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Corruption in Our Courts: What It Looks Like and Where It Is Hidden

ABSTRACT. Recent surveys and events indicate that judicial corruption could be a significant problem in the United States. This Note builds an economic model of bribery to better understand the incentives behind this pernicious phenomenon. It then compiles a data set of discovered incidents of judicial bribery in the United States to test the effectiveness of our anti-judicial-corruption institutions. This analysis suggests that our institutions are particularly ineffective at preventing and uncovering judicial bribery in civil disputes and traffic hearings.

NOTE CONTENTS

> *"If experience demands a presumption that a judge will seize every opportunity presented to him in the course of his official conduct to line his pockets, no canon of ethics or statute regarding disqualification can save our judicial system."*
>
> — Justice William Rehnquist[1]

INTRODUCTION

A judiciary without honesty has little chance of executing its moral and constitutional duties, no matter how many rules of ethics exist. This is especially true in the United States, where the judiciary is afforded wide discretion. Facts and law require interpretation; justice and equity require judgment. Every decision to grant a motion, to follow precedent, to interpret a statute or facts, to set a sentence or damages — every decision left up to the discretion of a judge — is a potential opportunity for corruption. Eliminating all opportunities for personal gain would require nothing less than the destruction of the independent and adaptable judicial system we know. And so we count on honest judges to navigate our ship of justice through these dangerous waters.

But we do not just keep our fingers crossed and hope we have good captains at the helm. We develop processes of choosing the most skilled and honest judges. We provide them with good pay and professional prestige to lessen the temptations of bribery. And we develop multilevel methods of oversight that intrude minimally (one hopes) upon their discretion and independence. We expect judges to be honest because we establish institutions that incentivize honesty.

Despite the critical importance of maintaining judicial integrity, there is a dearth of empirical literature that analyzes the effectiveness of these institutions. To be sure, some studies have tracked the historical development of judicial integrity institutions and others have catalogued cases of judicial corruption.[2] Others still have relied upon questionnaires to gauge perceptions

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1. William H. Rehnquist, *Sense and Nonsense About Judicial Ethics*, 28 REC. ASS'N B. CITY N.Y. 694, 699-700 (1973).

2. Books have been written in the past on corrupt judges, but they are historically rather than analytically focused. *See, e.g.*, CHARLES R. ASHMAN, THE FINEST JUDGES MONEY CAN BUY: AND OTHER FORMS OF JUDICIAL POLLUTION (1973); JOSEPH BORKIN, THE CORRUPT JUDGE: AN INQUIRY INTO BRIBERY AND OTHER HIGH CRIMES AND MISDEMEANORS IN THE FEDERAL COURTS (1962). Other works have provided anecdotal evidence of corruption and offered various policy proposals to combat it. *See* MAX BOOT, OUT OF ORDER: ARROGANCE, CORRUPTION, AND INCOMPETENCE ON THE BENCH 191-95 (1998) (discussing various cases of

and incidences of corruption.[3] But because no study has ventured beyond the description of discovered cases of judicial corruption, none has been able to answer the question of how effective our institutions have been at actually unearthing and punishing the crime.[4]

This Note begins to fill in this serious gap in the literature on judicial corruption. By developing an economic model to understand judicial corruption and creating the only recent sample of discovered cases of judicial bribery against which to test its predictions, this Note attempts to assess the effectiveness of our anticorruption mechanisms. In doing so, beyond cataloguing important patterns in judicial corruption, it advances the argument that there is a serious blind spot in the functioning of our anticorruption institutions. While the small sample size limits the certainty of this Note's findings, its analysis suggests that the mechanisms for detecting bribery of judges in civil matters and traffic violations are deficient and that much judicial corruption in these cases likely goes unnoticed.

Before moving on, it is worth mentioning why I have specifically focused this Note on judicial bribery. After all, many forms of judicial corruption exist and may in fact be more widespread than quid pro quo bribery. Cases of judges ruling on matters involving a financial or personal conflict of interest are numerous and are responsible for a large portion of sanctions handed down by state judicial conduct organizations (JCOs).[5] The receiving of gifts, the granting of favors, ex parte communications, and other actions that create partiality or its appearance are also highly prevalent forms of malfeasance dealt with by JCOs.

Despite the importance of these forms of corruption, I have chosen to limit my study to bribery cases for three reasons. First, a recent survey suggests that judicial bribery may be a significant problem in the United States. In a Transparency International survey, 2% of the North Americans (defined to include residents of the United States and Canada) who had come into contact

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judicial corruption); Geoffrey P. Miller, *Bad Judges*, 83 TEX. L. REV. 431 (2004) (cataloguing cases of judicial malfeasance).

3. *See, e.g.*, Transparency Int'l, *How Prevalent Is Bribery in the Judicial Sector?*, *in* GLOBAL CORRUPTION REPORT: CORRUPTION IN JUDICIAL SYSTEMS 11, 11-12 (Transparency Int'l ed., 2007) (comparing surveys of perceptions of judicial corruption with a poll of the percentage of people who say they have paid bribes within the judicial system).

4. Empirical studies exist on general judicial misconduct handled by judicial conduct organizations—which can include cases of corruption—but they do not make an attempt to analyze the effectiveness of institutions in dealing with corruption in particular. *See, e.g.*, CYNTHIA GRAY, A STUDY OF STATE JUDICIAL DISCIPLINE SANCTIONS (2002).

5. *See infra* Section II.A.

with the judiciary over the previous year reported having paid bribes.[6] Assuming parity of corruption between the United States and Canada,[7] and a U.S. adult population of 220 million,[8] this study implies that over one million bribes are paid in the U.S. judicial system each year. While this survey captures bribes directed not only toward judges, but also toward police, prosecutors, and jurors, the results are alarming enough to warrant further study into judges, whose integrity is most critical to a functioning judicial system. Second, cases of bribery offer greater details for study than do other forms of corruption. Because bribery is prosecutable, incidents of it should be relatively well investigated and reported. Third, bribery is one of the most pernicious forms of corruption. It can purchase favors in high-stakes cases and does not necessitate any personal or professional relationship between the briber and judge. It would seem, therefore, to be one of the most serious — and difficult to detect — forms of judicial corruption that exists. The most recent judicial scandal to come out of Pennsylvania, in which two judges pled guilty to accepting bribes from a private juvenile detention facility in exchange for incarcerating minors for extended periods of time, is evidence of just how vile and pernicious the consequences of judicial bribery can be. During the last five years, the judges collected over $2.6 million in bribes and presided over the trials of five thousand children, including one teenager who was sentenced to five months detention for stealing DVDs from Walmart.[9]

This Note is organized as follows: In Part I, I develop an economic model for understanding judicial bribery. In Part II, I review the accountability institutions of the state and federal judiciaries and describe the sample set of corrupt judges. I then go over the characteristics of the judges and courts in which bribery was discovered in Part III. In Part IV, I discuss the types of bribery discovered, the prices of the bribes and the corrupt actions that they bought, how the judges and bribers transacted the bribes, and what factors led to the bribes' discovery. This analysis leads to the troubling observation that

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6. Transparency Int'l, *supra* note 3, at 11.

7. It is seems unlikely that judicial bribery in the United States (which ranks twentieth in Transparency International's (TI) global survey of perceptions of overall corruption) is significantly less prevalent than in Canada (which ranks ninth in TI's global survey). Transparency International, Corruption Perceptions Index 2007, http://www.transparency.org/policy_research/surveys_indices/cpi/2007.

8. The 2004 Census Bureau estimated the adult population to be 217 million in 2004. Press Release, U.S. Census Bureau, Census Bureau Estimates Number of Adults, Older People and School-Aged Children in States (Mar. 10, 2004), *available at* http://www.census.gov/Press-Release/www/releases/archives/population/001703.html.

9. Stephanie Chen, *Pennsylvania Rocked by 'Jailing Kids for Cash' Scandal*, CNN.COM, Feb. 24, 2009, http://www.cnn.com/2009/CRIME/02/23/pennsylvania.corrupt.judges.

the majority of judges had accepted multiple bribes before being caught and that some were corrupted by as little as a pound of lunch meat.

In Part V, I examine interesting patterns from the data — in particular, the disproportionate amount of discovered bribery in criminal cases as compared to bribery in civil cases. I observe that this discrepancy appears to be due in large part to prosecutorial leverage, which allows criminals to bargain down their sentence in return for incriminating information about judges, leading to an increased rate of detection. After examining other possible explanations for the discrepancy, I argue that the data and model support the conclusion that bribery in civil cases is less likely to be detected than bribery in criminal cases. I conclude with a summary of my findings and suggestions for further research.

I.   UNDERSTANDING AND OBSERVING JUDICIAL CORRUPTION

The study of corruption poses unique problems. Corruption's covert nature means that only a fraction of it is ever exposed. Those cases that are discovered almost certainly share characteristics that led to their discovery. Relying solely on discovered cases of corruption as a means of analysis is therefore a limited method that can provide a distorted view of how much and what kind of corruption actually exists. This limitation has led scholars to rely on survey data of public perceptions of corruption as a proxy for the amount of corruption that exists.[10] The accuracy or inaccuracy of such perceptions notwithstanding, relying solely on public perceptions of corruption is bound to constrain the specificity of the conclusions. This Part provides another framework for understanding judicial corruption.

A.   An Economic Model of Bribery

Judicial corruption can be understood as the selling and purchasing of legal decisions. Understanding judicial bribery requires understanding the incentives that exist for parties or lawyers to purchase these decisions and for judges to sell them.[11] Below, in an attempt to predict what types of cases and

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10. *See, e.g.*, Daniel Kaufmann, Aart Kraay & Massimo Mastruzzi, *Measuring Governance Using Cross-Country Perceptions Data*, *in* INTERNATIONAL HANDBOOK ON THE ECONOMICS OF CORRUPTION 52 (Susan Rose-Ackerman ed., 2006); Paolo Mauro, *Corruption and Growth*, 110 Q.J. ECON. 681 (1995); Daniel Treisman, *The Causes of Corruption: A Cross-National Study*, 76 J. PUB. ECON. 399 (2000).

11. Since Susan Rose-Ackerman's 1978 breakthrough book, *Corruption: A Study in Political Economy*, economic analysis has been used widely to understand the interactions between institutions and corruption. These models primarily focus on the incentives that affect

judges will yield the most corruption, I describe the major factors that influence the briber's demand for corrupt judicial services and the judge's supply of those services.[12]

The model, for purposes of simplification, makes two assumptions. First, the model assumes that judges, litigants, and defendants are amoral. When they refuse to engage in corruption it is not because of any moral aversion, but because the costs imposed on them for doing so are greater than the gains. I will later relax this assumption to help explain the risk involved in engaging in corruption. Second, the model assumes that judges will supply corrupt decisions that, absent corruption, would not be prima facie wrong or in violation of another law. This assumption is reasonable given the wide discretion judges possess and their desire to limit their exposure to risk of punishment, and it is generally borne out in our sample.

1. Understanding Defendants' and Litigants' Demand for Corruption

A litigant or defendant (party) will make the bribe if the expected gains of the corrupt decision are greater than the sum of the costs of the bribe and the expected costs of getting caught. The expected gains (Y) from a corrupt decision can be understood as a function of four factors.

The first and most obvious factor that a party will take into account is the stakes of the case (S). The greater the value of a favorable decision, the more a party should be willing to pay for it. Assuming that the party had an initial probability of winning the case (p), the value that the bribe will purchase will be the added probability of winning the case. In other words, it will be the stakes (S) multiplied by the difference between the original odds of winning (p) and the odds of winning after paying the bribe, which is assumed to be 1, or certain victory, for the sake of simplicity. So far, the benefit of paying a bribe is equal to (S)(1-p).

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individual or group decisions to engage in corrupt behavior, such as the opportunity for corrupt action, the probability of conviction, the severity of punishment, and the opportunity costs. *See, e.g.*, SUSAN ROSE-ACKERMAN, CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES, AND REFORM (1999); John Macrae, *Underdevelopment and the Economics of Corruption: A Game Theory Approach*, 10 WORLD DEV. 677 (1982); Andrei Shleifer & Robert W. Vishny, *Corruption*, 108 Q.J. ECON. 599 (1993).

12. The model developed in this Section loosely follows the economic theory of criminal behavior developed in Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968). The discussion of bargaining space loosely follows models developed to describe bilateral bargaining and case settlement. *See, e.g.*, George L. Priest, *Regulating the Content and Volume of Litigation: An Economic Analysis*, 1 SUP. CT. ECON. REV. 163 (1982) (developing an economic model for settlement of civil disputes).

We must now take into account the probability that the briber may not be able to keep the spoils of his corrupt decision. This may be the result of two events. First, the corrupt decision may be reversed on appeal. The value of a corrupt decision will depend upon how large this rate of reversal (*RR*) is—a probability between 0 and 1. The closer the rate of reversal is to 1, the smaller the value of the decision. We show this by multiplying our benefit equation by (1-*RR*). Second, assuming that a party will not be able to keep the spoils of a corrupt decision if the bribe is discovered, the expected gains of the decision is multiplied by the probability that the corruption will go undiscovered. We can represent this by multiplying the equation by (1-*r*), where *r* equals the probability of being caught. The first half of our benefit equation is as follows:

$$Y = S(1\text{-}p)(1\text{-}RR)(1\text{-}r)$$

We must now consider the expected losses from offering the bribe. These are made up of the cost of the bribe (*B*) and expected cost of being caught and convicted (costs of detection or *CD*). Costs of detection can be considered in terms of reputation costs, loss of utility due to time in prison, and opportunity costs the briber will be forced to pay. To calculate expected losses, we multiply *CD* by the risk of being caught (*r*). Incorporating the price of the bribe, we can represent the expected costs of paying a bribe as $(r)(CD_P) + B$. The expected net benefit, therefore, that a party will experience from "buying" a corrupt decision can be understood in the following terms:

$$NB_P = Y - [(r)(CD_P) + B]$$

The party should be willing to make a bribe as long as it will result in a positive net benefit. In cases, therefore, where the expected gains from a corrupt decision would outstrip the expected losses of being caught, the party will be willing to make a bribe offer up to a value just below the difference between the two. Or, in terms of our equation:

$$B < Y - (r)(CD_P)$$

2. *Understanding the Supply of Corruption*

In deciding whether to sell a corrupt decision, a judge is likely to face a different decision-making model. The judge does not have to consider the value of the decision, the original probability of winning, or the risk of reversal. Instead, the judge will focus on whether the price of the bribe is greater than

the expected costs of accepting the bribe. As with the briber, the judge will calculate expected loss by multiplying the probability of being caught (r) by the cost of detection (CD_J). The judge's costs of detection are not necessarily equivalent to those that the briber faces. On average, judges probably face greater costs of detection in terms of loss of reputation, lost salary, and time in prison. Their detection costs are also relatively higher as judges represent larger prizes for law enforcement who may grant immunity to the briber in exchange for incriminating information about the judge. The judge is expected to face the following net benefit equation:

$$NB_J = B - (r)(CD_J)$$

He or she will render a corrupt decision when the bribe is greater than these expected costs:

$$B > (r)(CD_J)$$

Therefore, we expect corruption to flourish when there is a bribe (B) such that $B > (r)(CD_J)$ and $B < Y - (r)(CD_P)$. In other words, a bribe will be transacted when the judge's expected losses are less than the briber's expected net gains, and there is room for mutual gain.

Graphically this can be represented as follows, where everything to the left of ($B_{P(\max)}$) represents a bribe the party would be willing to pay, and everything to the right of ($B_{J(\min)}$) represents a bribe the judge would be willing to take. Smaller bribes on the continuum represent larger net gains to the party, while larger bribes on the continuum represent greater gains to the judge.

In Figure 1 below, the overlapping area represents this bargaining space between the judge and the party in which we expect the price of the bribe to fall.

Figure 1: Deal
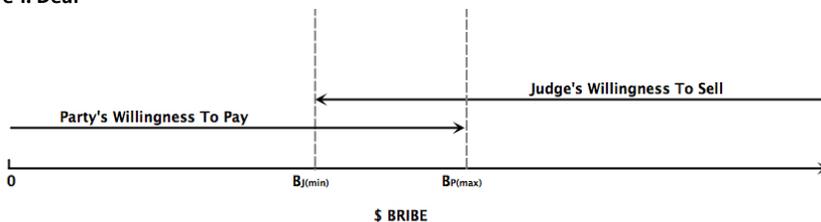
In the scenario depicted in Figure 1, we would expect a bribe to change hands, as there is room for mutual gain. By varying the values of the factors that affect the decision calculus of the judge and litigant or defendant,

however, we can envision various scenarios where the expected net gains for the bribing party would be less than the expected costs of the judge.

Figure 2: No Deal

B. Morality and the Risk of First Movers

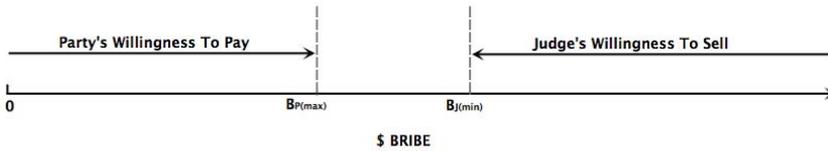In the above model, the risks faced by the judge and the briber can each be broken down into two components. The first component is the risk that the other party reports the bribe to the authorities, and the second is the risk that the authorities discover the bribe by some other means. For now, let us focus on the former risk. I call this the first-mover risk, as it is borne in large part by the party making the initial offer.[13]

1. First-Mover Risk

In our model of amoral actors, we would expect the decision whether to report a bribe to be made based on the net-benefit equations developed above. It is obvious enough that when the party on the receiving end of the offer has the opportunity to gain, they will accept it, and when they face a net loss from the offer, they will reject it. It is less obvious, however, why an amoral actor would report a corrupt offer rather than simply reject it. Let us explore why an amoral actor might report a corrupt offer and then examine how relaxing our assumptions of amorality affects the equation.

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13. Various scholars have employed game theory to analyze bilateral corrupt relationships. *See, e.g.*, Melanie Manion, *Corruption by Design: Bribery in Chinese Enterprise Licensing*, 12 J.L. ECON. & ORG. 167 (1996) (creating a model to determine the payoffs of bribing government bureaucrats, some of whom are "clean" and others of whom are corrupt). Melanie Manion's model does not, however, factor in the risk of approaching a clean bureaucrat who reports the bribe. *See also* Klaus Abbink, Bernd Irlenbusch & Elke Renner, *An Experimental Bribery Game*, 18 J.L. ECON. & ORG. 428 (2002) (creating an experiment to analyze the development of trust between briber and bribees). The first-mover risk assessed by Abbink, Irlenbusch, and Renner is not the risk that a clean official will report the bribe but that they will take the money and not deliver on their end of the deal.

a. Scenario One: Judge Offers To Sell a Favorable Decision

In this case, the amoral party, if offered a price that would increase his net benefit, would accept. If offered a higher nonnegotiable price that would decrease his net benefit or if he believed that the judge would not follow through on his end of the bargain, he would reject the bribe. The party would only report the bribe offer to the authorities in two distinct situations. First, he would report the offer if he believed a rejection of an unappealing offer would lead the judge to hand down an unfavorable decision—that is, if the judge was extorting from the party an unreasonable sum or if the party believed the judge was taking bribes from the other side as well. Second, the party would report the offer if he could parlay the offer into a favorable outcome for himself. For example, criminal defendants could trade information on the corrupt judge in exchange for a more lenient sentence in their present case. An astute judge should be able to mitigate this second risk altogether by avoiding engaging corruptly with criminal defendants and dealing only with civil parties or lawyers who will have little to gain by trading information to prosecutors. He should be able to mitigate the first risk significantly by offering realistic results at a reasonable price, which, given his insider knowledge of the stakes involved, should not be difficult. He would not be able to eliminate the risk, however, unless he could reliably signal that he is not accepting money or being pressured from the other side. It may be mitigated, though, by granting preliminary motions favorable to the bribe payers before the transaction as a way to signal loyalty.

b. Scenario Two: Litigant, Defendant, or Lawyer Offers To Buy a Favorable Decision

The amoral judge would follow a similar cost-benefit analysis as the receiving party in the above scenario, with a minor difference. The judge could reject offers that provided net losses without having to worry about the possibility of retaliation for the rejection. This would leave the judge free simply to reject the offer without reporting.[14] Even if the law required the judge to report the bribe, the amoral judge would tend against reporting for three reasons. First, the bribing party has no incentive to report their own bribe offer, and so the authorities are very unlikely to discover it. Second, the judge would avoid reporting the bribe so as not to discourage future offers. Third,

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14. Threats of violence, or potential threats of violence, might incentivize reporting in some cases. They also may incentivize the acceptance of unwanted offers.

the judge may avoid reporting for fear that the accused party could turn the accusation on its head, as was contemplated by the prominent trial lawyer Dickie Scruggs, who recently pled guilty to bribery charges.[15]

Given this analysis, it seems that while neither of the first movers in our amoral world appear to face significant risk, a judge would face a comparatively greater risk in initiating the first move.

2. First-Mover Risk with Relaxed Assumptions

Thankfully, the real world provides at least one additional obstacle to corrupt transactions that was assumed away in the previous Section: morality. We can assume a moral, law-abiding person will face not only a loss of utility from engaging in corruption but also an increase in utility from reporting corruption and enforcing justice. The first mover, however, is likely unaware of whether and by how much these considerations affect the other party's cost-benefit equation. For some moral actors, acting corruptly and not reporting the bribe may present a finite cost that can be compensated by other gains. For others, it may represent an infinite cost, making them totally incorruptible. We may incorporate the moral cost of making a bribe into our model, on the litigant's side, by including it as a value (M_1), such that when the party makes a bribe, the value of M_1 will be negative. On the other hand, when he reports a bribe request by a judge, the value of M_1 will be 0, but he will reap a utility gain of M_2 from acting morally. This is represented below, where the first equation represents the net benefit equation of a moral party making a bribe, while the second equation represents the net benefit of the moral party choosing to report the bribe.

$$(1)\ NB_1 = Y - [(r)(CD_P) + B] - M_1$$
$$(2)\ NB_2 = M_2$$

The party, therefore, will accept a bribe request from a judge when $Y - [(r)(CD_P) + B] - M_1 > M_2$. In terms of the size of the bribe, the moral party is willing to make any bribe (B) such that

$$B < Y - (r)(CD_P) - M_1 - M_2$$

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15. Jonathan D. Glater, *Guilty Plea by Lawyer to Bribery*, N.Y. TIMES, Mar. 15, 2008, at C1; Nelson D. Schwartz, *The Legal Trail in a Delta Drama: Trial of Leading Lawyer May Hinge on Ally's Role*, N.Y. TIMES, Jan. 20, 2008, Sunday Business, at 1 (describing that accusing the judge of soliciting the bribe was Scruggs's prospective defense strategy).

Any bribe request larger than that will be reported.

Graphically, we can illustrate this as follows. If requested by the judge, the amoral party would be willing to make a bribe of up to a given bribe, B. If that same party developed ethical scruples, he would suffer moral costs for paying the bribe, represented by the lightly shaded region, and would therefore only be willing to make a bribe of only $(B - M_1)$. It is important to remember that a bribe of $(B - M_1)$ would leave this party as well off as not making a bribe in the first place. The gains he experiences increase from this indifference point as the size of the bribe decreases. Therefore, once the bribe reaches and passes $(B - M_1)$, the party will compare the gains he would receive from making the bribe with the opportunity cost of M_2 he would incur from not reporting the bribe request, represented by the darkly shaded region. Only once the gains from the corrupt decision compensate the party for this opportunity cost would he make the bribe. In all other circumstances, he would report the solicitation by the judge. The same dynamic would hold if the litigant or the defendant were acting as the first mover. In the scenario illustrated below, any bribe request that is greater than $(B - M_1 - M_2)$ would be reported.

Figure 3
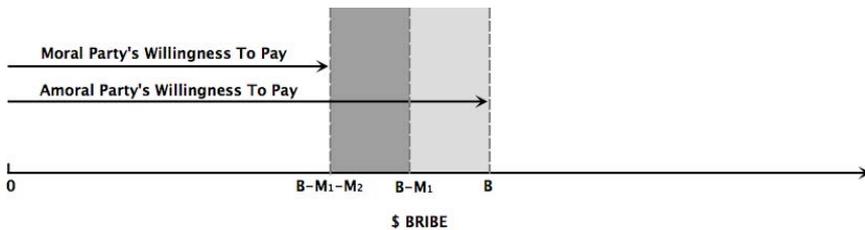
Because moral values are not always obvious on the surface, this presents a significant obstacle to the first mover in the real world. This informational asymmetry is probably enough to prevent a first bribe between many parties that would otherwise both benefit from a transaction. We would expect bribers and judges to attempt to get around this by offering noncommittal signals of their willingness to engage. We would also expect first-time corrupt relationships to be formed around relatively high-stakes cases. Corrupt judges making the first move will be able to offer a lot of value to high-stakes parties, increasing the likelihood that their moral losses will be compensated. Conversely, because first-moving parties in high stakes cases have the most to gain, they also have the most to give, making it more likely their bribe offer could entice a morally flexible judge.

If and when this first-mover obstacle is overcome and parties are connected, they are likely to enjoy more open and fruitful negotiation and a

considerable decrease in risk. As a consequence, we might expect corrupt judges to engage in multiple transactions with the same parties. At the same time, multiple favorable rulings to the benefit of one party or one lawyer might raise red flags that increase the risk of detection by other means. The extent to which judges and parties engage in multiple transactions with one another will depend upon how big this risk is relative to the risk of the first mover.

C. Model Predictions and Observations

Laying out the multiple predictions that could be derived from the various possible combinations of factors described above would be distracting and unhelpful. Instead, in the following Parts, I will use the above model as a lens for observing interesting patterns in the sample, discussing the patterns that seem to confirm or challenge my assumptions. For the sake of space, I will not necessarily revert to the full equations, but limit the discussion to only the relevant factors involved.

Because this Note is primarily concerned with the effectiveness of our anticorruption institutions, however, it is worth discussing how the risk of detection incorporated in the above model would affect observations of bribery in the sample. A higher rate of detection in some cases or for some judges should lead to a bias in our sample toward those cases. At the same time, we expect judges to internalize this risk by requiring a larger payment per bribe and expect bribing parties to internalize the risk by offering smaller bribe payments or not offering them at all. All things equal, a higher rate of detection, therefore, should reduce the overall incidence of corruption. We would not expect, however, for this reduction to necessarily balance out the bias in the sample of observed corruption away from those types of cases. The following example is illustrative.

Suppose that all judges face the same costs of detection—for example, $10,000. Now, suppose as well that there are two types of cases: one nonrisky, with a 10% chance of detection and another risky, with a 20% risk of detection. Under this scenario, a judge in a nonrisky case would require a bribe that is at least equal to his expected loss of $1000 (0.1 x $10,000) to act corruptly. This same judge would require at least $2000 (0.2 x $10,000) to act corruptly in a risky case.

Now, also suppose that the net benefit of corrupt decisions for our potential bribers ranges between $0 and $3000, and, to keep things simple, that there is an equivalent uniform distribution of these benefits for both risky and nonrisky cases. This is depicted graphically below, where net benefit is depicted on the x-axis and a function of net benefit ($f(B)$) represents the number of parties at each bribe level on the y-axis. The parties' ranges of net

benefits are represented by the rectangle. The judges' acceptable bribe range for risky cases is represented by the upper arrow, while the lower arrow represents their acceptable bribe range for nonrisky cases.

Figure 4
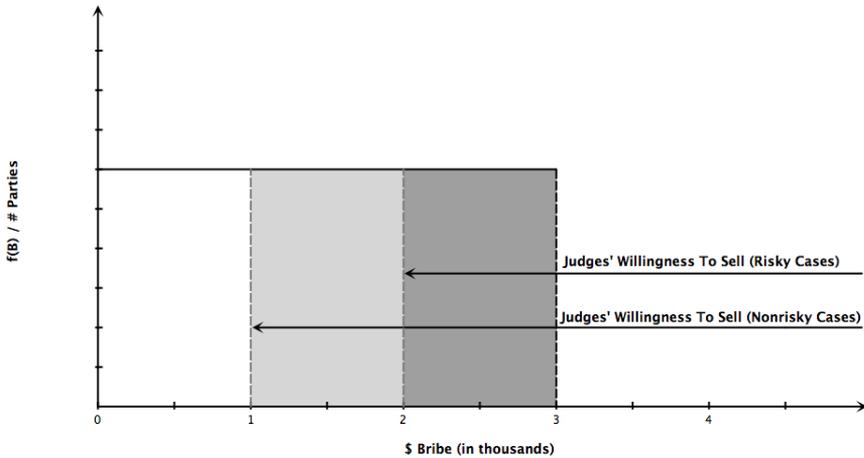
As we can see from Figure 4, there will be bribes exchanged in two-thirds of nonrisky cases, represented by both shaded regions, while only one-third of risky cases will be corrupted, represented by the darkly shaded region. But what will be observed is much different. To illustrate, assume there are a total of thirty risky cases and thirty nonrisky cases. The breakdown from Figure 4 shows that in twenty of the nonrisky cases bribes will be exchanged, while only ten bribes will be transacted in the risky cases. By multiplying the number of risky and nonrisky bribes by their respective rates of detection, we note the public will discover two instances of each type of case. Therefore, despite the actual difference in incidence of bribes, different rates of detection will lead us to observe the same number of bribes for each type of case. And unless the incidence of risky bribes decreases to zero, the bribes we observe will be of higher value than the actual distribution.

This example helps to illustrate the pitfall involved in studying observed corruption: what you see is almost certainly not what you get. While there is no way to guarantee an accurate analysis, accuracy can be maximized by understanding risk and the other incentives that drive parties to act corruptly or not. The framework built in this Part is the first step in this effort. The second step will be taken in the following sections, which investigate, among other aspects, the details of how cases of corruption were discovered and by what institutions. The next Part begins with a quick review of these institutions before describing the sample of corrupt judges they turned up.

II. SAMPLE AND METHODOLOGY

A. Accountability Institutions

Both state and federal judges face sanctions for corruption from primarily three institutions[16]: (1) impeachment by Congress or the state legislature; (2) criminal prosecution by federal or state authorities; and (3) censure by the federal judicial councils (FJCs) or, in the case of state judges, censure or removal by state JCOs.

While impeachment by the legislative branch was originally the preferred method of accountability for both state and federal judges, this time-consuming and political-capital-draining process[17] has been used less frequently as the obligations of Congress and state legislators have grown.[18]

The criminal prosecution of judges, which only became an accepted practice with regard to Article III judges after 1973,[19] has been filling this void. Tellingly, the last five federal judges to be impeached by the House and convicted by the Senate already had been either convicted of, or charged with, a crime.[20] Prior to their convictions, fifty years had passed without a single impeachment. Criminal prosecution of judges, while posing potential threats to judicial independence, is facilitated by prosecutors' capacity to offer plea bargains and immunity to informants. Indeed, most of the tips that the Department of Justice (DOJ) receives related to judicial corruption come from criminal defendants or convicts.[21] Prosecution can also be effective in breaking into otherwise secretive relationships, such as multijudge corruption rings.

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16. Many states have gone a step further and introduced judicial elections as an accountability mechanism. Although analyzing their success in holding corrupt judges accountable might make for an interesting study, it would require data and an approach that fall outside of the scope of the present analysis.

17. *See* Warren S. Grimes, *Hundred-Ton-Gun Control: Preserving Impeachment as the Exclusive Removal Mechanism for Federal Judges*, 38 UCLA L. REV. 1209, 1210 (1991).

18. *See id.* at 1224.

19. Federal judges had been investigated by the Department of Justice as early as 1913, but until the 7th Circuit in *United States v. Isaacs*, 493 F.2d 1124, 1142-44 (7th Cir. 1974), *cert denied sub nom* Kerner v. U.S., 417 U.S. 976 (1974), ruled that impeachment was not required before the prosecution of federal judges, prosecution did not become accepted practice. *See generally* EMILY FIELD VAN TASSEL, BEVERLY HUDSON WIRTZ & PETER WONDERS, WHY JUDGES RESIGN: INFLUENCES ON FEDERAL JUDICIAL SERVICE, 1789 TO 1992, at 34-35 (1993) (discussing the history of judicial prosecutions).

20. *See* Grimes, *supra* note 17, at 1214-15.

21. *See* Reid Weingarten, *Judicial Misconduct: A View from the Department of Justice*, 76 KY. L.J. 799, 800 (1988).

Although lacking the leverage available to prosecutors, federal judicial councils,[22] and JCOs, which now exist in all fifty states,[23] have greatly eclipsed Congress and state legislatures as anticorruption institutions. The former are composed of federal district and circuit court judges who investigate complaints filed by any citizen, which are vetted by the chief judge of the circuit. The Act creating the FJCs expressly withholds from them the authority to remove federal judges.[24] Instead, when the investigatory committee uncovers criminal or impeachable offenses, the judicial council may refer the judge to the Judicial Conference of the United States—an umbrella organization composed of judges elected from all circuits and presided over by the Chief Justice of the United States.[25] The Judicial Conference may further investigate the matter and certify the grounds for impeachment to the House.[26]

State JCOs, which receive and investigate complaints similar to federal judicial councils, offer a more streamlined approach to removal than their federal counterparts. In most states, these organizations are comprised of a mix of lawyers, judges, and lay people[27] and use the American Bar Association's Model Code of Judicial Ethics supplemented with statutory or constitutional provisions as their guidelines for determining misconduct.[28] They generally have the authority to investigate complaints made against judges, to issue a private admonition, to publicly reprimand or censure, to suspend, to impose mandatory retirement, to issue fines, and to recommend removal from office.[29] Rather than referring egregious conduct to the legislature for impeachment, most states have a process by which the JCO seeks removal by the state's highest court, or in some cases, another independent committee.[30]

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22. Federal judicial councils were established by the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, Pub. L. No. 96-458, 94 Stat. 2035 (codified at 28 U.S.C. §§ 351-364 (2000)).

23. *See* MARY L. VOLCANSEK, MARIA ELISABETTA DE FRANCISCIS & JACQUELINE LUCIENNE LAFON, JUDICIAL MISCONDUCT: A CROSS-NATIONAL COMPARISON 108 (1996).

24. § (3)(c)(6)(B)(vii), 94 Stat. at 2037 (codified at 28 U.S.C. § 354).

25. *See* VOLCANSEK ET AL., *supra* note 23, at 102.

26. *See* Grimes, *supra* note 17, at 1221.

27. VOLCANSEK ET AL., *supra* note 23, at 108.

28. *See* James D. Miller, *State Disciplinary Proceedings and the Impartiality of Judges*, *in* STATE JUDICIARIES AND IMPARTIALITY: JUDGING THE JUDGES 119, 119 (Roger Clegg & James D. Miller eds., 1996).

29. *See* James Alfini, Shailey Gupta-Brietzke & James F. McMartin IV, *Dealing with Judicial Misconduct in the States: Judicial Independence, Accountability and Reform*, 48 S. TEX. L. REV. 889, 892 (2007).

30. *See id.*

B. *Sample of Judges and Bribes*

The sample[31] used for this study is comprised of twenty investigations of judicial corruption from 1967 to 2000, where a total of thirty-eight state and federal judges were either convicted or removed from office by the institutions described above, on charges related to quid pro quo bribery in their traditional capacity as judges.[32] The cases were gathered from three main sources: the *Judicial Discipline and Disability Digests 1960-1991*,[33] which summarize all judicial discipline cases (related to removal or censure, but not criminal cases) handled by JCOs or state courts for those years; Cynthia Gray's *A Study of State Judicial Discipline Sanctions*,[34] which chronicles every removal of state judges by JCOs or the state courts from 1990 to 2001; and the DOJ's annual reports to Congress on the activities and operations of the Public Integrity Section from 1978 to 2000 (PIN Reports).[35] The Public Integrity Section (PIN) prosecutes cases that pose a conflict to the U.S. Attorney of the district or that are

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31. *See* Stratos Pahis, Table Accompanying *Corruption in Our Courts* (June 1, 2009) (unpublished manuscript), *available at* http://yalelawjournal.org/images/pdfs/ pahis_table.pdf. Reconstructing the fact patterns contained in the Table required piecing together facts from a variety of sources. It was, therefore, unworkable to include pincites for each fact included. Instead, I aggregated the relevant sources in a distinct footnote for each individual judge in the table.

32. I define the traditional role as one related to the administering, hearing, and deciding of cases. I do not include judges removed or convicted for bribery relating to administrative functions, unrelated to court business. *See, e.g.*, United States v. Reed, 647 F.2d 849 (8th Cir. 1981) (deciding a case in which an Arkansas judge charged with perjury in connection with allegations that he accepted bribes in his capacity as county administrator). I did, however, include three federal judges—Judge Alcee Hastings and Chief Judge Walter Nixon, who were both convicted of perjury, and Chief Judge Harry Claiborne, who was convicted of tax evasion. All convictions were related to bribery charges and the three judges were eventually impeached and convicted by the Senate. Given the significance of the cases, the strength of the government's evidence, and the eventual impeachments, I thought it was appropriate to include them in the study. I also included Judge Edward DeSaulnier, who was investigated, censured, and disbarred by the Massachusetts Commission on Judicial Conduct, and who was referred to the state legislature for an impeachment investigation but resigned before action was necessary.

33. JUDICIAL DISCIPLINE AND DISABILITY DIGEST: 1989-1991 SUPPLEMENT (Sara Mathias ed., 1993); JUDICIAL DISCIPLINE AND DISABILITY DIGEST: JULY 1986-DECEMBER 1988 SUPPLEMENT (Sara Mathias, Anne Lawson & Sheila MacManus eds., 1990); JUDICIAL DISCIPLINE AND DISABILITY DIGEST: POST-1980 SUPPLEMENTS (Yvette Begue ed., 1988); JUDICIAL DISCIPLINE AND DISABILITY DIGEST: 1960-1978 (Judith Rosenbaum ed., 1981).

34. GRAY, *supra* note 4.

35. Archive of PIN Reports, http://www.usdoj.gov/criminal/pin (last visited May 10, 2009).

politically sensitive.[36] Consequently, the PIN handles all cases involving federal judicial corruption[37] and at least some cases of state judicial corruption.[38] Of the investigations found in these sources, only those for which the fact patterns of corruption were available in major newspapers[39] or in the Westlaw legal database were kept for this study.

This collection of cases represent, to the best of my knowledge, every conviction or impeachment related to bribery of a U.S. federal judge from 1967 to 2000. The collection also includes most removals of state judges by a JCO or state court on charges related to bribery, and most bribery-related convictions of state judges stemming from prosecution by the PIN and reported in the PIN Reports for those same years. Missing from the study are cases in which state judges were prosecuted by U.S. Attorneys, rather than the PIN, and judges who resigned or died before they could be removed. Also missing are cases where state judges were impeached, although this appears to be a minor omission.[40]

C. Methodology

The judges in the sample are compiled in a table available as a PDF on *The Yale Law Journal* website.[41] The Table also includes the following information: (1) the date of the conviction or removal from office; (2) the court the judge sat on and whether the judge was appointed or elected; (3) the number of bribes the judge accepted and the types of cases for which they were accepted; (4) the corrupt action the judge took or promised to take in consideration of the bribe; (5) whether the bribe was transacted directly through the parties, through the

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36. U.S. DEP'T OF JUSTICE, REPORT TO CONGRESS ON THE ACTIVITIES AND OPERATIONS OF THE PUBLIC INTEGRITY SECTION FOR 2000, at 2 (2000) [hereinafter PIN REPORT 2000], *available at* http://www.usdoj.gov/criminal/pin/docs/arpt-2000.pdf.

37. *See* Weingarten, *supra* note 21, at 799.

38. *See infra* note 44 and accompanying text.

39. Using Proquest, I searched the following newspapers: *Atlanta Journal-Constitution*, *Boston Globe*, *Chicago Tribune*, *Los Angeles Times*, *New York Times*, *Wall Street Journal*, and *Washington Post*. When information on an investigation was available in this database or in the Westlaw legal database but was not adequate for my purposes, I expanded the search to include the *Pittsburgh Post-Gazette*, *Philadelphia Inquirer*, *Philadelphia Daily News*, *St. Louis Post-Dispatch*, and *San Jose Mercury News*.

40. Impeachments of state judges appear to be a rare occurrence. In the last fifteen years, only two state judges have been impeached, and one convicted. American Judicature Society, Methods of Removing State Judges, http://www.ajs.org/ethics/eth_impeachement.asp (last visited May 10, 2009).

41. Pahis, *supra* note 31.

lawyers, or through a middleman; (6) whether the judge accepted bribes from multiple parties or lawyers; (7) the size of the bribes; (8) how the corruption was uncovered; and (9) what charges the judge faced and, if applicable, how he was removed. With regards to *types of cases* in category 3, I create four classifications: criminal, civil, traffic, and administration. Civil cases are defined by two private entities facing off against each other, while criminal and traffic cases involve private individuals facing off against the government.[42] I define traffic cases to include regular traffic violations, as well as ordinance violations and drunk-driving charges.[43] The classification of administration does not refer to a particular type of case but rather to the judge's management of courtroom business. Corrupt administrative actions, for example, include setting bail and assigning lawyers to clients in return for kickbacks.

Throughout the Note, I make repeated references to information contained within the Table. When I do so, I cite in footnotes to the last names of specific judges whose corrupt acts are described therein. Generally, when discussing the attributes of the type of cases or bribes it is more appropriate to discuss the sample in terms of aggregate number of bribes rather than the judges in particular. Some vagaries in the fact patterns, however, inhibit the degree to which counting bribes is possible. In some of these situations, I revert to counting judges as a proxy for bribes. When analyzing the effectiveness of our anticorruption institutions, on the other hand, it makes more sense to talk in terms of individual judges, the specific bribes that led to their discovery, and the investigations that ensnared them.

When counting and analyzing bribes, I intend to describe not the number of transactions, but rather the number of corrupt decisions the bribes were meant to purchase. This approach is appropriate, as in many instances multiple bribes are made as installments toward the same corrupt action. Aggregating them allows us to analyze how much that action was worth. In other instances, a single payment is made to purchase influence in a number of cases. When possible, I will count the number of cases that the briber intended to influence

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42. There are civil cases in which the government is a party, but those do not arise in the sample.

43. I include ordinance violations in accordance with the methodology of the COURT STATISTICS PROJECT, EXAMINING THE WORK OF STATE COURTS 12 (2007), *available at* http://www.ncsconline.org/D_Research/csp/2007_files/Examining%20Final%20-%202007 %20-%201%20-%20Whole%20Doc.pdf. I include drunk-driving cases within the traffic category because many of the judges in the sample were caught for accepting bribes in both regular traffic cases and drunk-driving cases and often the fact patters did not allow for accurately distinguishing between the two. *See infra* notes 62, 64 (discussing of how this definition might affect the analysis).

as distinct bribes. When these numbers are not available, I will instead count the number of payments made.

While information regarding most of the judges in the sample is fairly comprehensive, not all categories of information are available at the same level of detail for all judges. For example, there are some notable gaps in a number of the judges who were exposed in an expansive investigation by the PIN, dubbed "Operation Greylord," into corruption within the Cook County Court of Chicago, Illinois. All told, the investigation convicted fifteen judges (each of whom is included in the sample) and fifty lawyers, in addition to police officers and court clerks.[44] Because the investigation uncovered corruption that in some cases spanned years, information regarding the number of bribes exchanged is sometimes unclear. Many judges were involved in kickback schemes through which they steered unrepresented clients to lawyers and then recouped a portion of the fees paid to the lawyers. Because the practice was so widespread and continued over such a long period of time, newspaper and court document accounts often do not describe in numerical terms the number of bribes that were exchanged. In other circumstances, the judges pled guilty before there could be a public airing of all of the charges, although it is clear they were involved in ongoing corruption. In these instances, I indicate the number of bribes in the Table as "multiple" and do not include these in the bribe counts, although I will make mention of how they might affect the conclusions.

D. Sample Bias

Unfortunately, because this study does not include every discovered case of judicial corruption, there is the possibility that the sample is biased. As described above, I include only cases of corruption in which judges were removed by JCOs or prosecuted by the PIN, and for which details were available in either the Westlaw legal database or in a major newspaper. This selection probably favors cases of corruption involving multiple and prestigious judges, large stakes, and egregious corruption, since such cases' scope and ramifications are more likely to grab the attention of the PIN and the major media. This bias is ameliorated by the fact that many of the cases' details came from removal hearings. The amount of detail offered in the decisions of the removal hearings varied considerably, but the level of detail is most likely not influenced by any of the above biasing factors. The PIN's exclusive jurisdiction

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44. Maurice Possley, *August 5, 1983: Operation Greylord Investigation Revealed*, CHI. TRIB., Nov. 6, 1997, § 2, at 2. For background on Operation Greylord, see JAMES TUOHY & ROB WARDEN, GREYLORD: JUSTICE, CHICAGO STYLE (1989).

over federal judges, however, probably biases the sample away from state judges. I will discuss in Parts IV and V how this bias might influence the observations.

III. CORRUPT JUDGES AND COURTS

Currently, of the total number of federal and state judges on the bench, state judges account for more than 31,000 (~95%),[45] and federal judges, including bankruptcy and federal magistrate judges, account for the remaining 1660 (~5%).[46] The 38 judges studied yielded a similar proportion, with state judges accounting for 34 (~89%) of the judges removed, and federal judges accounting for 4 (~11%) of the judges removed. Comparing the number of bribes that were discovered to the caseloads of state and federal judges is more difficult to do accurately, given the vagaries in the fact patterns. But accounting for those bribes for which there is a record, the sample shows five bribes accepted by federal judges were discovered (0.2%) compared to over 2840 bribes by state judges (99.8%). This shows that corruption by federal judges is underrepresented in our sample compared with the proportion of total incoming trial cases that the federal and state courts respectively accept. In 2006, state courts handled approximately 98% of total combined incoming trial cases, while federal courts handled the remaining 2%.[47]

All judges in the study served at the trial level. It is not surprising that cases of appellate corruption are minimal, considering that judges of first instance represent 98.3% of the state judiciary[48] and 89% of the federal judiciary.[49]

Of the state judges removed or convicted, 29 of the 34 judges (85%) were elected. This is almost identical to the 87% of state trial and appellate judges

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45. As of 2003, there were 1361 state appellate judges and about 30,000 state trial judges. COURT STATISTICS PROJECT, *supra* note 43, at 13, 63.

46. There are 179 federal circuit court judges, 28 U.S.C. § 44(a) (2000), and 663 federal district judges, *id.* § 133(a). Additionally, there are 316 bankruptcy judges, *id.* § 152(a)(2), and about 540 federal magistrate judges, Federal Magistrate Judges Association, http://www.fedjudge.org (last visited May 10, 2009).

47. There were 102.4 million cases filed in state courts in 2006. COURT STATISTICS PROJECT, *supra* note 43, at 12. There were about 2.1 million cases filed in federal courts over approximately the same period (the twelve-month period ending on March 31, 2006). Federal Judicial Caseload Statistics, Judicial Caseload Indicators, http://www.uscourts.gov/caseload2007/front/IndicatorsMar07.pdf (last visited May 10, 2009).

48. *See supra* note 45.

49. *See supra* note 46.

who either gain or retain their posts through elections.[50] Counting the number of bribes accepted by elected versus appointed judges shows a different result. Of the total number of bribes accepted by state judges, only 14 bribes accepted by appointed state judges were discovered (0.5%), while over 2700 bribes by elected judges were discovered (99.5%).

A. Federal Versus State Judges

Because federal judges hold positions of higher prestige and pay relative to state judges and therefore face higher detection costs, we expect their supply of corruption to be comparatively low. And because federal judges deal with cases of relatively higher stakes, we expect the demand for federal corruption to be comparatively high. According to our model, then, our net expectation is that bribe prices in the federal judiciary would be comparatively high, while the net effect on quantity supplied would depend upon which changed more: demand or supply.

While the sample size is too small to draw any significant conclusions, it provides anecdotal evidence that our expectations are indeed correct. Three of the federal judges in the study drew the largest bribes of the study — $150,000, $100,000, and $85,000. The smaller incidence of discovered bribery in federal courts with respect to the number of federal cases may suggest that the increased detection costs of judges outstrips any increases in the willingness to pay of parties before federal courts. This also may be attributable, however, to the different makeup of cases before federal and state courts.[51]

B. Trial Versus Appellate Judges

The sample seems to support the notion that bribery in courts of appeals is less common than in trial courts. Every one of the judges studied was bribed at the trial level. As noted, appellate judges represent just a fraction of the state and federal judiciaries, and so the absence of appellate bribery in the study simply could be attributable to the small fraction of cases that appellate courts hear. But there is reason to believe that appellate courts are structurally less prone to bribery. Appellate judges are more carefully vetted (and therefore

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50. Robert C. Berness, *Norms of Judicial Behavior: Understanding Restrictions on Judicial Candidate Speech in the Age of Attack Politics*, 53 RUTGERS L. REV. 1027, 1028 (2001).

51. Incoming federal trial cases are proportioned as follows: 11.5% civil; 3% criminal; 85% bankruptcy. Federal Judicial Caseload Statistics, *supra* note 47. Incoming state trial cases are divided as follows: 17% civil, 21% criminal, 54% traffic, 6% domestic, and 2% juvenile. COURT STATISTICS PROJECT, *supra* note 43, at 12.

perhaps face higher morality costs), receive higher pay, and hold positions of greater esteem. Of course, appellate cases are less likely to be reviewed again by state high courts or the Supreme Court, which makes bribery more attractive at this level. But the effect of the lower rate of reversal may be mitigated by the fact that appellate judges often must decide cases in panels of three or more. Successfully corrupting a decision, therefore, requires bribing two or more judges, which raises the price of the bribe and the risk of being caught for both the bribing party and the judges involved.[52]

C. *Elected Versus Appointed Judges*

Given the copious criticism of judicial elections as a poor method of selecting qualified judges, we might expect elected judges to fare worse in this study than unelected judges. According to this sample, a similar proportion of elected judges were caught acting corruptly as unelected judges, but elected judges were caught accepting a larger number of bribes relative to the number of cases that they handle.[53]

D. *Multijudge Corruption Rings*

Finally, it is worth noting that three investigations were responsible for prosecuting twenty-one of the thirty-eight judges in the sample. While it would seem this sample might be biased toward cases of large-scale corruption,[54] these cases do seem to intimate that corruption has a potentially infective quality and flourishes when those higher up in the hierarchical structure engage in it. In all three cases of large-scale corruption studied here, the supervising judge was corrupt and, in at least two of the cases, he appeared to gain the most from the corruption scheme. In Subsection IV.D.4, I discuss the risk implications for multijudge bribery schemes.

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52. *See infra* Subsection IV.D.4.
53. This assumes that elected judges handle a similar proportion of cases as appointed judges.
54. *See supra* Section II.C.

IV. FACT PATTERNS OF CORRUPTION

A. Types of Cases

This study reveals that the most common types of judicial bribery that are discovered and punished are bribes related to traffic violations and criminal prosecutions. At least twelve judges accepted a bribe in a traffic-violation, drunk-driving, or ordinance-violation case.[55] At least sixteen judges accepted a bribe related to a criminal case.[56] Meanwhile, removal or conviction for corruption in civil cases was far less prevalent; only five judges were disciplined for such offenses.[57] In addition, at least eleven judges received kickbacks from attorneys whom the judges either appointed, or steered unrepresented defendants to, or allowed to solicit clients in their court.[58] Another judge was removed for receiving kickbacks from a bail-bondsman,[59] while yet another was convicted of accepting bribes in a licensing court.[60]

Comparing the actual number of cases in which bribes were discovered rather than the number of judges who accepted the bribes is in theory a more accurate method of analyzing the distribution of bribery across cases. Given some of the vagaries in the fact patterns, this is difficult to execute in a precise manner. For example, some judges from Operation Greylord were indicted for taking an unidentified number of bribes to fix traffic cases. But even counting just the number of bribes that were identified, there are over 2500 traffic bribes within the sample.[61] Given that the sample documents only about one hundred nontraffic bribes that were meant to influence the judge's disposition toward a case, these transactions place traffic cases in a clearly dominant position vis-à-vis criminal and civil cases. They also would seem to make traffic bribery quite overrepresented in our sample relative to the proportion of traffic cases

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55. Judges Devine, Glecier, Jenkins, LeFevour, McCollom, McNulty, Melograne, Murphy, Oakey, Reynolds, Sollie, and Scaccheti. *See* Pahis, *supra* note 31, at 1-6, 8.

56. Judges Bates, Brennan, Cain, Collins, Coruzzi, DeSaulnier, Harris, Hastings, Hogan, Jenkins, Murphy, Nixon, Reynolds, Shiomos, and Thoma, as well as Chief Judge Claiborne. *Id.* at 1-7.

57. Judges Adams, Alonzo, Greer, Holzer, and Malkus. *Id.* at 1, 3, 6, 7.

58. Judges Devine, Glecier, Holzer, James, LeFevour, McDonnell, Murphy, Olson, Reynolds, Seaman, and Sodini. *Id.* at 1-6.

59. Justice McCann. *Id.* at 1.

60. Judge Salerno. *Id.* at 5. These numbers add up to forty-five, as some judges accepted bribes in different types of cases.

61. Judge LeFevour was responsible for accepting over 2500 traffic bribes alone. *Id.* at 2.

handled by the courts (54%).[62] Information on the number of instances in which bribes were transacted in criminal cases and civil cases is a bit clearer, but is still less than precise. For example, one judge was accused of requesting a "loan" from a lawyer when that lawyer had "a block" of cases before the judge.[63] Comparing the number of corrupt decisions in the two types of cases for which there is specific information, it appears that discovered bribery in criminal cases holds a dominant position over discovered bribery in civil cases. The ratio of 70 corrupt criminal decisions to 38 corrupt civil decisions represents a significant deviation from the 11:9 ratio of criminal to civil cases heard in state courts.[64]

B. *Corrupt Actions: What the Bribes Bought*

1. *Criminal Cases*

At least ten of the bribes paid in criminal cases sought to influence a judge to directly reduce or suspend a sentence, probation, or fine, after conviction.[65] Three bribes were paid to two judges so that they would influence the decision of another judge to reduce prison sentences.[66] One bribe was paid to a judge to persuade the prosecutor to drop charges against the defendant. [67] At least three bribes bought the dismissal of charges,[68] while another bribe bought the ordering of a new trial after the defendant was convicted.[69] In at least two cases, the briber sought or received a reduction in bail.[70] In one case, a bribe

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62. This is the percentage of incoming traffic cases in state courts in 2006. COURT STATISTICS PROJECT, *supra* note 43, at 12. Removing drunk-driving cases from the traffic category to conform with the Court Statistics Project's definition of traffic cases would reduce this overrepresentation, but probably not significantly. *See supra* note 43.

63. Judge Holzer. *See* Pahis, *supra* note 31, at 3.

64. Criminal cases made up 21% of all incoming cases in state courts in 2006, while civil cases made up 17% of the same. COURT STATISTICS PROJECT, *supra* note 43, at 12. Domestic and juvenile cases made up 6% and 2%, respectively, of the 2006 incoming case load. *Id.* Adding drunk-driving cases to conform with the Court Statistics Project's definition of criminal cases would only increase this overrepresentation. *See supra* note 43.

65. Judges Bates, Brennan, Collins, Coruzzi, Harris, Hastings, and Thoma. *See* Pahis, *supra* note 31, at 1-3, 5-7.

66. Judges Brennan and DeSaulnier, as well as Chief Judge Claiborne. *Id.* at 1-3.

67. Judge Nixon. *Id.* at 4.

68. Judges Brennan, Cain, and Reynolds. *Id.* at 2-3, 5.

69. Judge Brennan. *Id.* at 2-3.

70. Judges Cain and Harris. *Id.* at 5.

was used to buy the quashing of subpoenas related to an investigation,[71] while another bribe bought the acceptance of a habeas corpus petition.[72] At least one bought the acquittal of the defendants.[73]

2. Civil Cases

Corrupt action varied in civil cases. Three judges were convicted of steering cases toward settlements favorable to the bribing party, either through ruling on motions or advocating during settlement negotiations.[74] Two judges offered private consultations on cases to the lawyer before them.[75] Two judges handed down favorable monetary judgments.[76] In one case, the judge extorted money from a client of his former law firm by threatening to dismiss and impede the processing of their future cases.[77] In another set of cases, the judge would solicit loans from lawyers trying their cases before him (which incidentally were never paid back), although no explicit promises or threats were made.[78]

3. Traffic Violations

Bribing parties in traffic violation cases generally sought the dismissal of the case or, in the case of drunk driving, sometimes the lenient sentence of supervision. In the case of Judge Melograne, violations were dismissed before the police officers arrived to testify or after they were ordered away from the proceedings. Judge Melograne also conspired with the supervising judge at the Statutory Appeals Division to influence other judges. In the case of many of the Greylord judges, police officers—who often acted as middlemen passing the bribes to the judges—would sometimes take a cut of the bribe to change their testimony in court to allow for a dismissal.[79]

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71. Chief Judge Claiborne. *Id.* at 3.

72. Judge Jenkins. *Id.* at 6. The fourteen bribes that Judge Harris accepted were paid for the dismissal of charges, reductions in bail, and reductions in sentencing, in proportions unknown to this author.

73. Judge Murphy. *Id.* at 2.

74. Judges Adams, Greer, and Malkus. *Id.* at 6-7.

75. Judges Greer and Malkus. *Id.* at 6-7.

76. Judges Malkus and Adams. *Id.* at 7.

77. Judge Alonzo. *Id.* at 1.

78. Judge Holzer. *Id.* at 3.

79. *See, e.g.*, Judges LeFevour and Murphy. *Id.* at 2.

4. Administration of Cases

In one case, a lawyer bribed the supervising judge to assign cases to judges of the lawyer's choosing.[80] In another case, the judge set higher attorney's fees for a court appointed lawyer in exchange for a kickback.[81] In yet another case, a judge repeatedly increased bail for defendants in exchange for a kickback from the bail bond agency.[82] Many of the Greylord judges had an elaborate process, by which lawyers would bribe judges for the opportunity to solicit unrepresented defendants within the court, court clerks would steer these defendants to the paying lawyers, and the judges would share a cut of the fees that they would assign the lawyers for their work.[83]

C. Prices: How Much Was Paid

The bribes studied in these cases varied greatly in value, from a bag of ice for the dismissal of a traffic violation[84] to a $150,000 payment for the reversal of a forfeiture order of $845,000 in a criminal case.[85] Bribes in criminal cases with potential jail time ranged from $100 for the favorable treatment of auto-theft defendants[86] to $100,000 (half of which went to the middleman) for at least a forty-two-month reduction in jail time.[87] In the civil cases studied, bribes often were made with gifts and services or loans that were not or were only partially repaid. The sample size of civil cases is even smaller, and even harder to evaluate, as three of the five corrupt judges served on the same court and dealt with the same briber on multiple occasions. Nonetheless, it appears that very valuable judgments or settlements yielded substantial yet comparably small bribes. For example, $7 million worth of corrupt settlements yielded a $20,500 reward for one judge.[88] The disposal of traffic citations and fines yielded understandably smaller bribes for judges. There are records of $40 to $100 bribes and of gifts ranging from guns to jewelry to a bag of ice and a

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80. Judge Greer. *Id.* at 6.

81. Judge James. *Id.* at 1.

82. Justice McCann. *Id.* at 1.

83. Judges Devine, Glecier, Holzer, LeFevour, McDonnell, Murphy, Olson, Reynolds, Seaman, and Sodini. *Id.* at 2-6.

84. Judge Jenkins. *Id.* at 6.

85. Judge Hastings. *Id.* at 6.

86. Judge Hogan. *Id.* at 5.

87. Judge Collins. *Id.* at 6.

88. Judge Adams. *Id.* at 7.

pound of ham.[89] Small gifts do have the potential to add up over time, however, evidenced by the Greylord judge charged with accumulating over $100,000 from ticket fixing over a ten-year period of time.[90] Judges involved in kickback schemes took between 10% and 50% of the attorneys fees or bail-bond premiums that they were responsible for assigning.

D. Risk of Detection and Tip-Offs

The evidence regarding our ability to detect judicial corruption is generally not very encouraging. At least 29 of the 38 judges had engaged in previous corrupt acts prior to being caught.[91]

1. Prosecutorial Leverage

The data suggest that the most successful method for discovering corruption is the employment of prosecutorial leverage by the DOJ. Of the 20 investigations that ensnared the 38 judges in the sample, 10 (55%) were initiated through information obtained through prosecutorial leverage.[92] Criminal defendants were responsible for outing the largest number of corrupt judges, in exchange for more lenient sentences. In 6 investigations (30% of total investigations and 50% of criminal), the defendant or his agent voluntarily contacted the authorities after establishing a corrupt relationship with the judge.[93] In at least two cases, the briber went to the authorities after he received a heavier sentence than he had bargained for.[94] This would seem to confirm the hypothesis that dealing corruptly with criminal defendants, to whom this leverage can be extremely valuable, represents a significant risk to judges.

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89. *See, e.g.*, Judges Cain, Jenkins, LeFevour, Murphy, Oakey, and Salerno. *Id.* at 2, 5-6.

90. Judge LeFevour. *Id.* at 2.

91. Judges Adams, Alonzo, Brennan, Cain, Coruzzi, Devine, Glecier, Greer, Harris (fourteen cases through two lawyers), Hogan, Holzer, James, Jenkins, LeFevour (thousands of cases), Malkus, McCollom, McDonnell, McNulty, Melograne (hundreds of cases), Murphy, Oakey, Olson, Reynolds, Salerno, Scacchetti, Seaman, and Sodini, as well as Justice McCann (thirty-seven payments from bondsman) and Chief Judge Claiborne. *Id.* at 1-8.

92. Judges Bates, Brennan, Cain/Harris/Shiomos, Collins, Coruzzi, Hastings, Jenkins, Scacchetti, and Thoma, as well as Chief Judge Claiborne. *Id.* at 1-7.

93. Judges Brennan, Collins, Coruzzi, Scacchetti, and Thoma, as well as Chief Judge Claiborne. *Id.* at 1-3, 6-7.

94. Judge Thoma and Chief Judge Claiborne. *Id.* at 3-7.

Prosecutorial leverage was also critical in the initiation of three other investigations. In the cases of Judges Hastings and Jenkins, the judges' middlemen became FBI informants in return for leniency with respect to unrelated charges. In another investigation, the briber became a government informant after an unrelated investigation uncovered other corrupt dealings.[95] While it was not instrumental in initiating the investigation, prosecutorial leverage was vital to the success of Operation Greylord, in which multiple judges, lawyers, and clerks became government witnesses in return for leniency.[96]

2. Judicial Conduct Organizations and Uninterested Tip-Offs

Of the twenty investigations studied, it appears only two were initiated by JCOs[97] and only the investigation of Judge Sollie was handled exclusively by the JCO; the other JCO investigation led to criminal charges. Operation Greylord began when a disillusioned judge approached the FBI with no expectation of personal gain.[98] That it too over ten years after the expansive ring of corruption began for someone to come forward provides a sobering warning of the hazards of relying too heavily upon voluntary and disinterested tip-offs to fight corruption. Indeed, the lead prosecuting attorney for Operation Greylord lamented that he was not aware of a single lawyer who came forward voluntarily to complain about what was widespread corruption.[99] Underscoring this point is the fact that no investigation of judicial bribery in this sample was initiated by Congress, a legislature, or by a judicial council.

3. Judicial Extortion

In two cases in which the judge initiated the corrupt relationship and tried to extort money from attorneys, the attorneys themselves recorded the conversations and went to the authorities,[100] suggesting a potential danger in

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95. Judges Cain, Harris, and Shiomos. *Id.* at 3-5.

96. For a first-hand account of the investigation, see BROCTON LOCKWOOD WITH HARLAN MENDENHALL, OPERATION GREYLORD: BROCTON LOCKWOOD'S STORY (1989).

97. Judges Adams/Greer/Malkus and Sollie. *See* Pahis, *supra* note 31, at 1, 6-7.

98. *See generally* LOCKWOOD, *supra* note 96.

99. Maurice Possley, *Lawyers' 'Code of Silence' on Greylord Assailed*, CHI. TRIB., Nov. 23, 1985, § 1, at 1.

100. Judges Alonzo and James. *See* Pahis, *supra* note 31, at 1.

judge-initiated extortion. The case of Judge Holzer, who extorted money from lawyers with business in front of the court on at least three occasions, however, signals that lawyers may be reluctant to report judges for fear or retribution or for hopes of future payoffs.

4. Multijudge Corruption Rings

The incidence of multijudge corruption schemes is also noteworthy. There could be reasons to believe that multijudge involvement stymies investigations and reduces risk. Multiple players, however, also may serve to increase the risk of defection. First, the more judges involved, the greater the chance that an honest judge or a private party will take notice, prompting an investigation. Second, once an investigation begins, each corrupt judge will be caught in a classic prisoner's dilemma.[101] The more judges involved, the greater the incentive that a judge faces to defect. The evidence from this sample bears this argument out. In all three of the multiparty corruption schemes, corrupt judges became witnesses for the prosecution in exchange for leniency.

5. First-Mover Risk

Section II.B hypothesized that the first-mover risk might lead to long-term corrupt relationships between parties (or lawyers) and judges. The sample neither supports nor contradicts this hypothesis. All of the fifteen Greylord judges engaged in multiple acts of corruption before being caught, and at least thirteen of them accepted bribes from multiple parties or lawyers.[102] Of the non-Greylord judges, at least fifteen of the twenty-two engaged in multiple corrupt acts, with at least eight[103] dealing with multiple parties or lawyers and at least seven[104] dealing multiple times with the same lawyer or party. Only two judges were removed because an attorney reported their offer.[105] But given the

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101. For an introduction to the prisoner's dilemma, see ANATOL RAPOPORT & ALBERT M. CHAMMAH, PRISONER'S DILEMMA (1965).

102. This is true for all except Judges McDonnell and McNulty, for whom the evidence is not clear either way. *See* Pahis, *supra* note 31, at 4, 6.

103. Judges Brennan, Coruzzi, Harris, Jenkins, Melograne, Shiomos, Sollie, and Thoma. *Id.* at 1-8.

104. Judges Adams, Cain, Greer, James, Malkus, and Scacchetti, as well as Justice McCann. *Id.* at 1, 5-7.

105. This might suggest that our assumption was correct that judges face higher first-mover risk and therefore abstain from making the first move, leaving the parties and lawyers to bear the

number of bribes that changed hands before the judges were caught and given the number of parties involved, it would seem that any explanation would need to allow that corrupt judges, parties, and lawyers find ways to mitigate the first-mover risk and signal their openness to making a deal without leaving themselves vulnerable to reporting.

The use of middlemen was one method that some of the judges used to accomplish this. While at least fourteen judges dealt directly with the party,[106] at least fifteen judges dealt through middlemen, including friends of the judge or of the party,[107] bail bondsmen,[108] bailiffs,[109] third-party attorneys,[110] policemen,[111] clerks,[112] and unidentified middlemen.[113] At least six judges dealt directly with lawyers who appeared before them.[114]

V. ANALYSIS

The most striking findings of this study are the disproportionately high number of uncovered bribes related to traffic tickets vis-à-vis bribes made in criminal and civil cases, and the disproportionately high number of bribes in criminal cases as compared to bribes in civil cases. While it is unclear by how much traffic bribes are overrepresented in the sample, it is clear the overrepresentation is significant: Thousands of bribes were exchanged in traffic cases compared to around one hundred bribes made in all other cases. The overrepresentation of criminal cases vis-à-vis civil cases is also significant. This begs the question of whether these patterns reflect the incidence of judicial corruption in reality, or whether they represent a difference in relative rates of detection. Let us first examine the discrepancy between bribery in

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risk. The dataset cannot confirm this, however, as it does not include criminal or civil parties who were convicted for offering a rejected bribe.

106. Judges Alonzo, Hogan, Holzer, James, Jenkins, Murphy, Nixon, Oakey, Reynolds, Salerno, Sodini, and Sollie, as well as Justice McCann and Chief Judge Claiborne. *See* Pahis, *supra* note 31, at 1-6.

107. Judges Bates, Brennan, and Scacchetti. *Id.* at 1-3.

108. Judge DeSaulnier. *Id.* at 1.

109. Judge Sodini. *Id.* at 4.

110. Judges Coruzzi and Hastings. *Id.* at 2, 6.

111. Judges Hogan, LeFevour, McCollom, and Murphy. *Id.* at 2, 4-5.

112. Judge Reynolds. *Id.* at 3.

113. Judges Collins, Salerno, and Thoma. *Id.* at 5-7.

114. Judges Adams, Cain, Greer, Harris, Malkus, and Shiomos. *Id.* at 3-7.

criminal versus civil cases before moving on to addressing the frequency of bribery in traffic cases.

A. *Criminal Versus Civil Cases*

This Section argues that bribery in criminal cases is likely to present relatively more serious risks to the judge involved. This suggests that the sample overrepresents the amount of corruption in criminal cases, while underrepresenting the amount of corruption in civil cases.[115] Determining the level of bias in the sample requires evaluating the risk differential and other factors that drive the supply and demand of these respective corrupt decisions.

1. *Risk of Detection*

As discussed in the previous Part, six of the twelve investigations that ensnared the sixteen judges caught in bribery schemes related to criminal cases were initiated by the criminal defendant. The defendant became a government informant in exchange for a lenient sentence in the same case before the bribed judge. By making the corrupt arrangements and then notifying the authorities, the defendants were able to save money while still achieving a comparable result. The plea-bargaining authority of prosecutors appears then to create a strong incentive for the criminal defendant to defect in a bribery transaction. This raises the risk of detection for the judge accepting the bribe by adding what is akin to a first-mover risk to all such transactions, whether they are the first bribes exchanged between the two parties or not. Just as the moral gains of reporting induces offerees to reject and report bribes that otherwise would be advantageous to both parties, the plea-bargaining power of prosecutors induces some defendants to do the same. The judge, therefore, must contemplate the net benefits the briber could reap from reporting the bribe, even in the case where the defendant makes the first move. When the judge believes that the defendant could get a better deal from prosecuting authorities, the judge should refuse to engage. While in theory, prosecutors should always be able to provide a better deal by reducing a defendant's sentence for free, in practice this may not always be the case. There are risks that authorities may not be able to prosecute the judge, that prosecutors may not be open to

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115. The bias toward large-scale or newsworthy corruption, discussed in Section III.D, would not seem to skew the sample toward criminal cases, as none of the multijudge corruption cases were related to criminal trials. If anything, this sample bias would lead to an overrepresentation of civil case bribery, since, as was already noted, three of the four judges involved in civil case bribery served and acted corruptly together.

eliminating the defendant's charges or sentence, or that they may choose to prosecute the defendant for attempted bribery. It is difficult to know how large these risks are—the fact that the sample shows that some prosecutors are willing to make deals with defendants who initiated the bribe themselves may signal that the risks are not that large—but they most likely exist and create enough uncertainty that the expected value provided by the prosecuting authority is not always greater than the value provided by a corrupt judge.

Because judges face the risk that the defendant will choose to defect, the natural inclination will be to demand a larger bribe to compensate for that risk. But just as in our first-mover model, increasing the bribe demanded decreases the gain on the part of the defendant, leading to a greater risk of defection. Graphically we can show this as follows. While in a civil case, a judge would attempt to bargain for a bribe as close as possible to the maximum that the litigant would be willing to pay (B_P), here a judge would not accept any offer that would provide the briber less value than he would receive by reporting the bribe, which is represented as *PLEA*, for please bargain. Here, the judge would only accept a bribe that was less than (B_P - *PLEA*).

Figure 5
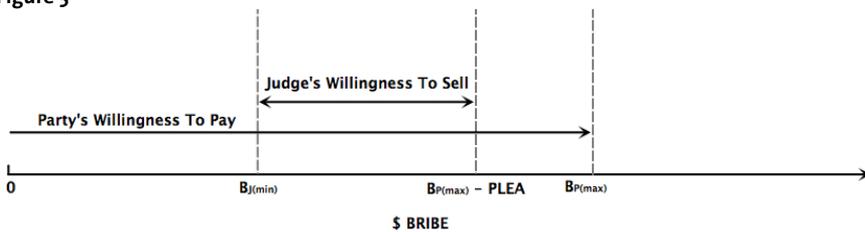
In Figure 5, there is room for a successful bribe as the judge is willing to accept a bribe (B) that is less than (B_P - *PLEA*). In general, however, we would expect the possibility of defection to reduce the number of bribes exchanged between judges and criminal defendants. We can show this through the following example. First, assume that there is a uniform distribution of judges' willingness to accept minimum bribes and that this minimum bribe threshold is distributed between bribes that are $1000 and bribes that are $4000. Next, assume that criminal defendants are willing to pay up to a certain bribe in between that range, say $3000. Absent the risk of defection, bribes will be transacted in two-thirds of all cases (in all cases in which judges are willing to accept as little as a $3000 bribe, represented by both shaded regions). But after accounting for the prosecutor's plea-bargaining powers, which here we assume to offer a value of $1000, we see that bribes will only be transacted in one-third of criminal cases (represented by the lightly shaded region). This analysis suggests that, all else equal, we should expect less bribery in criminal cases than in civil cases, in which there is no analogous incentive for defection.

Figure 6
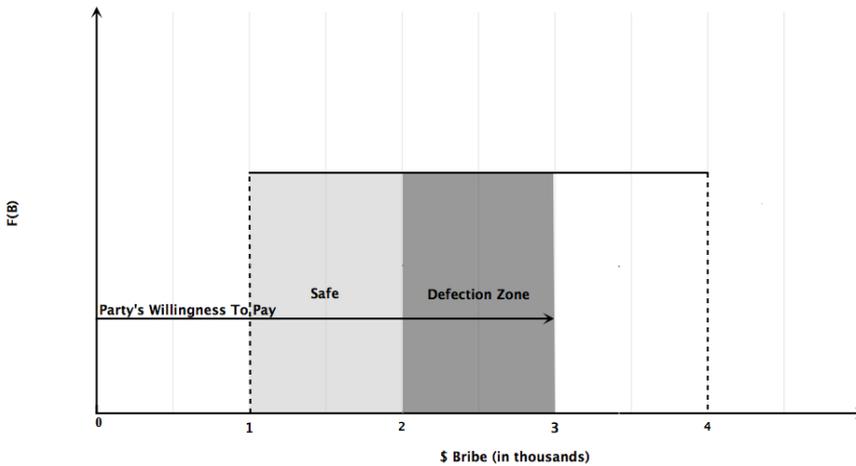
If the model is correct in its prediction that judges will shy away from accepting bribes within the zone of defection, why does the sample suggest the opposite? Indeed, six of the sixteen judges removed or convicted for accepting bribes in criminal cases were caught precisely because the defendant defected. To answer this question, we first must remind ourselves that we are looking not at a sample that is representative of bribery as it exists, but of bribery that is discovered. This sample in all likelihood overrepresents cases of high-risk bribery. Still, the model predicts that judges will rationally avoid accepting any bribes that fall within the zone of defection. Why, then, are any such bribes found in our sample? The fact that they are found suggests that the judges caught in this way either miscalculated or failed to perceive the risk.[116] Equally plausible is the possibility that the defendants themselves miscalculated the

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116. Many studies in behavioral law and economics have questioned the individual capacity for rational decisionmaking, even when the decisionmaker possesses complete information. *See* Robert A. Prentice, *The Case of the Irrational Auditor: Behavioral Insight into Securities Fraud Litigation*, 95 NW. U. L. REV. 133 (2000) (providing a brief overview of the literature). Individuals tend to be overly optimistic about their chances of success and think that they can beat the odds. *See, e.g.*, Donald C. Langevoort, *Organized Illusions: A Behavioral Theory of Why Corporations Mislead Stock Market Investors (and Cause Other Social Harms)*, *in* BEHAVIORAL LAW AND ECONOMICS 144, 149 (Cass R. Sunstein ed., 2000) ("One of the most robust findings in the literature of individual decision making is that of the systematic tendency of many people to overrate their own abilities, contributions, and talents. This egocentric bias readily takes the form of excessive optimism and overconfidence, coupled with an inflated sense of ability to control events and risk."); Cass R. Sunstein, *Introduction* to BEHAVIORAL LAW AND ECONOMICS, *supra*, at 1, 4 ("Even factually informed people tend to think that risks are less likely to materialize for themselves than for others. Thus there is systematic overconfidence in risk judgments . . . .").

benefit provided by the prosecuting authority. Given the potential uncertainty surrounding the gains achievable through defection, this is understandable. Unless the DOJ and state prosecutors develop a transparent policy of offering immunity to all defendants who can deliver to them a corrupt judge,[117] neither the judge nor the defendant will be aware of what can be gained through reporting the bribe. So while in theory there may be a clearly delineated zone of defection in which all bribes will be reported, in practice the edges of this zone may be rather fuzzy, creating the risk that even well-calculated bribes accepted on the part of the judge will be reported. Unlike other risks, this one cannot be compensated by a larger bribe and so it should lead to even fewer corrupt exchanges in criminal cases. Those judges who chose to brave the risk were more likely to appear in the sample.

The risk to judges accepting bribes in criminal cases is even greater when one considers that the government, being the prosecuting party, is likely to have a greater interest in corruption in these cases and, having front-row seats to the trial, is more likely to be attuned to suspect behavior by judges. Moreover, once an investigation into bribery in a criminal case is launched, it faces a higher probability of success. The prosecution is more likely capable of inducing defection even in cases where the briber would have preferred not to defect ex ante. Unlike investigations into civil corruption, the prosecution will be able to offer more than just immunity in return for incriminating information against the judge.

Because there seems to be no reason to believe that a judge would have a greater incentive to report a bribe in a civil case than in a criminal case, it is reasonable to conclude that corruption is less likely to be discovered in civil cases than in criminal cases, and that all else equal, judges are less likely to accept bribes in criminal cases. This conclusion is significant and provides at least one reason for believing that criminal cases are overrepresented and civil cases are underrepresented in our sample.

2. *Actual Incidence*

Whether, in fact, we expect there to be more bribery in civil cases than in criminal cases depends upon whether the willingness to pay of civil litigants is greater than that of criminal defendants. It also depends upon whether we expect judges, the risk of defection and the greater risks of detection in general

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117. The use of informants and the prosecutorial "deals" given to them is one of the most opaque practices in the judicial system and suffers from great inconsistencies in application. Alexandra Natapoff, *Snitching: The Institutional and Communal Consequences*, 73 U. CIN. L. REV. 645, 648, 654 (2004).

notwithstanding, to be more or less willing to accept bribes in criminal or civil cases. To address what our sample and model can tell us about what types of corruption go undetected, this Subsection explores both of these questions in turn.

a. Demand

There are at least five reasons for believing that demand for corruption might be relatively greater in criminal cases than in civil cases and at least one reason for believing that the opposite is true. First, criminal defendants may face greater stakes; all else equal, a criminal defendant may value freedom from the average jail sentence more than a civil party values the average monetary award from litigation. Given the great variance in value of the stakes in civil and criminal claims, however, it is unclear how much explanatory power this hypothesis provides. A second reason for why there might be relatively more demand for corruption in criminal cases is that criminal defendants face relatively lower costs of detection. While a criminal defendant might face a greater risk of detection, given the government's direct interest in the case, the potential costs of detection in terms of reputation and employment opportunity costs are probably relatively low, as they may already face incarceration. The willingness of the government to grant immunity to the defendant for turning state's evidence further reduces the costs of detection. Civil litigants, on the other hand, especially those engaged in high-stakes litigation, might have greater personal, professional, or corporate reputations to uphold. Third, even holding the stakes as well as the risk and cost of detection equal, the criminal defendant should be willing to pay more for the same value, as he has a sort of insurance policy against losing the value of the bribe. Should the judge not deliver the results bargained for, the criminal defendant has the ability to defect to the authorities and achieve a comparable result. The civil party has no such option reasonably available. Fourth, criminal defendants may face lower morality costs and be less risk averse. If they did indeed commit the crime they are accused of, their status as a defendant could be a signal of moral flexibility that translates, according to our model, into a willingness to offer larger bribes.

A fifth reason that criminal defendants may have a greater demand for corruption is that the decisions their bribes buy are probably less likely to be appealed and overturned.[118] While the government can appeal a range of

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[118]. Vikramaditya S. Khanna, *Double Jeopardy's Asymmetric Appeal Rights: What Purpose Do They Serve?*, 82 B.U. L. REV. 341, 350 (2002).

judicial decisions—including orders of dismissal before trials begin and judgments notwithstanding the verdict after trials end—prosecutorial appeals of midtrial dismissals, orders to suppress evidence, and decisions that lead directly to an acquittal are forbidden by the Fifth Amendment Double Jeopardy Clause.[119] This leaves corrupt judges with discretion to carry out the briber's wish in a manner that is nonreviewable.[120] The judges in this sample appeared to prefer reducing sentences, an action also relatively protected from appellate review. While prosecutorial sentence appeals were held constitutional by the U.S. Supreme Court in 1980,[121] their use has been restricted both at the state and federal levels.[122] Federal law restricts federal prosecutorial appeal to sentences allegedly "imposed in violation of the law,"[123] "imposed as a result of an incorrect application of the sentencing guidelines,"[124] "less than the sentence specified in the applicable guideline range,"[125] or "imposed for an offense for which there is no sentencing guideline and [are] plainly unreasonable."[126] Meanwhile, relatively few states have adopted statutes that enable prosecutorial sentence appeals at all,[127] and many of the states that allow such appeals restrict them to sentences that depart from sentencing statutes.[128] Relieving some of

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119. U.S. CONST. amend. V. ("No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb . . . ."). The Fourteenth Amendment applies the prohibition on double jeopardy to the states. Benton v. Maryland, 395 U.S. 784, 794 (1969); *see* Anne Bowen Poulin, *Government Appeals in Criminal Cases: The Myth of Asymmetry*, 77 U. CIN. L. REV. 1, 4, 51-52 (2008) ("Mid-trial rulings that fold into the ultimate verdict are insulated from government requested review as well. In addition, substantive issues arising in connection with jury instructions and pro-defendant evidence rulings are frequently beyond the reach of government appeal."). Acquittals purchased through bribes, however, are not subject to the prohibition of double jeopardy. United States *ex rel.* Aleman v. Circuit Court of Cook County, 967 F. Supp. 1022 (N.D. Ill. 1997), *aff'd*, 138 F.3d 302 (7th Cir. 1998).

120. *See* Poulin, *supra* note 119, at 52 ("A trial court is sometimes able—intentionally or not—to structure its rulings to preclude appellate review.").

121. United States v. DiFrancesco, 449 U.S. 117 (1980).

122. *See* Christina N. Davilas, Note, *Prosecutorial Sentence Appeals: Reviving the Forgotten Doctrine in State Law as an Alternative to Mandatory Sentencing Laws*, 87 CORNELL L. REV. 1259, 1266 (2002).

123. 18 U.S.C. § 3742(b)(1) (2000).

124. *Id.* § 3742(b)(2).

125. *Id.* § 3742(b)(3).

126. *Id.* § 3742(b)(4).

127. *See* Davilas, *supra* note 122, at 1266.

128. *Id.*; *see, e.g.*, ARIZ. REV. STAT. ANN. § 13-4032(5) (2001); FLA. STAT. ANN. § 924.07(1)(e) (West 2001); KAN. STAT. ANN. § 21-4721(d), (e) (2007); LA. CODE CRIM. PROC. ANN. art. 882 (2008).

the restrictions on sentencing appeals would decrease the value of corruption while avoiding the more restrictive approach of minimum sentencing laws.

There is at least one reason, however, for believing that that there may be greater demand for corruption in civil cases: the contingency payment method. As shown in the sample, attorneys, who deal more closely and repeatedly with judges than the parties, seem to be an effective conduit for corruption in both civil and criminal cases. In the civil cases involving Adams, Greer, and Malkus, for example, the corrupt attorney developed ongoing relationships with the judges and conspired with them to set attorneys fees in settlements. The greater use of the contingency payment method in civil cases may create a greater incentive for civil lawyers to bribe judges.[129]

b. Supply

While there are persuasive reasons for believing that demand for corruption in criminal cases might be relatively greater, there are at least five persuasive reasons for believing the overall supply of corruption in criminal cases is relatively lower. The first four have been discussed extensively in the above Subsection and will not be elaborated upon again here, though they deserve brief mention. First, the risk of defection that judges face will cause them to refrain from accepting bribes that, in other circumstances, would benefit both parties. Second, the uncertainty surrounding the value to the briber of reporting the bribe creates additional risk for bribes that theoretically fall outside the zone of defection. Third, the government has a greater interest in corruption in cases in which it is a party and is in a better position to detect suspicious behavior on the part of the judge. Fourth, investigations into bribery in criminal cases are more likely to be successful even in the absence of defection, as the government can offer incentives for the defendant to defect that go beyond immunity to charges of bribery. All of these factors point to greater risk for judges who accept and solicit bribes in criminal cases, which, all else equal, should reduce the incidence of such corruption.

The last factor that may reduce the willingness or ability of judges to sell corrupt criminal decisions is the prevalence of minimum sentencing laws.[130]

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129. Using the contingency fee method in criminal cases has generally been found to be unethical and prohibited. *See* Adam Silberlight, *Gambling with Ethics and Constitutional Rights: A Look at Issues Involved with Contingent Fee Arrangements in Criminal Defense Practice*, 27 SEATTLE U. L. REV. 805, 805 (2004).

130. *See* 24 C.J.S. *Criminal Law* § 2005 (2006).

These laws restrict judges' discretion with regards to what the sample reflects is the most common corrupt action taken in criminal cases.[131]

There is at least one factor, however, that may increase the willingness of judges to make the first move and solicit a bribe in a criminal case. A criminal defendant's position is most likely a sign of moral flexibility. The moral gain that criminal defendants receive from reporting a bribe offer therefore might be relatively lower than the moral gains accruing to civil parties. It would not seem that any of the other factors that influence supply of corruption in our model would lead intuitively to greater or lesser supply of corruption in criminal cases. For example, it does not appear that judges handling criminal cases would face greater detection costs than judges handling civil cases. The prevalence of courts that handle both criminal and civil cases makes this an effectively moot point.[132]

c. Uncertain Conclusions

The model leads us to believe that while the demand for corruption in criminal cases is greater than in civil cases, the supply of corruption is most likely lower. It remains unclear, therefore, whether we should expect a greater or lesser incidence of bribery in civil cases vis-à-vis criminal cases. This finding notwithstanding, the theory of differential rates of detection continues to be a relevant and explanatory piece of the puzzle, leading to the conclusion that bribery in civil cases is less likely to go detected.

3. Bias and Alternative Explanations

The bias toward large-scale or newsworthy corruption, discussed in Section III.B, would not seem to help explain the sample's disproportionately low number of bribes in civil cases relative to the number of actual civil cases. While Operation Greylord did net an additional three judges who accepted

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131. *See supra* Subsection IV.B.1. Since most of the corrupt acts in criminal cases went unnoticed until a party to the bribery notified the authorities, and because the investigations and prosecutions relied on other key testimony and evidence, there should not be a significant bias in sample from dealing only with discovered corruption. We might infer, therefore, that sentencing reduction is the means preferred by judges for achieving the desired result of criminal defendants. Other options for corrupting criminal cases include dismissing the case, issuing a judgment notwithstanding the verdict, and acquitting the defendant in a bench trial—all of which are likely to call greater attention to the judge and allow for appellate review.

132. COURT STATISTICS PROJECT, *supra* note 43, at 13.

bribes in criminal cases and one judge who accepted bribes in civil cases, the number of criminal bribes continues to far exceed the number of civil bribes even without accounting for these judges. Moreover, of those judges caught outside the Greylord net, three of the four judges involved in civil case bribery served and acted corruptly together – the same number of judges who served together and accepted bribes in criminal cases.

Another possible explanation for our sample's disproportionately low number of bribes in civil cases is that they are more likely to be handled by judicial conduct organizations or judicial councils. Given that the discovery of bribery in criminal cases is most often the result of a defendant seeking leniency, it seems reasonable to believe that the briber would notify law-enforcement authorities who could affect his sentence. The corollary is that civil cases are relatively more likely to be reported to judicial conduct organizations or judicial councils. Because JCOs and judicial councils are not endowed with prosecutorial leverage and are likely to only come across the case ex post, they may not be able to prove there was consideration in a transaction between a judge and a litigant or lawyer. Some quid pro quo transactions, then, would likely be classified as gifts, rather than as bribes.

It is unclear, however, how much this reclassification of bribes as gifts would bias the sample. After all, if a judge is removed by a judicial conduct organization, the case becomes public, opening the door for a follow-up DOJ prosecution. The ex post nature of the investigation (as opposed to criminal investigations which can make use of informants to catch the judge in the act) might hinder prosecution, as would the absence of any meaningful prosecutorial leverage. Bribing parties in civil cases, of course, do potentially face criminal charges for corruption, giving them an incentive to testify against the judge in exchange for immunity. But, unless the civil party is caught in the act of bribing or is implicated by a middleman, this incentive is limited. The judge, after all, would face little incentive to admit to wrongdoing unless he were part of a multijudge bribery scheme and engulfed in the type of prisoner's dilemma described above. Therefore, to the extent these reclassifications bias the sample, they also confirm the conclusion of this study that bribery in civil cases is less likely to be discovered.

The bias might be exacerbated when taking into account resignations. If a judge resigns amid an investigation, and the case against him is closed, it is unclear whether the JCO or judicial council is required to refer the case to the DOJ or does so in practice. Given concerns of maintaining judicial independence and integrity, there are reasons to believe JCOs and judicial councils would be reluctant to do so. Indeed, the promise to close the case could be a valuable bargaining chip for encouraging a resignation.

To the extent the judges engaging in these acts are removed or leave the judiciary, the accountability system would seem to work effectively. There are

at least two reasons, however, to believe that civil corruption is still relatively underdetected. First, these institutions are comparatively limited in their ability to discover and deter corruption. Without prosecutorial leverage, discovering and investigating civil bribery, even as gifts, will still be comparatively more difficult to do than discovering and investigating bribery in criminal cases. Second, while disciplinary sanctions and removal from office can be strong deterrents, they are less severe than the threat of criminal prosecution. Combining these factors leads us to conclude that bribery in civil cases presents lower costs to both the judge and the briber, possibly giving rise to a higher relative incidence rate than the sample shows.

B. Traffic Bribes

Bribery in traffic court would seem to fit in the same model as bribery in criminal court. After all, a defendant in traffic court presumably could trade information on a corrupt judge for the dismissal of his ticket. It presumably would be easier for the authorities to waive a traffic fine than a serious criminal charge for incriminating information on a judge. And yet the sample does not show any instances in which a traffic defendant voluntarily defected to the authorities.[133] This is not necessarily surprising when one considers that defection is not costless. Successful defection could require time-intensive cooperation with the authorities. It also carries a risk of failure and could bring possible charges against the defendant. Given the small stakes in traffic cases, these costs and potential risks are probably rarely worth incurring.

This might help explain why the sample shows that those traffic judges who accepted bribes did so repeatedly and extensively before being caught. Operation Greylord unveiled over ten years worth of ticket fixing which allowed one of the fifteen judges to amass over $100,000. While repeat bribery may increase the rate of detection if it continuously raises red flags, as with the case of Judge Melograne, the alarmingly high bribe-to-judge ratio (in the hundreds) suggests that the risk involved with corruption in traffic courts is relatively small and that the judges involved were able to successfully mitigate the first-mover risk. It is possible, of course, that Operation Greylord, which ensnared fifteen judges, is an outlier. Even after removing the fifteen Greylord judges from the study, ticket fixing remains overrepresented relative to the

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133. Judge Scacchetti was caught when the employer of one of his traffic defendants was arrested on unrelated charges and told the authorities about their prior corrupt dealings. *See* Pahis, *supra* note 31, at 1.

number of traffic cases handled, as Judge Melograne alone was responsible for hundreds of corrupt transactions.

There is no strong rationale for removing Judge Melograne from the study, as there are at least three additional strong reasons for believing that the abundance of traffic-related bribes in the sample is an accurate reflection of reality. First, given the small stakes involved, the interest that the state has in seeing a particular case through is probably weak. Second, the relatively little evidence involved in traffic hearings leaves the judge in a position to exercise a wide amount of discretion that can be abused at a low risk to the judge and the briber. Finally, traffic court judges do not possess the same prestige or salary of judges higher in the judicial hierarchy, leading them to face lower detection costs. Inputting all of these factors into the model in Part I suggests the willingness of judges to supply corrupt decisions in traffic court is most likely quite high. This, along with the low stakes involved, explains the low value of the bribes changing hands.

CONCLUSION

While the small sample size of corrupt judges limits the certainty of our findings, the study suggests there is a troubling gap in our efforts to prevent and prosecute judicial corruption. Of the thirty-eight judges studied in this case, thirty had engaged in corrupt acts other than the ones that led directly to their removal or conviction. That they were eventually caught is heartening, but it remains unclear how many other cases are being overlooked.

Even assuming these judges comprise a large share of a very small group of "bad apples," the many instances in which they were able to act corruptly without consequence is revelatory of deficiencies in our anticorruption institutions. This Note has attempted to shed light on these deficiencies by investigating the incentives that drive judicial bribery. Both the model and the sample suggest that corruption in civil and traffic cases seems especially prone to going undetected as compared to bribery in criminal cases. The discovery of bribery in the latter type of case is largely due to the incentive that criminal defendants have to report the corrupt judge in return for lesser charges in their present proceeding. This same incentive, however, is not found when bribes are made by lawyers, civil parties, or traffic defendants. Without it, unearthing corrupt relationships depends upon rare tips by third parties.

Expanding upon the sample of judicial bribes analyzed in this Note would prove helpful in establishing the robustness of these findings. Ways to bolster efforts to prevent corruption in civil and traffic cases, including through the creation of analogous incentives for defection, should be explored.