The Court of Appeals struck a blow to public corruption with its 1992 decision in *People v. Bac Tran*.³⁷⁰ The case involved a fire safety director who stuffed three hundred and ten dollars into the shirt of a city inspector.³⁷¹ The court interpreted the consolidation of several bribery statutes in the 1965 revision of the Penal Law when intent was replaced with “agreement or understanding.”³⁷² The court conducted a superficial review of legislative intent, concluding: “We do not need to speculate on what the Legislature intended, for we are confronted with the best evidence of its intention in its new core words ‘agreement or understanding.’”³⁷³ The court’s statutory interpretation defined the new term as “a *unilateral perception* or belief by a perpetrator that” a public servant will be influenced.³⁷⁴

A sharply worded dissent summarized the court’s decision as making “bribery of a public official hinge upon the *mens rea* of the

³⁶⁹ See S. 7707-A, 2009 Leg., 233d Reg. Sess. (N.Y. 2010). The “*Bac Tran* fix” was included in an omnibus ethics bill, the Public Corruption Prevention and Enforcement Act of 2010, that was drafted by the author and the Office of the District Attorney of New York. This amendment to the Penal Law was originally proposed and drafted by the District Attorney of New York. The proposal is included here because of its importance.

³⁷⁰ *People v. Bac Tran*, 80 N.Y.2d 170, 603 N.E.2d 950, 589 N.Y.S.2d 845 (1992).

³⁷¹ *Id.* 80 N.Y.2d at 173, 174 603 N.E.2d at 952, 589 N.Y.S.2d at 847 (explaining that a second act involved another hotel employee who offered an undercover investigator \$100).

³⁷² *Id.* at 175, 603 N.E.2d at 953, 589 N.Y.S.2d at 848; see N.Y. PENAL LAW §§ 200.00, 200.03 (McKinney 2012). Although the bribe-receiving statute has remained stable with the element of “agreement or understanding,” prior to the changes in the Penal Law in 1965, bribery only required “intent to influence.” Compare CLEVINGER-GILBERT CRIMINAL LAW AND PRACTICE: CODE OF CRIMINAL PROCEDURE PENAL LAW § 1822 (Jos. R. Clevenger ed. 1953) (providing the 1953 version of New York’s bribery statute), with PENAL LAW § 200.00.

³⁷³ *Bac Tran*, 80 N.Y.2d at 177, 603 N.E.2d at 954, 589 N.Y.S.2d at 849. The staff comments, whether or not binding, note that “The revision makes no . . . substantive changes in existing law but attempts, by a largely formal restatement, to simplify and clarify.” STAFF COMMENTS ON THE PROPOSED PENAL LAW, *supra* note 137, at 371.

³⁷⁴ *Bac Tran*, 80 N.Y.2d at 178, 603 N.E.2d at 955, 589 N.Y.S.2d at 955 (emphasis added) (citing PENAL LAW § 200.00).

bribe-receiver, not the bribe-giver.”³⁷⁵ Thus, absent a prior agreement, it would be difficult to prove bribery because the relevant *mens rea* does not rest upon the person offering the bribe. The dissenting judge disagreed with the majority’s conclusion that there was no evidence that the giver of the bribe understood his actions would influence the inspector: “If defendant did not understand this, it is difficult to imagine what could have been in his mind.”³⁷⁶

Article one hundred eighty of the Penal Law contains the bribery statutes that do not pertain to public servants.³⁷⁷ None of the three categories of bribery in the article—in the broad agent-principal, labor, and sports contexts—require the element “agreement or understanding.”³⁷⁸ The key *mens rea* in these statutes is “intent to influence.”³⁷⁹ It thus does not matter what the intended recipient of a bribe thinks. The crucial element in the article is the mere intent of a bribe-giver, i.e., one who stuffs a sum of money into the pocket of an inspector.

It strains common sense that the revisers of the Penal Law meant to create a novel *mens rea* for bribery only in the public servant context. There is no evidence to support that premise. In order to restore pre-*Bac Tran* interpretation of public servant bribery, “intent to influence” should replace “agreement or understanding” in sections 200.00 and 200.03 of the Penal Law.

VI. CONCLUSION

To the casual observer corrupt legislators may seem like the rule rather than the exception. To be sure, there are plenty of intelligent, moral, and hard-working members of the New York Assembly and Senate. The recent corrupt acts of the relatively few, however, cast an unflattering light upon the legislature as a whole. The theory of prosecution under receiving reward for official misconduct in the second degree presents a valid means to shock the Albany establishment. Section 200.25 should be revived from a dormant state and applied to state public servants whether or not there is a previous federal prosecution.

³⁷⁵ *Bac Tran*, 80 N.Y.2d at 180–81, 603 N.E.2d at 956, 589 N.Y.S.2d at 956 (Simons, J., dissenting).

³⁷⁶ *Id.* at 180, 603 N.E.2d at 956, 589 N.Y.S.2d at 956.

³⁷⁷ PENAL LAW §§ 180.00–180.45.

³⁷⁸ *Id.* §§ 180.00, 180.03, 180.15, 180.40.

³⁷⁹ *Id.*

In order to restore ethical and moral order to Albany, serious remedial measures are necessary both in enforcement and reform of current criminal laws that impact ethics. In addition to enforcing section 200.25, the proposed reforms will bring further order as a means of preventing public corruption.

In 1954, declaring the need for a Code of Ethics and explaining its boundaries, Dewey said during his annual address, “[c]ertainly government should not be deprived of the services of all but princes and paupers.”³⁸⁰ Presumably the governor meant that the ethics regime should not be so burdensome that only those two extreme classes will be able to comply. Neither should government consist of paupers who enter public service to become princes.

³⁸⁰ Dewey Annual Message, *supra* note 12, at 314. The declaration of intent of the law echoed this sentiment, noting that an inflexible code “would limit public service to the very wealthy or the very poor.” 1954 N.Y. Laws 1617.