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1 AN ANATOMY OF CORRUPTION*

2
3 QA BY DAVID SCHMIDTZ
4

5
6 I. CONCENTRATED POWER: THE CURE THAT *Is* THE DISEASE

7 Which social arrangements have a history of fostering progress and
8 prosperity? One quick answer, falsely attributed to Adam Smith, holds
9 that we are guided as if by an invisible hand to do what builds the wealth
10 of nations. A more sober answer, closer to what Smith said and believed,
11 is that *if* the right framework of rules—plus decent officiating—steers us
12 away from buying and selling monopoly privilege and steers us toward
13 being valuable to the people around us, we indeed will be part of the
14 engine that drives human progress and the wealth of nations.

15 However, to have a rule of law framework within which markets can
16 grow a healthy nation, officials must exercise oversight. Officials not
17 only enforce rules, but must also interpret, amend, and so on. Smith
18 saw this, and perceived a further, chronically tragic reality: namely,
19 this power to oversee markets is what crony capitalists are buying and
20 selling.¹

21 Smith's observation changes everything. Imagine concentrated power
22 in the hands of the worst ruler in living memory. Now, assume what you
23 know to be true: namely, concentrated power actually does fall into the
24 hands of people like that. As a preliminary, then, when formulating the-
25 ories about what is politically ideal, we can ask two questions. We can ask,
26 "Ideally, how much power would be wielded by people like *that*?" Or we
27 can ask, "Ideally, how much power would be wielded by ideal rulers?"
28 Which of these genuinely is a question about the human condition? Can
29 political philosophy answer the one that *needs* answering?

30 Why isn't it trying?
31
32
33

34 * These remarks adapt, revise, and condense David Schmitz, "Corruption," *Performance*
35 *and Progress*, ed. Subramanian Rangan (Oxford: Oxford University Press, 2015): 49-64. Work
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44 take up this topic in the first place.

45 AQ1 ¹ Richard Miller, "Is Capitalism Corrupt?" present volume, xx-xx.

II. CHARACTERIZING CORRUPTION

1
2
3 Organizations employ officials to speak and make decisions on their
4 behalf. One paradigm of corruption consists of officials treating their
5 fiduciary authority as a service to buy and sell for personal gain.²
6 Consider that officials are tasked with making it easier to transact with
7 organizations that they represent. But when corrupt officials regard their
8 authority as a service that they are at liberty to sell for personal gain, they
9 treat themselves as licensed to make it harder. When they take bribes for
10 approving transactions they ought to approve, transaction costs do in fact
11 rise. Conversely, when they take bribes for approving transactions they
12 should *not* approve (say, granting a license to dump toxic waste in the
13 middle of an ordinary neighborhood), external costs (that they may be
14 responsible for minimizing) can skyrocket instead.

15 *Corruption* essentially involves, let's say, a principal-agent problem,
16 namely, being entrusted with discretionary power for the purpose of carry-
17 ing out a particular fiduciary responsibility, then using that measure of
18 discretion in service of a personal agenda. What else can we say? As a
19 matter of observation, people who speak of corruption are presupposing
20 that the agenda is *rotten*.³ The damnability of it is baked in. Corruption
21 essentially is an abuse of power, not merely a use. A further observation:
22 when the fiduciary responsibility that an agent fails to meet is itself cor-
23 rupt or otherwise evil, we are less sure whether to call the agent corrupt.⁴
24 Further, corruption being an evil does not entail that its consequences are
25 evil on balance in any given case, or that we necessarily want to put a stop
26 to it.⁵ An opportunistic prison guard who, *to make money*, takes bribes to
27 help innocent political prisoners escape thereby handles an evil responsi-
28 bility in a paradigmatically corrupt way, and in the process makes an evil
29 situation better than it would have been.⁶

30 The paradigmatically rotten motive is seeking payment where one freely
31 accepted fiduciary duties that preclude seeking payment. Yet, paradigms
32 are not definitions, and greed is but one species in the genus of corrupt-
33 ing motives. Thus, for example, there are rules against nepotism. Seeking
34 to appoint your brother to be Attorney General can cross the line without
35

36
37 ² Mark Philp, "The Corruption of Politics," present volume, xxx-xx; Mark Knights,
38 "Explaining Away Corruption in Pre-Modern Britain," present volume, xxx-xx.

39 ³ Knights, "Explaining Away Corruption in Pre-Modern Britain."

40 ⁴ Suppose a guard at a concentration camp passively resists a corrupt judiciary by looking
41 the other way when a convict he believes to be innocent tries to escape. The guard has no
42 right to presume to judge the convict's case, yet having presumed to judge, he does so as
43 conscientiously as he can (and let us suppose you agree with his judgment). Would you call
44 him corrupt? Reasonable people disagree about this. We don't need to pretend to settle the
45 disagreement by definitional fiat.

46 ⁵ Michael C. Munger, "On the Contingent Vice of Corruption," present volume, xxx-xx.

47 ⁶ Mario Villarreal, "Corruption, Character, and Institutions," present volume, xxx-xx; Adrian
48 Blau, "Cognitive Corruption and Deliberative Democracy," present volume, xxx-xx.

1 being an obvious example of greed.⁷ Cheating on exams is corrupt in a
 2 way, too, without being an obvious example of greed, or even abuse of
 3 power. (Students accept a responsibility to uphold standards of which the
 4 exams are a part, and their agenda of getting a higher grade than they
 5 deserve does not relieve them of that responsibility. They are corrupt, and
 6 they are corrupting an institution.)⁸ On the other side, petty tyrants some-
 7 times say, “rules are rules; what can you do?” when in fact their job is to
 8 *get things done*, which includes discretionary power and responsibility to
 9 grant exceptions as required by circumstances not anticipated by those
 10 who made the rules. Pretending to lack discretionary power is a way of
 11 exercising discretionary power, which at some point becomes an abuse.
 12 Pretending you cannot help is less brutal than saying, “Of course I can
 13 help, but making people like you squirm is what I live for,” but remains
 14 arbitrary and abusive.

15 Sometimes the rotten motivation is hostile. Imagine county officials
 16 going the extra mile to make it gratuitously difficult for minorities to reg-
 17 ister to vote. Petty tyrants, officiously withholding what isn’t theirs to
 18 withhold, are not corrupt in exactly the same way as those who sell what
 19 isn’t theirs to sell. But still it is an abuse of power from rotten motive.

20 Sometimes a vacuum of reason can be more corrupting than spurious
 21 reason; some officials are dead to the honor of being good at their jobs.
 22 They show up in appearance only, aiming only to collect a paycheck or kill
 23 time. They do not even aim to get the job done so much as to comply with
 24 job requirements and to avoid being named in a lawsuit. They may bear
 25 no ill will, but they are of no use.

26 Another form of corruption, likewise not involving greed, is manifest
 27 when junior colleagues evaluate every decision (to go to lunch, serve on
 28 committee, write a book, help a student, or represent themselves as com-
 29 mitted to scholarship) as a means to the end of getting tenure. Professors
 30 thus obsessed tend to fall apart when they get tenure. They aim to comply
 31 with requirements for tenure. That is more problematic than you might
 32 think at first glance, because *deserving* tenure requires a driving motiva-
 33 tion *that can survive getting it*.⁹

34 In sum, while using public office for private gain is the paradigm
 35 of corruption, it is not a definition.¹⁰ Humans naturally reason about
 36
 37

38 ⁷ There is no rule against hiring the best candidate for the job, but what if your brother is
 39 the best candidate? A nepotism rule might limit corruption by forbidding that which is not
 40 corrupt (hiring the best candidate). Thus, nepotism rules limit corruption without defining
 41 it. No code can define corruption. What is in a person’s head matters. If no one doubts that
 42 Bobby Kennedy is the best candidate, that makes a difference to whether appointing him is
 43 corrupt, but not to whether appointing him is covered by the nepotism rule.

43 ⁸ Emanuela Ceva, “Political Corruption as a Relational Injustice,” present volume, xxx-xx;
 44 Maria Paola Ferretti, “A Taxonomy of Institutional Corruption,” present volume, xxx-xx.

44 ⁹ Elijah Millgram, “Hypophilosophy,” present volume, xxx-xx.

45 ¹⁰ See F. H. Buckley, “The Enforcement of Virtue,” present volume, xxx-xx.

1 paradigms, but as philosophers we are trained to reason about definitions.
 2 That training sometimes is a mistake. Be that as it may, when we aim to
 3 illuminate what can go wrong with the moral fiber of people in positions
 4 of responsibility, there is something to lose and little to gain by trying to
 5 define corruption more narrowly. Corruption can be a child of greed, to be sure,
 6 but also of other vices.¹¹

7
 8 *Corruption compromises self-awareness*
 9

10 A closely related risk of corruption goes with our need to find *kindred*
 11 spirits—people with whom we can reach a concurrence of sentiment.¹²
 12 Because this desire runs so deep, it corrupts in the following way. We tend
 13 not to notice how we adjust our attitudes to fit those of the people around
 14 us. Adjusting subconsciously makes us more vulnerable to social pressure.
 15 If we *notice* ourselves “going along to get along” then we can resist, or at
 16 least be cynical. But if we do not even notice ourselves adjusting as needed
 17 so as to be agreeable company, our ability to master this threat to our
 18 autonomy is compromised. It is human nature that we will do almost any-
 19 thing to avoid being outcasts. Thus, when colleagues insinuate that they
 20 are willing and able to bully us, it is only human to voice no resistance. We
 21 then grasp at reasons to agree, however flimsy, so as to make the depth of
 22 our capitulation less humiliating.¹³ Social pressures warp minds.¹⁴ To let
 23 oneself be corrupted by such pressure is to let oneself become a self that
 24 one cannot afford to examine too closely—a self unworthy of esteem. They
 25 are shallow, and cannot afford to be anything other than shallow.

26 A corrupt person *needs* to be less self-aware and less reflective, for accu-
 27 rate self-perception becomes unaffordable (but again, my point is not that
 28 the connection is necessary but that the tendency is robust). When one
 29 looks inward, there is, in a way, not enough there to be worth being aware
 30 of. At a community level, if being uncorrupt is a virtuous mean between
 31 extremes of vice, then passively silent cowardice at one extreme can be
 32 more lethal to a community than active greed at the other. At a personal
 33 level, cowardice under pressure is as corrupting as raw greed, and even
 34 more deeply shattering.
 35
 36

37 ¹¹ See Daniel M. Weinstock, “Corruption in Adversarial Systems: The Case of Democracy,”
 38 present volume xxx-xx, on the art and the vice of compromise. We should be careful to sep-
 39 arate moral compromise, which is bad, from political compromise, which arguably is noble.
 40 For example, it is inspiring rather than disheartening to think that Ronald Reagan and Tip
 41 O’Neill could have a couple of drinks, look each other in the eye, and say, “OK, now what?
 42 I’m listening.” That kind of compromise is as good as democratic governance can get.

43 ¹² James R. Otteson, *Adam Smith’s Marketplace of Life* (New York: Cambridge University
 44 Press, 2002), 207.

45 ¹³ See Jonathan Haidt, *The Righteous Mind* (New York: Pantheon House, 2012).

¹⁴ To Smith, wanting to be validated by others can drive our maturation through a certain
 stage, but we must outgrow that drive. To care too much about validation is to be controlled
 by the hoped-for source of validation.

III. AGENCY IS AN ACHIEVEMENT

Internal transparency is a prerequisite of agency, and corruption compromises transparency. I once heard an interview on National Public Radio. The guest was developing tools for screening job candidates. One of the guest's survey questions was, "If I had an opportunity to steal \$20,000 from my company with no chance of being caught, I would steal the money. True or false?" NPR's interviewer said (paraphrasing from memory), "Isn't that question a waste of time? Every applicant says 'false', so why bother?" The guest replied that, on the contrary, about 20 percent of applicants say they would steal the money. NPR's astounded interviewer asked how a job applicant could be so crazy as to answer like that. The guest answered (paraphrasing from memory), "All I know is that 20 percent say they would steal the money. My speculation, for what it is worth, is that applicants realize the survey is testing their honesty, then guess that the way to prove they are *relatively* honest is by admitting what to them seems obvious: like everyone else, they would steal the money."

I hear that as an implicit theory of corruption's ultimate price. As corrupt behavior warps perception, you reach a point where you are so far from being honest that you no longer have a clue what honesty is like. When you can't remember what honesty would be like, you can't remember how to fake it either. You are falling apart.

Internal transparency, and the possibility of self-awareness that goes with it, is an achievement, not simply a decision.¹⁵

Compromised group agency

This undermining of agency can be understood as a danger to organizations and individuals alike. Suppose your job involves balancing your unit's budget, and one of your balancing tools involves collecting fees from other units within the organization. You may wake up some day to find that your job, as an administrator in your unit, is to cannibalize other units. You need not be a monster to find yourself in such a position. It may happen as a consequence of your bosses restructuring your responsibilities. They need not be at fault either. They may be under orders to impose fiscal accountability and discipline, as part of an effort to *combat* corruption.

When Plato wrote about justice in the polis as a "writ large" model of justice in the individual soul, he was treating the paradigm of injustice as an individual soul divided against itself. Plato's discussion may be archaic in some ways. And yet, the word "corrupt" does, after all, carry with it connotations of being rotten, in a state of decomposition. This rendering seems natural from a virtue-theoretic perspective. What makes a tyrant

¹⁵ Blau, "Cognitive Corruption and Deliberative Democracy."

1 unjust is what makes a tyrant corrupt: the tyrant's soul is decomposing,
2 falling apart, losing its unifying purposiveness.

3 We need not entirely trust Plato's analogy. However, consider how it
4 illuminates the corruption of organizations. When an official accepts
5 bribes under the table, the agency for which the official works becomes
6 less transparent to itself. The agency is a soul out of touch with itself. Its
7 left hand does not know what its right hand is doing. The right hand does
8 not even *want* the left hand to know. Such loss of self-awareness is com-
9 promised agency.

10 Weakness of will compromises the potential to be an agent with a uni-
11 fied purpose. Some organizations are usefully seen as agents, but as a *cor-*
12 *porate* agent comes to lack both the appearance and the reality of being on
13 a mission, it stops resembling an agent. Notice: where we have no reason
14 to call x an *agent*, we have no reason (aside from linguistic habit) to call x
15 an *organization* either. What x is, literally, is a dysfunctional mess.

16 Finally, a further source of corruption, beyond greed, is sheer uncer-
17 tainty: there are times when officials exercising discretionary power
18 cannot simply follow the rules, because they have no uncontroversial
19 interpretation of the letter or the spirit of the law. Suppose you are a com-
20 pliance officer administering a grant, and the grantee asks you to look
21 the other way while the grantee uses the money for a purpose other than
22 the purpose for which the grant was given. Suppose the grantee is asking
23 permission for a manifestly smarter purpose than the purpose for which
24 the grant was given. Fill in the details to make the case as compelling as
25 you like. The risk of emerging from that situation as more or less corrupt
26 is real whichever way you decide—lazy and irresponsible if you go one
27 way, a pompous bureaucrat if you go the other. Having fiduciary respon-
28 sibility plus discretionary power, and remaining uncorrupted over time,
29 is not easy.

31 IV. NO MAN IS AN ISLAND

32
33 Adam Smith wondered how stable a liberal community could be in
34 the face of a tendency for its political infrastructure to decay into crony
35 capitalism: mercantilists lobby for subsidies for exporters, protectionists
36 lobby for tariffs or other trade barriers to choke off competition from
37 importers, and monopolists pay kings for a license to be free from compe-
38 tition altogether. Partnerships between big business and big government
39 culminate in big subsidies. These ways of compromising freedom are sold
40 to voters as protecting the middle class, but their true purpose generally
41 is to transfer wealth and power from ordinary citizens to well-connected
42 elites. As a result, an ordinary citizen's pivotal relationships are not with
43 free and equal trading partners but with bureaucrats: people whose grip
44 on our community is so tight that we cannot walk away from such terms
45 of engagement as they unilaterally propose. Thus, we reinvent feudalism.

1 We are at the mercy of lords. Corruption makes us less free, not only
2 less wealthy.¹⁶

3 The least concentrated power is our liberty as equal citizens to walk
4 away from a bad deal, to say no as individuals—that is, to *vote with our feet*.
5 This is the liberty that separates liberal from feudal society. Having an effective
6 right to exit a relationship limits how corrupt your partner can be.¹⁷

7 As Ryan Hanley sees it, Adam Smith’s “fascination with and gratitude
8 for the harnessing of the powers of the strong for the relief of the weak is
9 the fundamental fact uniting Smith’s seemingly separate defenses of both
10 commercial society and his specific vision of virtue.” Commercial societies
11 “promote not only universal opulence but also a universal freedom
12 of which the weak are the principal beneficiaries.”¹⁸ The crucial bottom
13 line: freedom in commercial society involves *depending* on many, yet being
14 at the *mercy* of none.

15

16 *Beyond men of system*

17

18 As Smith understood, the market for monopoly power—kings selling
19 monopoly licenses to raise funding for mercenaries to fight their wars—
20 has a singularly unhappy logic. Namely, kings adopt policies systemat-
21 ically favoring merchants who have lost their economic edge, because
22 inferior competitors are the ones who have the most to gain from barriers
23 to competition. The ease of transferring goods from one citizen to
24 another¹⁹ is thus a foundation of both the promise and the downfall of
25 capitalism. Easy transfer makes piracy possible, and the political process
26 enables crony capitalists to enlist kings to bureaucratize piracy and make
27 it seem normal.

28 Exacerbating crony capitalism’s perils is the ubiquitous threat posed
29 by “men of system.” As Samuel Fleischacker says, “the limitations Smith
30 describes on what anyone can know about their society should give pause
31 to those who are confident that governments can carry out even the task
32 of protecting freedom successfully. Taken together with his skepticism
33 about the judiciousness, decency, and impartiality of those who go into
34

35

36

37

38 ¹⁶ Richard Miller, “Is Capitalism Corrupt?”; Daniel Weinstock, “Corruption in Adversarial
39 Systems, The Case of Democracy”; Munger, “On the Contingent Vice of Corruption.” So we
40 want to term limit our representatives and thereby make sure they have no chance to
41 develop any expertise of their own, leaving us in a situation where the only people who have
42 even a clue about how to reform the system are the same industry executives who have spent
43 their careers undermining the official intent of such reforms. We trust them with unrivaled
44 power to regulate those who would enter the market and compete with them. Incredibly, *that*
45 is our response to the fact that we don’t trust them to regulate themselves.

46

47 ¹⁷ Ryan Patrick Hanley, *Adam Smith and the Character of Virtue* (New York: Cambridge Uni-
48 versity Press, 2009), 19.

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¹⁹ Noted by David Hume, *Treatise of Human Nature*, 3.2.2.16.

1 politics, this is what gives punch to the libertarian reading of Smith."²⁰
 2 One of Smith's insights is that a "man of system"

3
 4 seems to imagine that he can arrange the different members of a great
 5 society with as much ease as the hand arranges the different pieces
 6 upon a chess-board. He does not consider that the pieces upon the
 7 chess-board have no other principle of motion besides that which
 8 the hand impresses upon them; but that, in the great chess-board of
 9 human society, every single piece has a principle of motion of its own,
 10 altogether different from that which the legislature might chuse to
 11 impress upon it.²¹

12
 13 A man of system moves pawns in pursuit of his goals. In a real society,
 14 however, "pawns" respond as if they had minds of their own, which, after
 15 all, they do. Irritated by the pawns' contrarian response, men of system
 16 adjust, now seeking more to dominate than to help pawns. These bureau-
 17 crats are corrupted by their own petulance, without ever dreaming of
 18 selling public power for private gain.

19 Again, however, as Smith understood, we face a conundrum. If our com-
 20 munity is to achieve a rule of law, there has to be officiating.²² To the extent
 21 that referees succeed in taking nonconsensual and fraudulent transfers off
 22 the table, players learn to pursue their interests in ways they conceive as
 23 mutually advantageous—positive for everyone *involved* in a trade, and at
 24 least not a negative for anyone *affected* by it.

25 Unfortunately, power we give officials to push *our* agenda is at the same
 26 time power to push *their* agenda. As with sports, if the game inspires, it
 27 will be by virtue of what comes from letting the players play, but when
 28 officials push their agenda aggressively, other players are relegated to the
 29 sidelines waiting to see how it all plays out. What should we infer from
 30 the premise that officials, when given power, use it to pursue their own
 31 agenda, not ours? I infer this: we should be skeptical of conceptions of
 32 justice that make it seem like we should invest enormous power in the sort
 33 of people who most *covet* enormous power.

34 There is no use lamenting that valuable commodities are bought and
 35 sold, and that power is a valuable commodity.²³ What is disconcerting is
 36 that power's corrosiveness is proportionate to scale. More power com-
 37 mands a higher price, notwithstanding cosmetic tweaks to campaign
 38
 39

40
 41 ²⁰ Samuel Fleischacker, *On Adam Smith's Wealth of Nations* (Princeton, NJ: Princeton Press,
 42 2004), 235. See also Fleischacker (p. 233) on the delusions of the sovereign and the folly of
 43 the statesman who fancies himself fit to exercise the power to impose a central plan. See also
 44 Adam Smith, *Wealth of Nations*, IV.ii.10 and IV.ix.51.

²¹ Adam Smith, *Theory of Moral Sentiments*, VI.ii.42

²² John Hasnas, "The Corruption of the Rule of Law," present volume, x-xx.

²³ Munger, "On the Contingent Vice of Corruption."

1 finance laws. There is no mystery why candidates would spend ever more
 2 on campaigns. It is not because regulators are becoming more lax. It is
 3 because the prize keeps getting bigger.²⁴

4 When we create political power worth billions, the bidding for such
 5 power tends to be won by billionaires. The bigger the prize, the richer and
 6 more unscrupulous one needs to be to compete for it. It stands to reason
 7 that the process by which people gain political appointment would sys-
 8 tematically tend, and *increasingly* tend, to select the wrong person for the
 9 job. The truism that power corrupts implies that randomly selected officers
 10 would be corruptible. Yet, the truism is misleadingly optimistic. The more
 11 realistic worry is worse. Namely, the process of selecting officers is not
 12 random. We *select* for corruption. It is not a randomly selected fox but the
 13 most ravenous fox that tends to get the job of overseeing the henhouse.²⁵
 14 Political debate then devolves into hens lobbying the fox to devour the
 15 other hens first. No doubt some candidates are noble, but we can't sort
 16 them out. *Bought* politicians denounce corruption and name names like
 17 every other candidate; of course, they target not *their* buyers, but the chief
 18 *rivals* of their buyers.

20 V. TOWARD REMEDY: CONFLICT AND JUSTICE

21
 22 We all have been taught to think that when we do abstract theory, "jus-
 23 tice is the first virtue of institutions,"²⁶ from which we infer that our first
 24 task is to articulate principles of justice.²⁷ Benjamin Barber says of Rawls's
 25 writing that "when political terms do occasionally appear, they appear
 26 in startlingly naïve and abstract ways."²⁸ Robert Paul Wolff's criticism is
 27 equally sharp. He sees in Rawls "no conception of the generation, deploy-
 28 ment, limitations, or problems of political power" and notes that

29
 30 it would require very considerable political power to enforce the
 31 sorts of wage rates, tax policies, transfer payments, and job regula-
 32 tion called for by the difference principle. The men and women who
 33

34
 35
 36 ²⁴ Some say transparency is the solution. Perhaps, but we might also see transparency as a
 37 hard-won achievement, not a policy instrument—a consequence of beating corruption rather
 than a weapon with which we fight it.

38 ²⁵ I wish this were less true in democracies, but if anything, the most ravenous fox is also
 39 the most charismatic, and most adept at convincing voters (for whom politics has become
 40 "info-tainment") that they have nothing to lose by giving a charismatic leader more power.
 If the fox can make voters see politics as a team sport, and can convince voters that the fox is
 the home team, then voters will cheer for the fox no matter what.

41 ²⁶ John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971/
 42 1999), 3.

43 ²⁷ Bernard Williams sees the same thing, and laments it. See *In the Beginning Was the Deed*
 (Princeton, NJ: Princeton University Press, 2005).

44 ²⁸ Benjamin Barber, *The Conquest of Politics* (Princeton, NJ: Princeton University Press,
 45 1989), 310.

1 apply the principle, make the calculations, and issue the redistribu-
 2 tion orders will be the most powerful persons in the society, be they
 3 econometricians, elected representatives, or philosopher-kings. How
 4 are they to acquire this power? How will they protect and enlarge it
 5 once they have it? Whose interests will they serve?"²⁹

6
 7 It is indeed startling to see the work of the twentieth century's most
 8 influential political philosopher described as "startlingly naïve."³⁰ And
 9 yet, upon reflection, it is amazing that contemporary philosophical litera-
 10 ture has so little to say about the idea that power corrupts.

11 In practice, officials who make our basic structures work begin with
 12 resolving and avoiding conflict, not with justice. Theorists treat justice as
 13 more foundational than conflict-resolving rules of practice; practitioners
 14 need to do the opposite. The kind of questions that judges actually need
 15 to answer are questions like, "When is flying over someone's ranch at a
 16 height of 10,000 feet a form of trespass, and when is it a way of peacefully
 17 minding your own business?" Many key questions of justice are more
 18 downstream than they appear; they literally have no answers until judges
 19 sort out what will help current and potential litigants in particular circum-
 20 stances to stay out of court and get on with their lives. After judges settle
 21 a dispute, citizens go forward with legitimate mutual expectations about
 22 what to count as their due. Judges get it right when they actually settle it—
 23 when they establish expectations that everyone can live with and thereby
 24 minimize the need for future intervention by corruptible public officials.
 25 Judges cannot settle for expressing their own convictions about fairness or
 26 otherwise pursuing their own agenda. They have to settle disputes.

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 28
 29 ²⁹ Robert Paul Wolff, *Understanding Rawls: A Reconstruction and a Critique* (Princeton, NJ:
 30 Princeton University Press, 1977), 202.

31 ³⁰ It would naïve indeed to suppose for example that, for the sake of fairness, university
 32 resources should be distributed among departments in whatever manner is to the greatest
 33 advantage of the least advantaged department. However, what Rawls says is: the principle
 34 applies only to the basic structure. Jacob Barrett suggests, in conversation, that Rawls's early
 35 distinction between summary rules and rules of practice might have remained relevant to his
 36 later thinking. So, baseball has utility (let's say) but would have no utility qua baseball if
 37 umpires took themselves to have a right to make case by case utilitarian calculations regard-
 38 ing how many more strikes a given batter should be allowed. Similarly, society's basic struc-
 39 ture is unfair unless it passes muster with the Difference Principle. This it cannot do unless
 40 it comprises rules of practice that do not reduce to case-based applications of the Difference
 41 Principle. If this is Rawls's view, then his view has none of the naïveté that Barber and Wolff
 42 find in the Difference Principle. The Difference Principle informs only one practice: the prac-
 43 tice of *judging the fairness* of society's basic structure. We could stipulate this, or argue that
 44 the Principle more broadly applied would fail self-inspection. For example, would it be to
 45 the greatest advantage of the least advantaged to treat rules of university budgeting as mere
 summary rules that answer case by case to the Difference Principle? (Should our distribution
 of grades be to the greatest advantage of the least advantaged student?) The Difference Prin-
 ciple itself should warn us that ignoring empirical aspects of such questions is precisely what
 we have no right to do when evaluating society's basic structure and when evaluating the
 Difference Principle's proper scope.

1 Contra Rawls, the first virtue of social institutions is to establish a rule
2 of law that holds a community together not by virtue of imposing a vision
3 of justice but by virtue of enabling people to know what to expect from
4 each other, to invent ever-better ways of being of service to each other, and
5 to not feel threatened by the awareness of being among people who will
6 never have a common destination.

7 Consider how this orientation toward conflict resolution moves a
8 society in the direction of being less vulnerable to corruption. It rules out
9 creating the power to ram through a thick conception of justice, which
10 implies that when it comes to society's basic structure, no *thick* conception
11 of justice is a *true* conception. A theory about justice that sets aside whether
12 alleged requirements of justice can be satisfied without inviting wholesale
13 corruption needs to be rejected, not merely tinkered with downstream by
14 officials responsible for implementation.

15 In a healthy society, people's movements constitute a flow of traffic
16 that moves smoothly, not by virtue of people reaching consensus on what
17 their destinations should be, or on which minority should bear the cost
18 of implementing what the winner calls justice, but by virtue of people
19 (1) learning to avoid needing to reach consensus on destinations, and
20 (2) learning to reach consensus on the question that truly needs consen-
21 sus: namely, who has the right of way.

22 If we settle for conflict resolution, that is, for having our day in court,
23 and for having a forum for airing grievances as they arise, we remain vul-
24 nerable to corruption, but there is less scope for corruptible discretion.
25 Judges have a license not to pursue a *vision* so much as to find out what
26 litigants can live with. Judges are constrained by a need to converge on
27 a result that leaves litigants—not theorists but real people whose futures
28 genuinely hang in the balance—feeling like they had a say, and were given
29 terms of peace that leave them free to carry on as equal citizens with lives
30 of their own to live.

31 The least corrupt system in the long run minimizes reliance on powerful
32 officials, thereby minimizing the concentration of what corrupts—that is,
33 power—in corruptible officials. Thus, one key question for a legal system
34 is: Does the rule of law embodied in this system minimize the need for
35 ongoing tinkering?³¹ The power to tinker will be a supremely valuable
36 commodity, and sooner or later those who possess that power will be cor-
37 rupt. The least corruptible forms of power are the most dispersed forms,
38 and above all the power to vote with one's feet.

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45 ³¹ Again, see Hasnas, "The Corruption of the Rule of Law."