

INSTITUTIONAL CORRUPTION REVISITED: EXPLORING OPEN QUESTIONS WITHIN THE INSTITUTIONAL CORRUPTION LITERATURE

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I. INTRODUCTION

In 2010, the landmark decisions of *Citizens United v. Federal Election Commission* (“FEC”) and *Speechnow.org v. FEC* paved the way for the creation of super political action committees (“super PACs”) that can receive and spend unlimited sums of money on independent campaigning in support of or opposition to candidates for political office.¹ While these court decisions invited a significant amount of controversy in response to their pronouncements, the 2016 U.S. presidential elections reignited the debate over campaign finance, transforming the topic into a central political issue.² More than ever, politicians, non-profit organizations, the media, and average citizens have become concerned with the disproportionate influence of wealth on policy and electoral outcomes. The notion that Big Money buys politics is common in today’s political and civil discourse.³

The issue of private donations to politicians has also attracted the attention of academics. Many scholars have suggested that the United

¹ Michael S. Kang, *The Year of the Super PAC*, 81 GEO. WASH. 1902, 1903 (2013).

² See *Movement Strengthens: Oregon Becomes the 16th State to Call for an Amendment to Overturn Citizens United*, BUZZFLASH (July 2, 2013), <http://truth-out.org/buzzflash/commentary/item/18064-oregon-amendment-citizens-united>; *New Polling: Voters Demand Response to Citizens United and to Problem of Big Money in Politics*, COMMON CAUSE (Feb. 8, 2010), <http://www.commoncause.org/press/press-releases/new-polling-voters-demand-response-to-citizens-united-and-to-problem-of-big-money-in-politics.html?referrer=https://www.google.com/>.

³ See e.g. Nicholas Cofessore & Megan Thee-Brennan, *Poll Shows Americans Favor an Overhaul of Campaign Financing*, N.Y. TIMES (June 2, 2015), http://mobile.nytimes.com/2015/06/03/us/politics/poll-shows-americans-favor-overhaul-of-campaign-financing.html?referrer=&_r=3; *Getting Big Money Out of Politics and Restoring Democracy*, FRIENDS OF BERNIE SANDERS, <https://bernieanders.com/issues/money-in-politics/> (last visited Jan. 30, 2017); Sean McElwee, *The 1 percent’s twisted games: How they’re distorting reality and diluting democracy*, SALON (July 26, 2015), http://www.salon.com/2015/07/26/the_1_percent_s_twisted_games_how_theyre_distorting_reality_and_diluting_democracy/; Mark Murray, *Poll: Voters Pick Top Concerns About 2016 Election*, NBC (June 21, 2015), <http://www.nbcnews.com/meet-the-press/poll-voters-pick-top-concerns-about-2016-election-n379131>.

States' campaign finance system is an example of a larger phenomenon called "institutional corruption"—a term that broadly refers to legal, systemic corruption rather than illegal, quid-pro-quo corruption.⁴ A growing number of researchers have examined the topic of institutional corruption on both a theoretical and practical level. In the dynamic conversation about institutional corruption, scholars have advanced different views about how institutional corruption should be understood. Many unresolved questions about institutional corruption remain due to the multiplicity of opinions in the literature.

In this paper, we will document and examine some open questions within the literature. First, we will examine different conceptions of the nature and definition of institutional corruption, specifically with regards to the aspects of institutional purpose, the funder-institution relationship, and public trust. Then, we will discuss differing notions of individuals' moral responsibility of individuals in institutional corruption. Finally, we will explore three proposed solutions to institutional corruption: conflict of interest disclosure, conflict of interest elimination, and blinding.

II. WHAT IS INSTITUTIONAL CORRUPTION?

The term institutional corruption was first coined by Dennis Thompson, who defined it as "political gain or benefit by a public official under conditions that in general tend to promote private interests."⁵ He created this term specifically to consider the nature of corruption in Congress. Lawrence Lessig then suggested a broader definition that could be applied to a wider range of institutions.⁶ According to Lessig, "Institutional corruption is manifest when there is a systemic and strategic influence which is legal, or even currently ethical, that undermines the institution's effectiveness by diverting it from its purpose or weakening its ability to achieve its purpose, including, to the extent relevant to its purpose, weakening either the public's trust in that institution or the institution's inherent trustworthiness."⁷

Since Lessig offered this definition, many researchers have explored the concept of institutional corruption and commented on various aspects of this definition, with several scholars developing their own working

4 Thompson, *supra* note 2, at 16; Donald W. Light, *Strengthening the Theory of Institutional Corruptions: Broadening, Clarifying, and Measuring*, 4 (Edmond J. Safra Ctr. for Ethics, Working Paper No. 2, 2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2236391; Lessig, "Institutional Corruption" Defined, *supra* note 1, at 553; Arjun Ponnambalam, *The Power of Perception: Reconciling Competing Hypotheses about the Influence of NRA Money in Politics*, 5 (Edmond J. Safra Ctr. for Ethics, Working Paper No.27, 2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2341790; Dieter Zinnbauer, *The Vexing Issue of the Revolving Door*, 6 (Edmond J. Safra Ctr. for Ethics, Working Paper No. 61, 2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2600633.

5 Thompson, *supra* note 2, at 6.

6 Lessig, "Institutional Corruption" Defined, *supra* note 1, at 553–54.

7 Lessig, "Institutional Corruption" Defined, *supra* note 1, at 553. Lessig previously defined "institutional corruption" as the result of an influence within an economy of influence that either weakens the effectiveness of that institution or public trust in that institution. This earlier definition inspired a significant amount of scholarship as well. Lessig, "Institutional Corruption" Defined, *supra* note 1.

definitions of institutional corruption.⁸ This recent scholarship has contributed to a much greater understanding of the legal corruption that is widespread in the public and private institutions that affect everyday life. Yet a number of unanswered questions remain regarding the nature and definition of institutional corruption.

This paper will address some of these unresolved questions. Specifically, we focus on the topics of institutional purpose, the funder-institution relationship, public trust, and personal responsibility as they pertain to institutional corruption. We also explore proposed solutions to institutional corruption, namely conflict of interest disclosure, conflict of interest elimination, and blinding.

III. WHICH INSTITUTIONAL PURPOSES ARE CORRUPTED IN INSTITUTIONAL CORRUPTION?

According to Lessig, institutions are corrupted when their own purposes are undermined.⁹ That definition, however, requires an institution to have a purpose.¹⁰ There are two primary questions in the literature regarding the role of institutional purpose in the definition of institutional corruption. First, how does one determine when an institution's purpose has been corrupted? Second, does the corruption of a "harmful" institutional purpose qualify as institutional corruption?

A. HOW DOES ONE DETERMINE WHEN AN INSTITUTION'S PURPOSE HAS BEEN CORRUPTED?

Institutional corruption occurs when an institution deviates from its institutional purpose.¹¹ Yet in some cases, it is unclear how to specify a given institution's purpose in order to show that institutional corruption took place.

8 In this paper, we will focus primarily on Lessig's definition, but will also note discrepancies between his and other scholars' conceptions of "institutional corruption." See e.g., Gregg Fields, *What Institutional Corruption Shares With Obscenity* 2 (Edmond J. Safra Ctr. for Ethics, Working Paper No. 6, 2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2252033; Garry C. Gray, *Insider Accounts of Institutional Corruption: Examining the Social Organization of Unethical Behaviour*, 53 BRIT. J. OF CRIMINOLOGY 533, 533 (2013); Donald W. Light et. al., *Institutional Corruption of Pharmaceuticals and the Myth of Safe and Effective Drugs*, 41 J.L. MED. & ETHICS 590, 590 (2013); Jonathan H. Marks, *What's the Big Deal?: The Ethics of Public-Private Partnerships Related to Food and Health* 7 (Edmond J. Safra Ctr. for Ethics, Working Paper No. 11, 2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2268079; Gustavo H. Maultasch de Oliveira, *Institutional Corruption as a Problem of Institutional Design: A General Framework*, 4 (Edmond J. Safra Ctr. for Ethics, Working Paper No. 41, 2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2423554; Christopher Robertson, *Blinding as a Solution to Institutional Corruption*, 4 (Edmond J. Safra Ctr. for Ethics, Working Paper No. 21, 2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2321353; Marc A. Rodwin, *Conflicts of Interest, Institutional Corruption, and Pharma: An Agenda for Reform*, 30 J.L. MED. & ETHICS 511, 512 (2012); Malcolm S. Salter, *Short-Termism At Its Worst: How Short-Termism Invites Corruption . . . and What to Do About It*, 1, 4-5 (Edmond J. Safra Ctr. for Ethics, Working Paper No. 5, 2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2247545; Paul C. Taylor, *Institutional Corruption: From Purpose to Function*, 5 (Edmond J. Safra Ctr. for Ethics, Working Paper No. 30, 2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2417066##; Thompson, *supra* note 2, at 5.

9 Lessig, "Institutional Corruption" Defined, *supra* note 1, at 553.

10 *Id.* (describing the case in which an institution has a purpose).

11 *Id.*

For instance, Del Monte Foods, a prominent North American food production and distribution company, has a declared mission: “[t]o bring to life health and wellness.”¹² As a private, for-profit corporation, however, Del Monte also has as its purpose the maximization of shareholder values. These purposes can sometimes conflict. For example, a study conducted by the Environmental Working Group (“EWG”) showed that Del Monte products¹³ contained Bisphenol A (“BPA”),¹⁴ a cost-effective chemical that hundreds of studies demonstrated to cause harmful side effects in users, ranging from hyperactivity to obesity to cancer.¹⁵

To conclude whether a company has deviated from its purpose, one needs to specify what its “true” purpose is. But how would we determine which of the two aforementioned purposes of Del Monte is its “true” purpose? If Del Monte satisfied its objective of increasing profits while deviating from its mission of producing safe products, was it institutionally corrupt?

Scholars studying institutional corruption have not reached a consensus on how to determine institutional purpose. Lessig’s definition is agnostic regarding purpose identification; he does not put forth a standard method of specifying an institution’s purpose.¹⁶ Scholars—within and outside of the institutional corruption literature—suggest various methods of discerning institutional purpose.¹⁷

For some, a for-profit corporation’s only institutional purpose is to maximize shareholder value. That was the view famously advanced by Milton Friedman,¹⁸ and many continue to subscribe to that view. On this account, a company like Del Monte would compromise its purpose if it reduced shareholder value, even if it did so for another, socially beneficial purpose; only a breach of a corporation’s fiduciary obligations to its shareholders constitutes institutional corruption. Thus, the company’s use

¹² *About Us: Vision, Mission & Values*, DEL MONTE, <http://www.delmontepacific.com/Website/Content.aspx?i=11> (last visited Jan. 30, 2017).

¹³ In addition to the products of many other popular brands.

¹⁴ John Kell, *Bisphenol A: Many Popular Canned Foods Still Use Controversial Chemical*, FORTUNE (Mar. 30, 2016), <http://fortune.com/2016/03/30/bpa-campbell-del-monte-cans/>. But see, *Del Monte Foods Announces Conversion to Non-BPA Packaging and Increases Non-GMO Vegetable, Tomato and Fruit Cup Product Offerings*, BUS. WIRE, <http://www.businesswire.com/news/home/20160329006083/en/Del-Monte-Foods-Announces-Conversion-Non-BPA-Packaging> (last visited Jan. 30, 2017). This paper focuses on the moment in which the company used BPAs.

¹⁵ Ruchi Bhandari et. al., *Urinary Bisphenol A and Obesity in US Children*, 177 AM. J. OF EPIDEMIOLOGY 1263, 1269 (2012); Mariah Blake, *The Scary New Evidence on BPA-Free Plastics*, MOTHER JONES (Mar. 3, 2014), <http://www.motherjones.com/environment/2014/03/tritan-certichem-eastman-bpa-free-plastic-safe?page=1>; Harley et. al., *Prenatal and early childhood bisphenol A concentrations and behavior in school-aged children*, 126 ENVTL. RES. 43, 49 (2013); Nina Notman, *BPA: friend or foe?*, CHEMISTRY WORLD (Nov. 20, 2012), <http://www.rsc.org/chemistryworld/2012/11/bpa-bisphenol/>; Marco Pupo et. al., *Bisphenol A Induces Gene Expression Changes and Proliferative Effects through GPER in Breast Cancer Cells and Cancer-Associated Fibroblasts*, 120 ENVTL. HEALTH PERSP. 1177, 1182 (2012).

¹⁶ See Lessig, “*Institutional Corruption*” Defined, *supra* note 1, at 554.

¹⁷ See e.g. Fulton Friedman, *A Friedman Doctrine*, N.Y. TIMES (Sept. 13, 1970), [http://query.nytimes.com/gst/abstract.html?res=9E05E0DA153CE531A15750C1A96F9C946190D6CF](http://query.nytimes.com/gst/abstract.html?res=9E05E0DA153CE531A15750C1A96F9C946190D6CF;); Light, *supra* note 8, at 591; Maultasch de Oliveira, *supra* note 8, at 6–12; Taylor, *supra* note 8, at 7–8.

¹⁸ Friedman, *supra* note 17.

of BPA could well fulfill its institutional purpose of maximizing shareholder value because BPA is a cost-effective chemical.

By contrast, Light seems to state that while an institution can have multiple objectives, it becomes institutionally corrupt when its “societal mission” is distorted.¹⁹ On this logic, a deviation from Del Monte’s declared societal mission “to bring to life health and wellness” constitutes institutional corruption.

The question of whether a corporation’s purpose is singularly to maximize profits or additionally to fulfill a societal purpose is at the forefront of contemporary business ethics debates.²⁰ Arguing in favor of some purpose beyond profit are current notions of “Corporate Social Responsibility” (“CSR”). One conception of Corporate Social Responsibility is the triple bottom line, which holds that businesses need to simultaneously prioritize economic, social, and environmental goals.²¹ Alternatively, Porter and Kramer advocate a conception of CSR in which the purpose of business is shared value creation, as in strategic innovation generating products that create economic and social value at the same time.²² Others resist the CSR movement, for the reasons first articulated by Friedman.²³ Moreover, some contest CSR due to concern that efforts to make corporations be “good” are both ineffective when needed (since in bad times, competition will force them to maximize profits) and ultimately politically disempowering (since they weaken efforts to reform public policy through government).²⁴ Berkeley economist Robert Reich is the most prominent of these CSR skeptics.

B. DOES INSTITUTIONAL CORRUPTION NECESSARILY INVOLVE THE CORRUPTING OF INSTITUTIONAL PURPOSES THAT SERVE THE GREATER GOOD?

Institutions can have “good purposes” or “bad purposes.” Does “institutional corruption” depend upon which purpose an institution has? For example, the Ku Klux Klan (“KKK”) was founded in 1866. Its mission, according to a 1920 pamphlet was to “stand for white supremacy.”²⁵ The KKK pursued its mission through intimidation, torture, and murder. While

¹⁹ Donald Light, *Strengthening the Theory of Institutional Corruptions: Broadening, Clarifying, and Measuring* 16-17 (2013) (unpublished manuscript). It should be noted that Light, Lexchin, and Darrow speak about an institution’s purpose while Friedman focuses on a business’s purpose.

²⁰ Zachary Cheers, *The Corporate Social Responsibility Debate*, 4 (Apr. 12, 2011) (unpublished B.S. thesis, Liberty University) (on file with Digital Commons at Liberty University).

²¹ Ante Glavas & Jenny Mish, *Resources and Capabilities of Triple Bottom Line Firms: Going Over Old or Breaking New Ground?*, 127 J. BUS. ETHICS 623, 623–24 (2015).

²² Michael E. Porter & Mark R. Kramer, *Creating Shared Value*, 89(1/2) HARV. BUS. REV. 62, 66 (2011).

²³ Stephen Bainbridge, *Obama Preaches the False Religion of Corporate Social Responsibility*, PROFESSOR BAINBRIDGE (Feb. 11, 2015, 10:22 AM), <http://www.professorbainbridge.com/professorbainbridge.com/2011/02/obama-preaches-the-false-religion-of-corporate-social-responsibility.html>.

²⁴ ROBERT B. REICH, *SUPERCAPITALISM: THE TRANSFORMATION OF BUSINESS, DEMOCRACY, AND EVERYDAY LIFE*. 7 (2008).

²⁵ *Philosophy of the Ku Klux Klan*, THE JACKSON SUN, http://orig.jacksonsun.com/civilrights/sec4_philosophy_klan.shtml (last visited Feb. 6, 2017).

the organization amassed a substantial following in the 1920's, it declined afterwards in large part due to internal squabbles over money and power.²⁶ The KKK leaders' utilization of the organization to achieve their own purposes weakened the institution's ability to achieve its purpose of "[standing] for white supremacy."²⁷ The question arises: Is it appropriate to label the KKK as institutionally corrupt?

In order to answer that question, one must ask: Does institutional corruption only apply to cases in which institutions that serve the greater good diverge from that public purpose? Or can it also pertain to situations—like the one described above—where institutions that harm the greater good deviate from their purpose? Two main schools of thought have emerged on this issue in the institutional corruption literature. The first view, initially articulated by Lessig, is that institutional corruption is purpose-agnostic;²⁸ it refers to the undermining of *any* institutional purpose, regardless of whether that institution serves or harms the greater good. By this logic, institutional corruption could refer to the corruption of the Red Cross, the Catholic Church, or the KKK.

In contrast, others imply that institutional corruption refers to the corruption of institutions meant to serve the public interest.²⁹ On this account, governmental and medical institutions can become institutionally corrupt, while the KKK cannot.

However, this second view raises a number of questions: What is the "public good?" Who determines what is in the public's best interest? The answer to these questions is not clear, and certainly not stable. Today, the Klu Klux Klan is seen as a fringe hate group. During the KKK's peak, however, its declared purpose of "[standing] for white supremacy" would have been in line with many people's conception of the "public good."³⁰

The question of whether or not institutional corruption necessarily involves the corruption of purposes that serve the greater good is important because the answer determines whether or not institutional corruption has "an intrinsic connection to immorality."³¹ If institutional corruption always harms the greater good, then institutional corruption is inherently "immoral" according to utilitarian morality. On the other hand, if institutional corruption can *benefit* the greater good (such as "corrupting"

26 Richard E. Baudouin, *Ku Klux Klan: A History of Racism and Violence*. SOUTHERN POVERTY L. CTR. 20 (2011).

27 Here and elsewhere in the paper, we operate under the assumption of Oliveira that an institution determines its own institutional purpose by articulating said purpose in its mission statement. Maultasch de Oliveira, *supra* note 8, at 13.

28 Lessig, "Institutional Corruption" *Defined*, *supra* note 1, at 554.

29 Mirko Draca, *Institutional Corruption? The Revolving Door in American and British Politics*, CAGE 1, 3 (2009), <http://www.smf.co.uk/wp-content/uploads/2014/10/Social-Market-Foundation-Institutional-Corruption-the-revolving-door-in-American-and-British-politics.pdf>; Fields, *supra* note 10, at 2; Ponnambalam, *supra* note 6, at 5. *But see*, Lessig, "Institutional Corruption" *Defined*, *supra* note 1, at 554.

30 JOHN M. MURRIN, *LIBERTY, EQUALITY, POWER: A HISTORY OF THE AMERICAN PEOPLE* 24 (Ann West, et al. eds., 6th ed. 2005).

31 The question of whether institutional corruption has "an intrinsic connection to immorality" is explored in Daniel Wickler's unpublished paper, "What is the moral content of the label 'Institutional Corruption?'" Dan Wickler, What is the Moral Content of the Label "Institutional Corruption?" (2012) (unpublished manuscript) (on file with the Harvard School of Public Health).

the KKK would), then it is not necessary a morally “bad” phenomenon in the utilitarian sense.

IV. WHO IS INSTITUTIONALLY CORRUPT: THE FUNDERS, THE DECISION-MAKERS, OR THE SYSTEM?

In America’s current campaign finance system, funders can contribute unlimited sums of money to independent Super-PACs that support or oppose political candidates.³² These donors are part of a class that many studies have shown to have a disproportional influence on policy and electoral outcomes. For instance, a recent study found that, “Economic elites and organized groups representing business interests have substantial independent impacts on U.S. government policy, while average citizens and mass-based interest groups have little or no independent influence.”³³ Furthermore, studies have shown that the interests of these donors quite often conflict with the desires and interests of the general population. For instance, while the majority of Americans support national health insurance, the majority of donors oppose it.³⁴

Scholars of institutional corruption agree that the situation described above constitutes institutional corruption.³⁵ However, scholars disagree about who precisely is corrupt in that situation: the donors, Congress, or the campaign finance system.

Consider that there are two parties in any sphere of institutional corruption: a funding party and a decision-making party.³⁶ In the event that the funders’ money influences the decisions of the decision-makers, who is the subject of institutional corruption: one, both, or the system that enabled the passage of funding from the former to the latter?

One view seems to indicate that it is the decision-making party who is corrupted by institutional corruption, not the funder. For example, Brock defines institutional corruption as when “[s]ome parties have improper influence over *the institution’s* operations, practices, or policies resulting in important losses to effectiveness or equity.”³⁷ In this sentence, Brock seemingly designates the decision-making party—“the institution” that is influenced by other “parties”—as the one that is corrupted. Other scholars likewise seem to refer to the decision-making—rather than funding—party as the subject of institutional corruption.³⁸

32 Kang, *supra* note 3, at 1903.

33 Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERS. ON POL. 564, 565 (2014).

34 McElwee, *supra* note 5; David Callahan & J. Mijin Cha, *Stacked Deck: How the Dominance of Politics by the Affluent & Business Undermines Economic Mobility in America*. DEMOS (Feb. 2013), <http://www.demos.org/stacked-deck-how-dominance-politics-affluent-business-undermines-economic-mobility-america>.

35 Thompson, *supra* note 2, at 16; Ponnambalam, *supra* note 6, at 5. See Lessig, “*Institutional Corruption*” *Defined*, *supra* note 1, at 553.

36 Robertson, *supra* note 10, at 4.

37 Gillian Brock, *Institutional Integrity, Corruption, and Taxation*, 7 (Edmond J. Safra Ctr. For Ethics, Working Paper No. 39, 2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2408183.

38 See Lessig, “*Institutional Corruption*” *Defined*, *supra* note 1, at 553; Jose V. Mendonca, *Brazil’s Case Against Private-Sponsored Events for Judges: A Not-Yet-Perfect Attempt at Fighting*

Another view, articulated by Light, holds that the funding party should also be considered institutionally corrupt (in addition to the decision-making party) if that funding undermines the institutional purpose of the funder.³⁹ So, with regard to the fact that funding from pharmaceutical companies biases academics' review of those companies' drugs,⁴⁰ Light would label the pharmaceutical company as institutionally corrupt (as well as the physicians), because said funding undermines its purpose of producing safe, effective drugs.⁴¹

A third view is that neither the funding party nor the decision-making party should be considered as the "subject" of institutional corruption. Rather, the corruption is in the "system"—the laws or rules that enable the unhealthy relationship between funder and decision-maker to exist. Bernie Sanders, a presidential candidate in the 2016 national elections, was an outspoken campaign finance reform advocate who funded his campaign through donations from individuals rather than super-PACs.⁴² He said in an interview, "Our campaign finance system . . . is a corrupt system. The Supreme Court, in *Citizens United*, created a system in which billionaires can buy elections."⁴³ According to this view, neither the "billionaire class" nor Congress is corrupt; the corruption lies within the system of law that enables the billionaires to legally control politics.

The question of which—if any—specific party is responsible for institutional corruption will become important if institutional corruption is to be legally regulated. The answer to this question will determine which party within any given realm of institutional corruption—i.e., the funding party, the decision-making institution, or the legal system—will be held accountable.

A. DOES ONE NEED TO DEMONSTRATE A CAUSAL RELATIONSHIP BETWEEN THE FUNDING AND DECISION-MAKING TO "PROVE" INSTITUTIONAL CORRUPTION?

Think tanks are independent organizations that conduct research and make recommendations to the government on public policy issues. In the US, UK, and many other countries, think tanks can receive funding from private organizations.⁴⁴ For instance, in 2013, Britain's leading tobacco

Institutional Corruption, 6 (Edmond J. Safra Ctr. For Ethics, Working Paper No. 24, 2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2331515.

³⁹ Light, *supra* note 4, at 10.

⁴⁰ Andreas Lundh, et al., *Industry Sponsorship and Research Outcome (Review)*, COCHRANE LIBRARY 1 (Dec. 12, 2012), <http://doi.wiley.com/10.1002/14651858.MR000033.pub2>.

⁴¹ The topic of institutional corruption in the pharmaceutical industry will be covered in more depth later in the paper.

⁴² Jose A. DelReal, *Bernie Sanders Pledges Not to Accept Super PAC Support*, WASH. POST (May 10, 2015), <https://www.washingtonpost.com/news/post-politics/wp/2015/05/10/bernie-sanders-pledges-not-to-accept-super-pac-support/>.

⁴³ *Bernie Sanders on Campaign Finance: It's a Corrupt System*, BLOOMBERG POLITICS (Aug. 17, 2015), <http://www.bloomberg.com/politics/videos/2015-08-17/bernie-sanders-on-campaign-finance-it-s-a-corrupt-system>.

⁴⁴ *Corporate Interests and Think Tanks – An Overview of Current Debates*, TRANSPARIFY (Apr. 14, 2014), <http://www.transparify.org/blog/2014/4/14/corporate-interests-and-think-tanks-an-overview-of-current-debates>.

companies donated tens of thousand of pounds to the Adam Smith Institute (“ASI”) and the Institute of Economic Affairs (“IEA”). These think tanks then criticized some of the government’s anti-tobacco initiatives, such as its ban on smoking in pubs. The think tanks’ criticisms prompted many to argue that such funding influenced their pro-tobacco recommendations.⁴⁵ Because the ASI and IEA purport to be “independent” institutions,⁴⁶ one could argue that making policy recommendations based on funding⁴⁷ renders them institutionally corrupt. Yet how does one prove that institutional corruption occurred, in this case and in general?

According to Robertson’s “causal model” of institutional corruption, “[a] funder creates a dependency,⁴⁸ which then causes a decision maker to alter his or her behavior in a way that biases an outcome.”⁴⁹ In other words, institutional corruption occurs when funding *causes* a shift in institutional outcome. On the other hand, Thompson argues that institutional corruption can also occur when there is a “reasonable belief” that an institution provided a “service” in “exchange” for a “benefit.”⁵⁰ As such, the *perception* of a causal connection between funding and outcome is sufficient to “prove” institutional corruption—at least for institutions that owe the public the confidence of their own independence.

Thus, according to Robertson’s logic, one would have to show that an increase in funding from tobacco companies altered the think tanks’ behavior in order to refer to this situation as institutional corruption. According to Thompson’s logic, the mere fact that the funding was reasonably perceived to have influenced the think tanks’ recommendations is sufficient to make this situation institutional corruption.

V. WHAT IS THE RELATIONSHIP BETWEEN TRUST AND INSTITUTIONAL CORRUPTION?

The relationship between public trust and institutional corruption is one of the most debated aspects of institutional corruption in the literature; there are many different opinions regarding the specific role that loss of trust plays in institutional corruption.⁵¹ In this section, we will examine the

45 Jamie Doward, *Health Groups Dismayed By News “Big Tobacco” Funded Rightwing Thinktanks*, THE GUARDIAN (June 1, 2013), <http://www.theguardian.com/society/2013/jun/01/thinktanks-big-tobacco-funds-smoking>.

46 ADAM SMITH INSTITUTE, <http://www.adamsmith.org/> (last visited November 5, 2016); INSTITUTE OF ECONOMIC AFFAIRS, <https://iea.org.uk/about-us/> (last visited November 5, 2016).

47 Assuming that funding indeed influenced their recommendations.

48 A dependency occurs when a decision-making institution loses its independence because it is dependent on a certain source of funding. Robertson, *supra* note 10, at 4 (explaining that dependency occurs when a decision-making institution loses its independence because it relies on a certain source of funding).

49 *Id.*

50 Funding is an example of a “benefit.” Thompson, *supra* note 2, at 3, 12.

51 An illustration of the diversity of opinions regarding the role of trust in institutional corruption is the fact that while certain scholars include “loss of trust” in their definitions of institutional corruption, *see e.g.*, Brock, *supra* note 39, at 6; Lessig, “*Institutional Corruption*” *Defined*, *supra* note 1, at 553; Mendonca, *supra* note 40, at 6; Robertson, *supra* note 10, at 3; Salter, *supra* note 10, at 120, other scholars do not mention “loss of trust” at all, *see e.g.*, Maultasch de Oliveira, *supra* note 8; Michael Pierce, *Divided Loyalties: Using Fiduciary Law to Show Institutional Corruption* (Edmond J. Safra Ctr. for Ethics, Working Paper No. 19, 2013),

issue of trust and institutional corruption by asking two questions: Is loss of trust a necessary condition for institutional corruption? Is it a sufficient condition for institutional corruption?

A. IS LOSS OF PUBLIC TRUST A NECESSARY CONDITION FOR INSTITUTIONAL CORRUPTION?

According to a 2015 Gallup Poll, Americans' confidence in major institutions is on the decline.⁵² Only the military and small businesses have seen an increase in public trust, with the military being the most trusted institution in America.⁵³ Yet despite America's high level of confidence in the military, scholars argue that a revolving door between senior Pentagon officials and the defense industry contributes to the undue influence of certain weapons contractors on decisions made by the military.⁵⁴ For instance, Citizens for Responsibility and Ethics in Washington ("CREW") found that: "70 percent (or 76) of the 108 three-and-four star generals and admirals who retired between 2009 and 2011 took jobs with defense contractors or consultants."⁵⁵ In at least a few cases, the retirees have continued to advise the Department of Defense while on the payroll of defense contractors.⁵⁶ The influence of these companies on the Department of Defense's ("DoD") military decisions could undermine the military's mission of "[protecting] the security of [America],"⁵⁷ as it gives military officials incentives to support certain companies' weapons even if those weapons are not the most effective choices.

Can the military be institutionally corrupt if it remains trusted by the American population? More broadly, if an institution deviates from its purpose but maintains the public's trust, is it—or is it not—institutionally corrupt? Is loss of public confidence in an institution a necessary criterion for institutional corruption?⁵⁸

Some scholars seem to view loss of public trust as a necessary condition for institutional corruption. For instance, Thompson defines institutional corruption as "conduct that undermines the effectiveness [of an institution] and confidence necessary to carry out [its] purpose."⁵⁹

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2313321; Rodwin, *supra* note 10; Marc A. Rodwin, *Introduction: Institutional Corruption and the Pharmaceutical Policy*, 41 J.L. MED. & ETHICS 544 (2013), <http://doi.org/10.1111/jlme.12062>.

⁵² *Confidence in Institutions*, GALLUP (Jun. 2, 2015), <http://www.gallup.com/poll/1597/Confidence-Institutions.aspx>.

⁵³ *Id.*

⁵⁴ Gliga, *supra* note 2, at 10.

⁵⁵ Katherine S. Carson, *Tarnished Brass?*, EDMOND J. SAFRA CENTER FOR ETHICS BLOG (Mar. 3, 2014), <http://ethics.harvard.edu/blog/tarnished-brass>.

⁵⁶ *Strategic Maneuvers: The Revolving Door from the Pentagon to the Private Sector*. CITIZENS FOR RESP. AND ETHICS IN WASH. (2012), <http://www.crewsmostcorrupt.org/pages/strategic-maneuvers-generals-defense-department-revolving-door>.

⁵⁷ *About the Department of Defense*, DEPARTMENT OF DEFENSE, (Aug. 27, 2015), <http://www.defense.gov/About-DoD>.

⁵⁸ In this context, "trust" in an institution does not mean "faith that an institution is reliable or good," but rather the belief that an institution is fulfilling its purpose. Furthermore, the "public" refers to the general population, including but not limited to the people who specifically rely on that institution.

⁵⁹ Thompson, *supra* note 2, at 5.

In contrast, other scholars implicitly state that loss of trust is *not* a necessary condition for institutional corruption. For instance, Light notes that institutions can be corrupt while still maintaining public confidence.⁶⁰ A number of scholars do not even mention loss of trust in their respective papers on institutional corruption;⁶¹ clearly, they believe that an institution can be corrupted without losing the public's trust.

While scholars are divided over whether loss of trust is a "must" for institutional corruption, the fact that some scholars believe institutional corruption can only occur when public confidence declines demonstrates the importance of the concept of public trust in the institutional corruption literature.

B. IS LOSS OF TRUST A SUFFICIENT CONDITION FOR INSTITUTIONAL CORRUPTION?

In 1998, United States President Bill Clinton was accused of having a sexual relationship with White House employee Monica Lewinsky. After giving false testimony denying any sexual relationship with Lewinsky, Clinton was impeached due to charges of perjury and obstruction of justice (and was subsequently acquitted).⁶² During the impeachment process, the American public's trust in the government plummeted.⁶³ However, this loss of trust in government was due to the president's perceived dishonesty; it is unlikely that this sudden decline in confidence was caused by a corresponding drop in general governmental effectiveness or an undermining of its purpose.

Certain scholars implicitly state that loss of trust in an institution is enough to corrupt that institution, whether or not the institution has deviated from its purpose.⁶⁴ In this section, we will examine the debate over whether or not loss of trust in an institution is a sufficient condition for institutional corruption.

One view is that loss of public trust is not a sufficient condition for institutional corruption. For instance, Light, Lexchin, and Darrow state that institutional corruption occurs when institutions diverge from their "societal mission."⁶⁵ Elsewhere, Light argues that loss of trust in an institution is not sufficient to render an institution corrupt if that institution

⁶⁰ Light, *supra* note 4, at 8.

⁶¹ See Maultasch de Oliveira, *supra* note 8 (discussing institutional corruption without touching on loss of trust); Pierce, *supra* note 53 (discussing institutional corruption in the context of corporate law without discussing loss of trust); Rodwin, *supra* note 10 (discussing institutional corruption in the pharmaceutical industry without mentioning loss of trust); Rodwin, *supra* note 53 (discussing institutional corruption and pharmaceutical policy without mention of loss of trust).

⁶² *Clinton Impeachment Trial*, N.Y. TIMES (Feb. 8, 1999), <http://partners.nytimes.com/library/politics/clintonlewinsky-documents.html>.

⁶³ *Distrust, Discontent, Anger and Partisan Rancor - Section 1: Trust in Government 1958-2010*, PEW RES. CTR. (Apr. 18, 2010), <http://www.people-press.org/2010/04/18/section-1-trust-in-government-1958-2010/>.

⁶⁴ Ponnambalam, *supra* note 6, at 5; Thompson, *supra* note 2, at 7, 17. See generally Laura Johnston, *A Passport at Any Price? Citizenship by Investment Through the Prism of Institutional Corruption*, 22 (Edmond J. Safra Ctr. For Ethics, Working Paper, 2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2324101.

⁶⁵ See e.g., Light, *supra* note 8, at 590.

has not deviated from its mission.⁶⁶ Similarly, Oliveira asserts that institutional corruption occurs due to an institution's failure to achieve its institutional purpose; he does not mention "loss of trust" once in his paper on institutional corruption, thus indicating his belief that loss of trust is not a sufficient condition for institutional corruption.⁶⁷

The alternative argues that loss of trust is, in fact, a sufficient condition for institutional corruption. Lessig states that institutional corruption occurs when an institution's effectiveness is undermined due to a deviation from its purpose, "including, to the extent relevant to its purpose, [through a] weakening [of] . . . the public's trust in that institution."⁶⁸ According to this view, institutional corruption occurs when an institution diverges from its institutional purpose; because institutions rely on public trust to fulfill their purposes, loss of trust in institutions constitutes institutional corruption, as it harms the ability for institutions to achieve their purposes.

On this account, a loss of trust in government would corrupt that government, as this perception would decrease political participation such as voting and thus prevents a government from being able to sufficiently represent its constituents.⁶⁹ Therefore, the Clinton administration could be identified as institutionally corrupt, as the Lewinsky scandal and Clinton's subsequent impeachment reduced citizens' trust in the Clinton administration—regardless of whether or not this loss of public confidence in the government was warranted. Similarly, loss of trust in medicine causes people to refuse to vaccinate, thus preventing medical institutions from providing healthcare to the public.⁷⁰ Additionally, studies show that loss of trust in the legal system prevents people with legitimate cases from going to court, thereby hindering the legal system from fulfilling its duty.⁷¹ Finally, studies have shown that loss of trust in financial institutions stops people from investing and thus prevents the economy from being able to function.⁷²

Several scholars have implied that loss of trust is a sufficient criterion for institutional corruption.⁷³ For instance, Johnston states that institutional corruption refers to either the corrosion of an institution itself "or public trust in that institution."⁷⁴ However, to our knowledge, the "sufficient"

66 Light, *supra* note 4, at 16.

67 Maultasch de Oliveira, *supra* note 8, at 5.

68 Lessig, "Institutional Corruption" *Defined*, *supra* note 1, at 555.

69 Similarly, a people that did not trust its government's ability to govern could revolt and oust the government, thus definitively preventing its leaders from leading. LAWRENCE LESSIG, *REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS--AND A PLAN TO STOP IT* 14 (2011).

70 *Anti-Vaccine Parents Lacking Trust in Medicine*, ARIZ. DAILY SUN (Mar. 15, 2015), http://azdailysun.com/news/opinion/editorial/anti-vaccine-parents-lacking-trust-in-medicine/article_e5d63508-24c2-59c3-95d7-d91613d0cd92.html.

71 Ron Faucheux, *By the Numbers: Americans Lack Confidence in the Legal System*, THE ATL. (Jul. 6, 2012), <http://www.theatlantic.com/national/archive/2012/07/by-the-numbers-americans-lack-confidence-in-the-legal-system/259458/>.

72 *Lack of Trust - Caused by Institutional Corruption - Is Killing the Economy*, WASH.'S BLOG (May 4, 2012), <http://www.washingtonsblog.com/2012/05/trust.html>.

73 Ponnambalam, *supra* note 6, at 5; Thompson, *supra* note 2, at 7, 17. *See generally* Johnston, *supra* note 66.

74 Johnston, *supra* note 66, at 4.

argument as articulated in this section has not yet been explicitly spelled out in the literature.

VI. WHAT IS THE MORAL RESPONSIBILITY OF AN INDIVIDUAL WITHIN A CORRUPT SYSTEM?

While institutional corruption indicates systemic problems within an institution, the activities that constitute institutional corruption are ultimately carried out by individuals. However, unlike individual corruption, which is perpetrated by people who engage in illegal quid-pro-quo activities, institutional corruption is not only legal but also “built into the routines and practices of organizations” and perpetrated by individuals who often do not have corrupt motives.⁷⁵ Yet institutional corruption can be as—if not more—damaging to society as individual corruption. In addition to undermining an institution’s purpose, cases of institutional corruption often harm the many people that rely on that institution.

Therefore, assigning responsibility to individual perpetrators of institutional corruption is an important—if complicated—issue. In this section, we examine questions related to the moral responsibility of the individual in institutional corruption, namely whether individuals should be held responsible for the outcomes of institutional corruption and whether individuals have a moral responsibility to defy a corrupt system.

A. WHO IS RESPONSIBLE FOR THE OUTCOMES OF INSTITUTIONAL CORRUPTION: INDIVIDUAL ACTORS OR THE “SYSTEM?”

In the past two decades, local American police departments have become increasingly militarized. The amount of money spent by American police departments on military equipment has risen from one-million dollars in 1990 to nearly four-hundred-fifty-million in 2013.⁷⁶ During the Obama administration alone, “police departments have received tens of thousands of machine guns; nearly 200,000 ammunition magazines; thousands of pieces of camouflage and night-vision equipment; and hundreds of silencers, armored cars and aircraft.”⁷⁷ How did this situation come to be?

America’s defense industry donates millions of dollars to politicians, and this funding has heavily influenced the process of police militarization.⁷⁸ Maplight, an organization that reveals the influence of funding on politics, found that members of Congress who opposed a 2014 bill to demilitarize police received seventy-three percent more money from

⁷⁵ Thompson, *supra* note 2, at 3.

⁷⁶ *War Comes Home: The Excessive Militarization of American Policing*, AM. CIV. LIBERTIES UNION 26 (Jun. 2014) [hereinafter *War Comes Home*].

⁷⁷ Responding to criticisms about this militarization process, President Obama took steps to demilitarize the police in May 2015. Matt Apuzzo, *War Gear Flows to Police Departments*, N.Y. TIMES (Jun. 8, 2014), <http://www.nytimes.com/2014/06/09/us/war-gear-flows-to-police-departments.html>.

⁷⁸ J.F., *How America’s police became so heavily armed*, THE ECONOMIST (May 18, 2015, 1:50 PM), <http://www.economist.com/blogs/economist-explains/2015/05/economist-explains-22> [hereinafter *America’s Police*].

defense contractors than those voting in favor of the bill.⁷⁹ Many have argued that rather than protecting the people, the militarization of police departments has endangered American citizens. For instance, criminal justice expert Radley Balko's book, *Rise of the Warrior Cop: The Militarization of America's Police Forces* offers a "comprehensive account of the dangers of police militarization."⁸⁰ Other sources warn of militarization's perils.⁸¹ This situation appears to be an instance of institutional corruption, as the police's militarization undermines its mission "to safeguard the lives and property of the people [it serves]...and to enhance public safety."⁸²

Stories in which innocent people were killed and maimed as a result of botched Special Weapons and Tactical ("SWAT") police unit raids are not uncommon.⁸³ For instance, in 2014, a SWAT team executed a no-knock warrant on a suspected drug dealer's home. Before entering the home, one of the SWAT officers threw a flash bang grenade that landed in the crib of a one-year-old child, severely burning the child's face.⁸⁴ The question arises: In the event that an overly militarized police officer illegitimately harms an innocent citizen, who is responsible: the officer or the corrupt law enforcement system?⁸⁵ The question of whether individuals or the system they operate in should be held responsible for the often-detrimental outcomes of institutional corruption is debated within the literature.

Some scholars argue that the "system" is responsible for these outcomes, rather than the people within the system.⁸⁶ For example, according to Oliveira, flawed institutional design is responsible for

79 H. Amdt, *H.R. 4870 Department of Defense Appropriations Act*, MAPLIGHT, (2015), [http://maplight.org/us-congress/bill/113-hr-4870/4318251/contributions-by-vote?party\[D\]=D&party\[R\]=R&party\[I\]=I&vote\[AYE\]=AYE&vote\[NOE\]=NOE&vote\[NV\]=NV&voted_with\[with\]=with&voted_with\[not-with\]=not-with&state=&custom_from=01/01/2011&custom_to=12/31/2013&politicians=&all_pols=1&uid=53121&interests-support=&interests-oppose=D2000-D3000-D5000-D9000-D8000-D4000-D0000&from=01-01-2011&to=12-31-2013&source=pacs-nonpacs&campaign=congressional](http://maplight.org/us-congress/bill/113-hr-4870/4318251/contributions-by-vote?party[D]=D&party[R]=R&party[I]=I&vote[AYE]=AYE&vote[NOE]=NOE&vote[NV]=NV&voted_with[with]=with&voted_with[not-with]=not-with&state=&custom_from=01/01/2011&custom_to=12/31/2013&politicians=&all_pols=1&uid=53121&interests-support=&interests-oppose=D2000-D3000-D5000-D9000-D8000-D4000-D0000&from=01-01-2011&to=12-31-2013&source=pacs-nonpacs&campaign=congressional), (Last visited Jan. 31, 2017).

80 Glenn Greenwald, *The Militarization of U.S. Police: Finally Dragged Into the Light by the Horrors of Ferguson*, THE INTERCEPT (Aug. 14, 2014, 5:40 AM), <https://theintercept.com/2014/08/14/militarization-u-s-police-dragged-light-horrors-ferguson/>.

81 See generally Cadman R. Kiker III, *From Mayberry to Ferguson: The Militarization of American Policing Equipment, Culture, and Mission*, 71 WASH. & LEE L. REV. ONLINE 282 (2015), <http://scholarlycommons.law.wlu.edu/wlulr-online/vol71/iss4/5>; Bret McCabe, *Does the militarization of American police help them serve and protect?*, J. H. MAG. (Spring 2015), <http://hub.jhu.edu/magazine/2015/spring/aclumilitarizationofpolice/>; *War Comes Home*, *supra* note 78.

82 *Mission Statement of the LAPD*, LOS ANGELES POLICE DEP'T, http://www.lapdonline.org/inside_the_lapd/content_basic_view/844 (Last visited Jan. 27, 2017). This is the specific mission statement of the Los Angeles Police Department; it appears that all U.S. police departments articulate a mission statement similar to "[enhancing] public safety."

83 *America's Police*, *supra* note 80.

84 Elliott C. McLaughlin, *No indictment for Ga. cops who burned baby with grenade*, CNN (Oct. 7, 2014, 5:50 PM), <http://www.cnn.com/2014/10/07/us/georgia-toddler-stun-grenade-no-indictment/index.html>.

85 This section differs from the previous segment about the funding of institutions because that one asked whether the funding party, funded party, or system is the subject of institutional corruption, while this one asks who or what is responsible for the negative ramifications of institutional corruption.

86 See generally Mendonca, *supra* note 40; Irma E. Sandoval-Ballesteros, *From "Institutional" to "Structural" Corruption: Rethinking Accountability in a World of Public-Private Partnerships*, 33 (Edmond J. Safra Ctr. For Ethics, Working Paper, 2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2370576.

institutional corruption, not the individuals acting within the design.⁸⁷ This view of institutional corruption as a systemic rather than personal problem is popular, especially in the discourse about the responsibility of those operating in America's campaign finance system. Former Congressman and Governor Charles "Buddy" Roemer declared in an Edmond J. Safra Center lecture about institutional corruption in campaign finance, "It's the system that's corrupt . . . and members are slaves to it . . . People within the system can't imagine the system functioning any other way."⁸⁸ Similarly, former presidential candidate Bernie Sanders declared that the campaign finance system is "a corrupt system."⁸⁹ Yet when asked if the donors are corrupt, he responded, "No. The system is corrupt."⁹⁰

An alternative position holds that always "blaming the system" for the results of institutional corruption "lets too many individuals in the system off the moral hook." Thompson and Light stress the fact that there is a range of different ways that individuals can choose to act within a corrupt system; simply absolving all individuals of responsibility for adverse institutional results constitutes an overly simplistic moral judgment.⁹¹ Thompson and Lessig argue that individuals within the system should be held (at least partially, according to Thompson) responsible for an outcome if they failed to change the system from within.⁹²

A third view is that responsibility for institutional corruption lies not with those within the system or with the system itself, but rather with those who created the system. In the second 2016 U.S. presidential debate, after Hillary Clinton accused Donald Trump of taking advantage of loopholes in the tax code—in other words, of legally exploiting an institutionally corrupt system to his personal benefit—Trump responded by blaming Clinton for not changing these tax provisions while she was a senator, thus accusing her of being complicit in the creation of a corrupt system and implying that she was responsible for the institutional corruption.⁹³

While assigning responsibility to actors of institutional corruption in general is complicated, assigning responsibility to *unintentional* offenders of institutional corruption in particular is an even more challenging issue.

⁸⁷ Maultasch de Oliveira, *supra* note 8, at 5.

⁸⁸ Buddy Roemer, *Fixing Congress: A Republican View*, BRIGHT COVE, <http://link.brightcove.com/services/player/bcpid17939774001?autoStart=false&bctid=870620966001&height=100%25&linkSrc=twitter&referrer=http%3A%2F%2Fethics.harvard.edu%2Fperson%2Fbuddy-roemer&secureConnections=true&secureHTMLConnections=true&width=100%25> (last visited Jan. 27, 2017).

⁸⁹ *Bernie Sanders on Campaign Finance: It's a Corrupt System*, BLOOMBERG POL. (Aug. 17, 2015), <http://www.bloomberg.com/politics/videos/2015-08-17/bernie-sanders-on-campaign-finance-it-s-a-corrupt-system>.

⁹⁰ *Id.*

⁹¹ Thompson, *supra* note 2, at 16–17; Light, *supra* note 4, at 18.

⁹² Lawrence Lessig, *Institutional Corruptions*, (Euro. Univ. Inst., Robert Schuman Ctr. For Advanced Stud., Working Paper, 2012) 8 <http://cadmus.eui.eu/handle/1814/24995>; Thompson, *supra* note 2, at 17.

⁹³ Hilary Clinton, Democratic Party Presidential Nominee, & Donald Trump, Republican Party Presidential Nominee, *Second Presidential Debate*, Washington University, St. Louis, MO (Oct. 9, 2016).

B. SHOULD UNINTENTIONAL OFFENDERS OF INSTITUTIONAL CORRUPTION BE HELD MORALLY RESPONSIBLE FOR THE CORRUPT OUTCOMES OF INSTITUTIONAL CORRUPTION?

One of the most commonly discussed scenarios in the institutional corruption literature is the corruption of the pharmaceutical industry.⁹⁴ Scholars discuss the ways in which the pharmaceutical industry influences the medical system. For instance, drug firms fund researchers for consulting, serving on advisory boards, lecturing, and conducting clinical trials. They also provide grants to researchers.⁹⁵

In particular, pharmaceutical companies sponsor around ninety percent of published clinical drug trials.⁹⁶ The industry-supported clinical trial process looks like this: A drug company pays an academic (through a grant or a contract) to test the safety and efficacy of its product in a lab with a clinical trial. Based on the results of the trial, the physician or researcher who conducted the trial publishes a positive or negative review of the product. If the review is positive, the company can submit an application to the FDA to approve that drug for market use, citing the positive review as evidence of the drug's safety and efficacy. If the FDA deems this evidence as legitimate, it will release the drug into the market.⁹⁷

Funding from drug companies has been found to influence academics that review their drugs in favor of that company's products. In fact, industry-sponsored trials are four times likelier to produce positive reviews of drugs than independently run experiments.⁹⁸ This system enables a significant amount of unsafe drugs to reach the market, thus undermining pharmaceutical companies' missions of "developing new, safe medicines."⁹⁹ Indeed, one in five drugs released into the market is so harmful that it either receives the most severe regulatory warning or is

⁹⁴ See generally Lisa Cosgrove & Robert Whitaker, *Finding Solutions to Institutional Corruption: Lessons From Cognitive Dissonance Theory* 9 (Edmond J. Safra Ctr. For Ethics, Working Paper, 2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2261375; Marc-Andre Gagnon, *Corruption of Pharmaceutical Markets: Addressing the Misalignment of Financial Incentives and Public Health*, 41 J.L. MED. & ETHICS 571 (2013); Marks, *supra* note 10; Barbara K. Redman, *Are the Biomedical Sciences Sliding Toward Institutional Corruption? And Why Didn't We Notice it?*, 59 (Edmond J. Safra Ctr. For Ethics, Working Paper, 2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2585141; Robertson, *supra* note 10; Rodwin, *supra* note 10; Marc A. Rodwin, *Independent clinical trials to test drugs: the neglected reform*, 6 SAINT LOUIS UNIV. J. OF HEALTH L. & POL'Y 113 (Jan 8, 2013), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2193594; Rodwin, *supra* note 53; Sah & Fugh-Berman, *supra* note 2; Light, *supra* note 8.

⁹⁵ Rodwin, *supra* note 10, at 512, 517–18.

⁹⁶ Maeve McClenaghan, *Why Big Pharma is bad for your health*, THE BUREAU OF INVESTIGATIVE JOURNALISM, (Sept. 28, 2012), <https://www.thebureauinvestigates.com/2012/09/28/why-big-pharma-is-bad-for-your-health/>.

⁹⁷ *The FDA's Drug Review Process: Ensuring Drugs Are Safe and Effective*, FDA, <http://www.fda.gov/Drugs/ResourcesForYou/Consumers/ucm143534.htm> (Last visited Jan. 27, 2017).

⁹⁸ BEN GOLDACRE, *BAD PHARMA: HOW DRUG COMPANIES MISLEAD DOCTORS AND HARM PATIENTS* 3 (2013).

⁹⁹ This is the specific mission statement of the Pfizer, but it appears that all pharmaceutical companies articulate a mission statement similar to "developing new, safe medicines." PFIZER, INC., <http://www.delawarebio.org/pfizer-inc> (Last visited Jan. 27, 2017).

withdrawn; prescription drugs are the fourth leading cause of death and a major cause of hospitalization in America.¹⁰⁰

In the event that a drug is positively reviewed and released into the market, and causes numerous unforeseen and fatal side effects, it would appear that the specific reviewers of that drug should be held responsible for these catastrophic outcomes. However, it is likely that in many cases, the academics being paid by pharmaceutical companies to review these drugs are unaware that they are acting with bias; they are unintentional perpetrators of institutional corruptions. Indeed, research has shown that biases that arise from financial conflicts of interest operate largely on the subconscious—rather than conscious—mind.¹⁰¹ In general, scholars of institutional corruption emphasize that many actors of institutional corruption take part in institutional corruption without the knowledge or intent of subverting an institution's purpose.¹⁰²

Yet the case of the pharmaceutical industry shows that institutional corruption can have a disastrous impact on a population that relies on that institution. The question is: Should the unintentional offenders of institutional corruption—for example, the pharmaceutically-funded academics who approved drugs that were later found to have deadly side effects—be held morally responsible for the unforeseen consequences of their behavior?

While this discussion is strictly concerned with the *moral* responsibility of unintentional offenders of institutional corruption, the question of whether individuals should be held *legally* responsible for their unintentional actions is debated in the legal community as well.¹⁰³ On the one hand, the American legal system rules that one can be guilty even without criminal intent. The criminal category of “negligence” refers to an offense in which a person acts in a way that poses a substantial and unjustifiable risk to others that he or she is unaware of but should be aware of.¹⁰⁴ In addition, strict liability is a type of culpability in which the actor is responsible regardless of his or her mental state and even in the absence of negligence.¹⁰⁵ In opposition to this tradition, Finkelstein argued that people should not be held legally responsible for consequences of their actions that they did not intend or foresee.¹⁰⁶ Her logic is that legal judgments of culpability should resemble everyday judgments of moral culpability as closely as possible.¹⁰⁷ Since in everyday interactions, a person only judges

¹⁰⁰ Light, *supra* note 8, at 593.

¹⁰¹ See Cosgrove & Whitaker, *supra* note 96, at 9–12; Sah & Fugh-Berman, *supra* note 2, at 665.

¹⁰² Lessig, *Institutional Corruptions*, *supra* note 94, at 3; Light, *supra* note 4, at 10; Thompson, *supra* note 2, at 16.

¹⁰³ The legal literature discusses illegal actions (i.e. killing) committed unintentionally, while this section focuses on legal and even normative actions committed unintentionally.

¹⁰⁴ *Negligence*, THE FREE DICTIONARY, <http://www.thefreedictionary.com/negligent> (Last visited Jan. 27, 2017).

¹⁰⁵ *Strict Liability*, THE FREE DICTIONARY, <http://legal-dictionary.thefreedictionary.com/Strict+Liability> (Last visited Jan. 27, 2017).

¹⁰⁶ See generally Claire Finkelstein, *Responsibility for Unintended Consequences*, 2 OHIO ST. J. CRIM. L. 579 (2004).

¹⁰⁷ *Id.* at 599.

another person as culpable if the latter acted intentionally, so too should the legal system only pronounce intentional offenders as guilty.

The question of the culpability of unintentional individuals needs to be discussed in the institutional corruption literature, given that a significant portion of these cases involves unintentional offenders. More scholarship on this topic could spread awareness regarding institutional corruption and thus inform unintentional offenders of their participation in this phenomenon.

C. WHAT IS THE MORAL OBLIGATION OF INDIVIDUALS WHO FIND THEMSELVES WITHIN A CORRUPT INSTITUTION?

Prominent 19th century American author Henry David Thoreau once said, “Unjust laws exist; shall we be content to obey them, or shall we endeavor to amend them, and obey them until we have succeeded, or shall we transgress them at once?”¹⁰⁸ This question is particularly relevant to institutional corruption, which often occurs when individuals follow laws and rules that undermine an institution’s purpose in a way that damages the public. Translated into institutional corruption terms, the question becomes, “Is an individual within a corrupt system (especially a corrupt system of law) obligated to do nothing, to change the system from within (while complying with that system), or to simply disobey that system?” People within and outside of the institutional corruption literature disagree on this question.

Lessig and Thompson assert that individuals within a corrupt system are responsible for working to reform that system.¹⁰⁹ Lessig adds, however, that people are *not* morally obligated to disobey the system before it has been reformed.¹¹⁰ He has stated that in general, “I am not a believer in breaking bad laws,” at least when the consequences of breaking the law is significant.¹¹¹

In contrast to Lessig, Thoreau argued that one is morally responsible to break unjust laws if one believes that doing so is the only way to rectify the law.¹¹² Thoreau’s coining of the term “civil disobedience” inspired a wave of activists who broke the law for the sake of correcting a corrupt system: Indian independence leader Mahatma Gandhi protested Britain’s prohibition of Indians from gathering or selling salt by leading an illicit salt collection movement;¹¹³ civil rights activist Martin Luther King Jr. protested enforced segregation by “sitting in” white food cafes;¹¹⁴ and Edward Snowden illegally released government documents that revealed its

108 HENRY DAVID THOREAU, ON THE DUTY OF CIVIL DISOBEDIENCE 12 (1849).

109 Lessig, *Institutional Corruptions*, *supra* note 94, at 8; Thompson, *supra* note 2, at 17.

110 Lessig, *Institutional Corruptions*, *supra* note 94, at 8.

111 Mike Wendy, *Larry Lessig Responds – Says Swartz’s Alleged Actions Crossed Ethical Line*, MEDIA FREEDOM, (Jul. 20, 2011, 11:02 PM), <http://mediafreedom.org/2011/07/larry-lessig-responds-says-swartzs-alleged-actions-crossed-ethical-line/>, (Last Visited Jan. 27, 2017).

112 THOREAU, *supra* note 110.

113 *Gandhi Leads Civil Disobedience*, ON THIS DAY IN HISTORY, <http://www.history.com/this-day-in-history/gandhi-leads-civil-disobedience> (last visited Jan. 6, 2016).

114 MARTIN LUTHER KING JR., THE AUTOBIOGRAPHY OF MARTIN LUTHER KING, JR. ch. 14 (Carson Clayborne ed., 2001).

extensive and invasive surveillance program.¹¹⁵ Each of these three individuals declared their actions as civil disobedience.¹¹⁶ As King famously proclaimed, “One has a moral responsibility to disobey unjust laws.”¹¹⁷

In summary, Lessig and Thoreau agree that an individual within a corrupt system is responsible to protest that system. The question is how far one must take that protest—whether one is obligated to actually disobey the system in order to change it remains an unresolved question for both scholars and the general public.

VII. HOW TO END INSTITUTIONAL CORRUPTION

Supreme Court Justice Louis Brandeis once famously declared, “Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.”¹¹⁸

Brandeis’s idea that transparency is the antidote to corruption has been central to many anti-corruption initiatives and organizations, most notably Transparency International and the Sunlight Foundation. However, whether transparency is the solution to *institutional* corruption is an unresolved question. While policy measures in fighting institutional corruption almost always involve transparency, many scholars argue that transparency alone is not sufficient to eliminate institutional corruption.

Many cases of institutional corruption originate from a conflict of interest, in which it is in an institutional actor’s interest to act in favor of a funding party. Almost all policies intended to combat the negative effects of conflicts of interest in any field include or are limited to disclosure.¹¹⁹ In the medical field, for instance, medical journals require physicians to disclose funding sources whenever they publish an article.¹²⁰ Additionally, the “Physician Financial Transparency Reports” (“Sunshine Act”) requires pharmaceutical companies to report payments and transfers of value made to physicians.¹²¹

However, many institutional corruption scholars argue that while conflict of interest disclosure is part of the solution to institutional corruption, it is not the solution in and of itself; transparency does not

115 Amy Davidson, *Did Edward Snowden Break His Oath?*, THE NEW YORKER, (Jan. 5, 2014), <http://www.newyorker.com/news/amy-davidson/did-edward-snowden-break-his-oath>.

116 Mahatma Gandhi, *Duty of Disobeying Laws*, INDIAN OP. (Sep. 1907); King, *supra* note 116; Jon Queally, *Snowden: Exposing NSA Overreach an Act of “Civil Disobedience”*, COMMON DREAMS, (May 19, 2014), <http://www.commondreams.org/news/2014/05/29/snowden-exposing-nsa-overreach-act-civil-disobedience>.

117 Martin Luther King Jr., *Letter from a Birmingham Jail*, (Apr. 16, 1963), UNIV. OF PENN. AFRICAN STUD. CTR., https://www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html.

118 Louis D. Brandeis, *What Publicity Can Do*, HARPER’S WEEKLY, Dec. 20, 1913, at 11.

119 George Loewenstein et al., *The Limits of Transparency: Pitfalls and Potential of Disclosing Conflicts of Interest*, 101 AM. ECON. REV. 423–428 (2011).

120 Robertson, *supra* note 10, at 7.

121 *Sunshine Act Physician Financial Transparency Reports*, AM. MED. ASS’N, <http://www.ama-assn.org/ama/pub/advocacy/topics/sunshine-act-and-physician-financial-transparency-reports.page?>, (last visited Jan. 27, 2017).

preclude bias.¹²² For example, Cosgrove and Whitaker argue that although policies that require professionals to disclose conflicts of interest alert those professionals that their relationships with interest groups may potentially bias them, when individuals who see themselves as ethical are told that they might be influenced to act in a biased manner, they often resolve this cognitive dissonance by rejecting the idea that they could possibly be biased.¹²³ Thus, they do not alter their behavior in order to minimize biased actions. The error in this thought process is the lack of understanding that influence is usually a subtle, subconscious process rather than a conscious, deliberate one.¹²⁴

Many scholars of institutional corruption suggest that the solution to institutional corruption stemming from conflicts of interest is simply to eliminate the conflict rather than disclosing it.¹²⁵ For example, Rodwin proposes a reform to eliminate bias in clinical trials that test drugs by “[removing] all drug firm influence on the design and conduct of clinical trials used to decide whether to allow marketing of a drug.”¹²⁶

Robertson suggests a third option: blinding as a solution to institutional corruption. Based on the assumption that institutional corruption occurs when funding biases a decision maker, Robertson argues that concealing the identity of the funder and decision maker from each other may lead to less biased results. Specifically, he proposes that drug companies should provide funds to test the safety and efficacy of their drugs to an intermediary, such as the National Institute of Health (“NIH”), who would then select researchers for the job based on scientific merit. Thus, the drug company would be unaware of the specific researchers and the researchers would be unaware of the specific drug companies. Furthermore, the NIH would fund a significant amount of similar research using public funds, so that individual researchers would be unable to determine whether their project is publicly or privately funded. This proposal would preclude bias because it prevents pharmaceutical companies from being in contact with researchers. Moreover, drug companies’ lack of knowledge about the identity of researchers would ensure researchers that their ability to receive future grants is not contingent on them producing positive reviews of drugs.¹²⁷

Out of all the unresolved questions, the question of whether disclosure, blinding, or elimination is the best way to combat institutional corruption has the most practical importance; the answer determines how anti-institutional corruption policy will be shaped.

122 Brock, *supra* note 39, at 43; Gagnon, *supra* note 96, at 571–80; Light, *supra* note 4, at 13–14; Marks, *supra* note 10, at 20.

123 Cosgrove & Whitaker, *supra* note 96, at 10–11.

124 Lessig, *Institutional Corruptions*, *supra* note 1, at 3; Light, *supra* note 4, at 19; Sah & Fugh-Berman, *supra* note 2, at 665. See Thompson, *supra* note 2, at 16.

125 Cosgrove & Whitaker, *supra* note 96, at 17–18; Lawrence Lessig, *Against Transparency: The Perils of Openness in Government*, NEW REPUBLIC 37–44, <https://newrepublic.com/article/70097/against-transparency>, (Last visited Jan. 27, 2017). See generally Rodwin, *supra* note 96.

126 Rodwin, *supra* note 96, at 115.

127 Robertson, *supra* note 10, at 14–16.

VIII. CONCLUSION

Although significant progress has been made in the study of institutional corruption during the last few years, the project of understanding and addressing the legal corruption of our institutions is far from finished. While Lessig's definition inspired a wave of new scholarship on institutional corruption, many unresolved questions remain. In this paper, we highlighted unresolved questions on the topics of institutional purpose, funding of institutions, public trust, and personal responsibility as they pertain to institutional corruption. We also looked at three potential solutions to institutional corruption that are discussed in the literature: conflict of interest disclosure, conflict of interest elimination, and blinding. We invite further discussion on these unresolved questions, and hope that this paper inspires a new wave of scholarship that will continue the crucial conversation on institutional corruption.

