

Florida State University College of Law

## Scholarship Repository

---

Scholarly Publications

---

2022

### Conceptualising Corruption and the Rule of Law

Jacob Eisler

Florida State University College of Law, jeisler@law.fsu.edu

Follow this and additional works at: <https://ir.law.fsu.edu/articles>



Part of the Law Commons

---

#### Recommended Citation

Jacob Eisler, *Conceptualising Corruption and the Rule of Law*, 85 *Modern Law Review* 1071 (2022),  
Available at: <https://ir.law.fsu.edu/articles/779>

This Article is brought to you for free and open access by Scholarship Repository. It has been accepted for inclusion in Scholarly Publications by an authorized administrator of Scholarship Repository. For more information, please contact [efarrell@law.fsu.edu](mailto:efarrell@law.fsu.edu).

---

## REVIEW ARTICLE

---

### Conceptualising Corruption and the Rule of Law

Jacob Eisler\*

---

*Yuen Yuen Ang, China's Gilded Age: The Paradox of Economic Boom and Vast Corruption*, Cambridge: Cambridge University Press, 2020, 257 pp, hb.

*Timothy K. Kuhner, Tyranny of Greed: Trump, Corruption, and the Revolution to Come*, Stanford, CA: Stanford University Press, 2020, 179 pp, pb.

What is the best way to conceptualise corruption? The conventional approach is to define corruption as individual action that deviates from civic duty for the sake of private gain. However, scholars such as Dennis Thompson, Lawrence Lessig, and Zephyr Teachout have proposed an alternate conception, defining corruption as structural misalignment of normalised political practices. This transforms corruption from condemnation of personal conduct into an evaluation of whether institutions are performing their roles appropriately.

Scholars continue to wrestle with the tradeoffs between the clarity and convenience of the conventional definition and the normative depth of the institutional view. Two recent books describe societies awash with corruption, and demonstrate the consequences of incorporating the institutional definition. Yuen Yuen Ang's *China's Gilded Age* describes a society thriving in spite, and perhaps because, of pervasive corrupt conduct. She relies on the conventional definition to measure corruption for her dazzling empirical analysis. Her conclusion that transaction-facilitating corruption in China is pervasive, formally condoned, and socially beneficial makes her critical use of the institutional frame especially provocative. Her project queries if corruption has meaning without reference to the foundational values of a polity. Timothy Kuhner's *Tyranny of Greed* offers a fierce critique of American politics, exceptional for its systemic, moralising definition of corruption. Kuhner indicts Donald Trump's presidency as exemplifying the avarice that undermines American society. Kuhner depicts corruption as pervasive moral decay, infiltrating persons as well as institutions

---

\*Associate Professor of Public Law, Southampton Law School; Research Associate, Centre for Business Research, University of Cambridge Judge Business School. Many thanks to Peter Turner, Aidan Finley, and two anonymous reviewers for advice, suggestions, and encouragement.

and tainting established norms and rules. He evokes both the critical potential and analytic limitations of the institutional approach.

Ang and Kuhner indicate underappreciated characteristics of the institutional account, particularly its relationship to the rule of law. Because it is defined by culpable violation of familiar norms that dictate individual conduct, anti-corruption enforcement based on a conventional account of corruption will tend to satisfy rule of law requirements of transparency, predictability and accessibility. The engagement of Ang and Kuhner shows how the institutional account unsettles the relationship between rule of law and identification of corruption. This derives from the fact that a claim of institutional corruption is informed by an external account of good political practice, and can occur without intentional violation of norms of integrity. This suggests that the two accounts can fulfil different roles in the pursuit of political integrity. Institutional identification of corruption is useful to guide wide-ranging structural reforms, while the conventional conception should be deployed to condemn individual behaviour or impose criminal sanction.

### THE CONVENTIONAL VIEW AND THE INSTITUTIONAL INNOVATION

Joseph Nye provides a leading conventional formulation<sup>1</sup> of corruption: ‘Corruption is behavior which deviates from the formal duties of a public role because of private-regarding (personal, close family, private clique) pecuniary or status gains; or violates rules against the exercise of certain types of private-regarding influence’.<sup>2</sup>

This defines corruption as 1) discrete instances of conduct that 2) violate public-duty norms to obtain private gain. In short, corruption is self-enriching violation of norms of civic duty. Classic examples would include accepting bribes, embezzling state property, or using resources of public office to engage in self-dealing such as insider trading. Such conduct turns power that should be used for the public weal into a personal benefit for the official who holds it. It is a betrayal of public trust, and typically harmful to accountable, efficient governance.

1 As C.E. De Vries and H. Solaz, ‘The Electoral Consequences of Corruption’ (2017) 20 *Annual Review of Political Science* 391, 392 observe, even if the public-for-private exchange definition is indeterminate, ‘it has become widely accepted within the literature’. For examples of prominent definitions that cite or mirror Nye’s definition, see J.C. Scott, *Comparative Political Corruption* (Englewood Cliffs, NJ: Prentice-Hall, 1972) 4; P. Bardhan, ‘Corruption and Development: A Review of Issues’ (1997) 35 *Journal of Economic Literature* 1320, 1321; S. Rose-Ackerman, *Corruption and Government* (Cambridge: Cambridge University Press, 1999) 91; L.A. Schwindt-Bayer and M. Tavits, *Clarity of Responsibility, Accountability, and Corruption* (Cambridge: Cambridge University Press, 2016) 4; *China’s Gilded Age 2*. For prominent examples of such definition being used in practice, see Transparency International, *What is Corruption 2021* at <https://www.transparency.org/en/what-is-corruption>; The World Bank, *Anticorruption Fact Sheet* 19 February 2020 at <https://www.worldbank.org/en/news/factsheet/2020/02/19/anticorruption-fact-sheet>.

2 J. Nye, ‘Corruption and Political Development: A Cost-Benefit Analysis’ (1967) 61 *The American Political Science Review* 417, 419.

However (as even its proponents often concede) this definition is not complete. Declaring an act corrupt invokes shared norms of social and political integrity. These norms are difficult to capture and highly contestable. Scholars offer various ways of approximating them, none of which is wholly satisfactory. Empirical social scientists often treat perceptions of corruption as a proxy for corruption itself;<sup>3</sup> other scholars correlate corruption with violation of law.<sup>4</sup> However, as Mark Philp and Jacob Rowbottom note, defining an act as corrupt is inevitably a moral claim about political organisation. It is informed by the fundamental terms by which a society should operate, the ‘healthy ... normal’<sup>5</sup>, or ‘naturally sound’<sup>6</sup> conditions of politics.

But what if a society and its institutions are not ‘healthy’ or ‘sound’? Under such circumstances, standards internal to the polity will cease to clearly mark corruption. This may be most salient in weak states that operate as autocrats’ private fiefdoms. Such dictators can strip a society of resources to enrich themselves without violating articulated rules or expectations of behaviour within the polity.<sup>7</sup> Lack of clarity in identifying corruption can also occur in democratic states with clearer norms and strong institutions. The instances may be more obscure or attenuated. Officials can participate in influence networks that blur public–private boundaries, such as reciprocity with constituent pressure groups and lobbyists,<sup>8</sup> or use their office to groom themselves for lucrative positions in the private sector.<sup>9</sup> Such conduct may also be internal to the political process, such as seemingly legitimate state action that benefits narrow interest

- 3 De Vries and Solaz, n 1 above, 394–95; Schwindt–Bayer and Tavits, n 1 above 5; M. Agerberg, ‘Corrupted Estimates? Response Bias in Citizens Surveys on Corruption’ *Political Behavior* 2020 at <https://doi.org/10.1007/s11109-020-09630-5>. For critiques of treating this as *defining* corruption, see Scott, n 1 above, 4; M. Philp, ‘Conceptualising Political Corruption’ in A.J. Heidenheimer and M. Johnston (eds), *Political Corruption* (New Brunswick, NJ: Transaction Publishers, 3<sup>rd</sup> ed, 2002) 41, 45–46. Furthermore, empirical evidence has raised questions regarding the reliability of perceptions of corruption correlating to actual levels of corruption. D. Treisman, ‘What Have We Learned About the Causes of Corruption from Ten Years of Cross-National Empirical Research?’ (2007) 10 *Annual Review of Political Science* 211, 241.
- 4 Nye, n 2 above, 419 (listing the classically illegal behaviours of bribery, nepotism, and misappropriation as the core forms of corruption); Scott, *ibid*, 4 (using legal norms to inform when behaviour is corrupt); Schwindt–Bayer and Tavits, *ibid*, 7 (differentiating corruption from clientelism in part on the basis of lawfulness of the conduct); P. Fernández–Vázquez, P. Barberá and G. Rivero, ‘Rooting Out Corruption or Rooting for Corruption? The Heterogeneous Electoral Consequences of Scandals’ (2016) 4 *Political Science Research and Methods* 379, 379–381 (identifying corruption by illegality even when it confers a social benefit on a constituency).
- 5 Philp, n 3 above, 52.
- 6 J. Rowbottom, *Democracy Distorted* (Cambridge: Cambridge University Press, 2010) 82.
- 7 See M. Johnston, *Syndromes of Corruption* (Cambridge: Cambridge University Press, 2005) 124 (feature of states dominated by self-interest cliques with little oversight); Scott, n 1 above, 85 (Haiti under Duvalier corrupt because ‘traditional limits and institutional restraints’ such as ‘traditional norms’ and ‘any other institutional based center of power’ were ‘totally absent’); R.H. Bates, *When Things Fell Apart: State Failure in Late-Century Africa* (Cambridge: Cambridge University Press, 2008) 97–98 (‘forging of authoritarian political institutions’ meant that ‘predation became more attractive than stewardship’).
- 8 One recent example in the UK involves former Prime Minister David Cameron undertaking lobbying on behalf of a now-defunct financial institution. M. Honeycomb–Foster, ‘David Cameron, Britain’s biggest (hidden) lobbyist’ *Politico* 13 April 2021 at <https://www.politico.eu/article/david-cameron-uk-latest-hidden-lobbying-greensill/>.
- 9 See for example Johnston, n 7 above, 63–85 (describing such practices in the United States, Germany, and Japan); L. Lessig, *Republic, Lost* (New York, NY: Twelve, 2011) 101–107 (describ-

groups, or even leaders themselves. Examples include pork-barrel spending<sup>10</sup> or passage of election laws that benefit incumbents.<sup>11</sup> These practices may undermine good governance yet be commonly practiced and grudgingly accepted such that it is difficult to classify them as norm-defiant.

It is contestable whether the conventional conception of corruption successfully captures such conduct, and where such behaviour is prevalent and tolerated it suggests a systemic pathology. This complexity has engendered a new trend in the scholarship. Dennis Thompson pioneered the concept of ‘institutional corruption’, describing how corruption may occur not only through discrete instances of personal self-enrichment, but where private interests generally infiltrate public decision-making.<sup>12</sup> When private interests become pervasively influential, leaders must aggrandise them to effectively govern, and corrupt conduct ‘closely resemble[s] practices that are an integral part of legitimate political life.’<sup>13</sup> Private campaign financing has generated particular interests in institutional accounts in American scholarship.<sup>14</sup> While such a systemic approach does not yet have broad traction in the UK,<sup>15</sup> it seems ripe to do so. The Brexit campaign and post-referendum political machinations highlighted pervasively self-serving behaviour among political elites.<sup>16</sup>

---

ing such practices in the United States); Z. Teachout, *Corruption in America* (Cambridge, MA: Harvard University Press, 2014) 246–249 (describing the relationship between revolving doors and lobbying).

- 10 Lessig, *ibid.*, 115–117 (pork-barrel spending); for an even more narrowly targeted account of how such power can be used, see D.F. Thompson, *Ethics in Congress* (Washington, DC: The Brookings Institution, 1995) 80–84.
- 11 This can occur through manipulation of electoral rules. See S. Issacharoff and R.H. Pildes, ‘Politics as Markets: Partisan Lockups of the Democratic Process’ (1998) 50 *Stanford Law Review* 643 for the authoritative account. A glaring example in contemporary practice is partisan gerrymandering. M.S. Kang, ‘Gerrymandering and the Constitutional Norm Against Government Partisanship’ (2017) 116 *Michigan Law Review* 351, 356 (describing it as ruthless partisan exploitation of electoral procedure).
- 12 In the social science literature, there has been a parallel trend towards conceiving of corruption as a systemic collective action rather than principal-agent problem. A. Persson, B. Rothstein, and J. Teorel, ‘Why Anticorruption Reforms Fail – Systemic Corruption as a Collective Action Problem’ (2013) 26 *Governance* 449, 450. Ironically, both scholarly trends hark back towards the classical view of corruption as ‘global degeneration’. C.J. Friedrich, ‘Corruption Concepts in Historical Perspective’ in Heidenheimer and Johnston (eds), n 3 above, 15, 20, contrasts this ancient view with the modern view of corruption as ‘a particular form of political pathology ... defined in behavioral terms’.
- 13 Thompson, n 10 above, 27–28.
- 14 Lessig, n 9 above, 231 critiques American politics as rife with ‘dependence’ corruption, where entire institutions serve the wrong interests. Teachout, n 9 above, 295 has describes a moral order embedded in the US constitution, and which aggrandisement of plutocrats contravenes.
- 15 Rowbottom, n 6 above, 78–110 articulates questionable practices characteristic of an institutional account. However, UK legal scholarship on corruption takes a doctrinal and conventional approach, particularly the Bribery Act 2010. See J. Horder and P. Alldridge (eds), *Modern Bribery Law* (Cambridge: Cambridge University Press, 2013); G. Sullivan, ‘The Bribery Act 2010: Part 1: an overview’ (2011) 2 *Criminal Law Review* 87. M. Philp, ‘The Corruption of Politics’ (2018) 35 *Social Philosophy and Policy* 73, 79 notes that integrity in the UK is typically equated to formal disinterest.
- 16 In *Ball v Johnson* [2019] EWHC 1709 (Admin) an accusation of Boris Johnson’s misfeasance in his advocacy for the Brexit Vote was squashed on technicalities. For an account of Brexit vote corruption, see E. McGaughey, ‘Could Brexit Be Void?’ (2018) 29 *King’s Law Journal* 331.

Conventional and institutional corruption are qualitatively different types, rather than directly competing substantive accounts. Institutional scholars typically recognise transgressions such as bribery and embezzlement as uncontroversial violations of conventional norms.<sup>17</sup> The institutional approach differs in describing corruption of systems, where the established practices that comprise governance do not conform to legitimate demands of political integrity.<sup>18</sup> Institutional corruption addresses how government performs its internal political functions, with the pathology occurring within the public domain, rather than opportunistic conversion of government power to self-aggrandising ends, with public resources being converted to private benefit. Like conventional corruption, the institutional type can be traced to norm violation.<sup>19</sup> The distinction is where the breach from integrity inheres – individual actors who defy norms (conventional), or the collective arrangement of the system such that participants deviate from integrity through widely held practices (institutional).<sup>20</sup>

Institutional corruption describes pathologies that the conventional approach struggles to conceptualise. This is particularly true where corruption assumes forms that cannot be characterised as individual misfeasance. This manifests in the relationship between corruption and lawbreaking. Scholars who rely on the conventional account certainly recognise that because corruption violates norms rather than formally articulated rules, conduct can violate norms but not be illegal (or vice versa).<sup>21</sup> Yet because conventional standards of public-regardingness are often inscribed in laws, scholars will often treat violation of legal rules dictating public integrity as a (imperfect but adequate) proxy for corruption.<sup>22</sup> Even where conventional definitions do not turn to law as informing the substance of corruption and instead turn to a basis such as public opinion, the resulting formulation of corruption is often rule-like or adverts to

17 Lessig, n 9 above, 228 (differentiating between ‘type 1’ corruption such as individual bribery and systemic ‘type 2’ corruption); Teachout, n 9 above, 294 (describing the multiple meanings corruption can have).

18 Thompson, n 10 above, 36–37; Lessig, *ibid*, 228.

19 Thompson, *ibid*, 65–69.

20 D.F. Thompson, ‘Theories of Institutional Corruption’ (2018) 21 *Annual Review of Political Science* 495, 496.

21 See for example Bardhan, n 1 above, 1322 (recognising the difference between ‘corrupt’ and ‘illicit’ activities before adopting a conventional understanding). This observation has been advanced as a purely analytic matter prior to the institutional conception. Whether conduct is corrupt falls along gradients that reflects normative contestability, but legal judgments themselves require finality. See J.G. Peters and S. Welch, ‘Political Corruption in America: A Search for Definitions and a Theory’ (1978) 72 *The American Political Science Review* 974 (legal-theoretical account of how corruption consists of shades of grey); D.H. Lowenstein, ‘Political Bribery and the Intermediate Theory of Politics’ (1985) 32 *UCLA Law Review* 784. More unusually, conduct with ‘good motives’ may be corrupt by formal legal definitions, as some have worried is an implication of the UK Bribery Act. B. Sullivan, ‘Reformulating bribery: a legal critique of the Bribery Act 2010’ in Horder and Alldridge (eds), n 15 above, 13, 36; see also J. Horder and P. Alldridge, ‘Introduction’ *ibid* 1, 4–5.

22 See n 4 above.

law-breaking.<sup>23</sup> This is because conventional corruption identifies when expectations of individual behaviour are violated, requiring a rule-like benchmark.

Institutional corruption indicts entire political systems for normalising illegitimate self-interest in political discourse and engagement. Such normalisation can occur through adoption of an internally coherent set of rules or through the institutions that promulgate those rules. Framing institutional corruption as individual rule-compliance is an analytically misdirected endeavour because that is not the level of social organisation at which institutional corruption manifests. Thompson distinguishes between ‘legal and illegal corruption’<sup>24</sup> because legal corruption is built into the practices of an institution and outwardly resembles political business as usual. Lawrence Lessig observes that even if all transactional, personally enriching corruption – the type of corruption criminalised by laws that explicate expectations for public servants, such as anti-bribery and anti-kickback laws – were eliminated, institutions might still have corrupt ‘dependencies’, and, as a result, encourage official conduct that prioritises the wrong interests.<sup>25</sup> Laura Underkuffler describes law as a contentless ‘shell’ that says nothing about the content or real presence of corruption, because corruption is a moral rather than formal deficiency.<sup>26</sup>

### CONVENTIONAL APPROACHES AND SOCIAL SCIENCE INSIGHT: CHINA AND ‘BENEFICIAL’ CORRUPTION

Ang and Kuhner deploy the institutional approach differently in their respective works. Ang relies on a conventional definition to measure corrupt behaviour, correlating corruption with formal illegality and perceptions of corruption. In her conclusion, she queries if the conventional conception is satisfactory, and turns to the institutional frame.<sup>27</sup> The institutional approach requires considering what norms of political practice should be morally authoritative in China. Ang does not decisively answer this question, and the institutional approach primarily serves to destabilise the conception of corruption generally.

This tension emerges from Ang’s analysis of a thorny paradox: how has China enjoyed such dramatic economic expansion while experiencing levels of corruption that are usually economically and politically debilitating? Ang resolves this puzzle by demonstrating that corruption in China is predominantly ‘access money’. Access money consists of ‘high-stakes rewards extended by business actors to powerful officials, not just for speed, but to access exclusive valuable

23 See J.S.T. Quah, ‘Corruption in Asian Countries: Can It Be Minimized?’ (1999) 59 *Public Administration Review* 483, 484 (summarising the central question in prominent surveys which ask respondents to evaluate the prevalence of rule-violations). Surveys often rely on conventional definitions which resemble rules, see n 3 above; Schwandt-Bayer and Tavits, n 1 above, 44 (describing and relying upon Transparency International’s and the World Bank’s surveys on corruption).

24 Thompson, n 10 above, 26.

25 Lessig, n 9 above, 231.

26 L. Underkuffler, *Captured by Evil: The Idea of Corruption in Law* (New Haven, CT: Yale University Press, 2013) 2.

27 *China’s Gilded Age*, 203–204.

privileges.<sup>28</sup> Access money presents as the familiar and conventionally corrupt form of bribery, exchanging public power for private gain. The immediate beneficiaries of access money transactions are officials (who receive payoffs) and the investors (who receive business opportunities). But Ang observes that access money can facilitate broad economic growth, accelerating investment and yielding economic gains that diffuse throughout the society. While relying on access money to coordinate investment and governance comes with risks and inefficiencies,<sup>29</sup> China has mitigated these risks by tying collective benefits to personal enrichment. Other scholars have tended to characterise access money (commonly called ‘grand corruption’) as destructive.<sup>30</sup> Ang is sensitive to this perception, and counters that access money in China is more akin to the coordinating role that wealth-for-influence exchanges play in developed nations such as the US and Singapore.<sup>31</sup> This comparison implies that Ang is describing institutional as well as conventional corruption in China. If access money is not merely personal enrichment, but the standard mode of Chinese governance (as opposed to officials performing their roles with civic integrity), it indicates that political norms in China are misaligned.

Much of Ang’s empirical measurement relies on established scholarly proxies for individual norm violations. The most intriguing piece of evidence is a quantitative analysis of corruption prosecutions. Embezzlement (theft-like and socially damaging) prosecutions have declined even as bribery (the core of access money) prosecutions have correspondingly risen.<sup>32</sup> This is bolstered by a quantitative analysis of media mentions of corrupt conduct<sup>33</sup> and case studies of high-profile prosecutions.<sup>34</sup> Prosecutions as a correlate of corruption assumes that illegality of individual conduct tracks norm-violation. Likewise, media mentions reflect perceptions of corruption, a standard mechanism for measuring individual norm-violation.

However, Ang’s own sophisticated analysis of access money raises questions of whether the practice violates the norms that undergird Chinese politics. She recounts how access money’s prevalence is a matter of state policy: the Chinese government has incentivised officials to use access money to enrich themselves, and in parallel discouraged self-enrichment through theft-like embezzlement. When conduct is promoted as state policy, it queries whether the conduct violates norms of individual civic integrity. Rather, the proper category appears to be institutional corruption, in which the norms internal to political practice are defective. Of course, state condoning of a given activity is not enough to alle-

28 *ibid.*, 10. Ang contrasts access money with three other types, two theft-like and one (speed money), like access money, transactional.

29 *ibid.*, 145–148.

30 Rose-Ackerman, n 1 above, 30 describes grand bribery as linked to failing states. Johnston, n 7 above, 156 describes it as typical of ‘elite mogul’ regimes with weak development.

31 *China’s Gilded Age*, 33–35. Wealth-for-soft-influence dynamics are the core of what Lessig and Teachout describe as American institutional corruption. This might seem to move China into what Johnston, *ibid.*, 60 calls an ‘influence market’ regime, but Ang, *China’s Gilded Age*, 49 resists Johnston’s case study methodology.

32 *China’s Gilded Age*, 71–75.

33 *ibid.*, 78–80. However, the source Ang examines – the *People’s Daily* – is an official state source of news, thus perhaps limiting its reliability as an indicator of state corruption.

34 *ibid.*, 125–142.



viate concerns of conventional corruption (even if it also indicates institutional corruption). It may be that access money violates normative expectations of personal civic duty and is also indicative of a political system that is misaligned. Indeed, a polity in which both conventional and institutional corruption are rife typically suggests a weak or failing state.<sup>35</sup>

Yet China is flourishing rather than faltering. Moreover, the broader role that Ang attributes to access money in this flourishing challenges the characterisation of access money as either conventionally or institutionally corrupt. Ang observes how access money has coordinated the personal interest in self-enrichment with conduct that advances the interests of the entire society. As corruption is typically destructive when used to ‘top-up’ salaries by undercompensated government workers,<sup>36</sup> this is a remarkable outcome and one of Ang’s more novel observations.<sup>37</sup> When workers endure bad professional circumstances such as low pay, and react by exploiting their powers to extort money from private citizens, it can yield a self-reinforcing spiral, harming growth (by preventing development of a tax base), further reducing government funds, and eroding norms of civic cooperation. But ‘China charted an usual pathway out of this vicious cycle ... allowing ... street-level bureaucrats to extract some payments to top up their paltry formal salaries, while also aligning their financial incentives [fringe benefits and performance bonuses] with long-term economic development objectives.’<sup>38</sup> This ‘profit-sharing’ encouraged officials to self-enrich through behaviour that generates financial investment.<sup>39</sup> Profit-sharing through access money is a desirable political practice, pulling China out of a vicious cycle of apathetic and alienated governance that afflicts many developing countries.

That Ang describes access money as i) widespread and ostensibly accepted as an individual practice; ii) condoned and even encouraged by the state; and iii) beneficial for social development raises a puzzle regarding its normative status. The defining feature of conventional corruption is self-enriching violation of norms of public duty. While access money transactions present as exploitation of public power for self-enrichment and satisfy at least one of the commonly used proxies (illegality),<sup>40</sup> critical reflection queries if it is norm-violative within China. When a practice is accepted by constituent members of a polity, *de facto* is state policy, *and* benefits social development, its norm-violative status is unclear. The widely condoned use of access money as a salary

35 Such a scenario fits the description of weak institutions combined with predatory conduct by those in power. See Johnston, n 7 above, 41.

36 A. Cornell and A. Sundell, ‘Money matters: The role of public sector wages in corruption prevention’ (2019) 98 *Public Administration* 244.

37 As Ang, *China’s Gilded Age*, 12 notes, scholarship has noted corruption can be beneficial in the different context of low-level day-to-day transactions to cut through bureaucracy and red tape (what Ang calls ‘speed’ money). Bardhan, n 1 above, 1323; Nye, n 2 above, 419–420. There have been other recent arguments that particular instances of ‘grand’ corruption can benefit the polity, though Ang’s is unique in integrating it into a characterisation of the entire political order. cf Fernández-Vázquez, Barberá and Rivero, n 4 above, 380 (observing no negative electoral consequences for corruption when the corrupt act confers an economic benefit on the polity).

38 *China’s Gilded Age*, 86.

39 *ibid*, 99–109.

40 *ibid*, 219–221 (describing Chinese anti-corruption statutes); cf n 4 above.

supplement is especially instructive; it acts as a bonus that not only tops up officials' incomes, but encourages officials to promote society-wide economic development which trickles down to constituents. While Ang points to perceptions of Chinese corruption, these are based on outside experts' perceptions, a means of informing the norms that has been challenged even if widely used in the scholarship.<sup>41</sup> Furthermore such expert perceptions might deploy generically conventional definitions of corruption, rather than incorporate unique norms of Chinese governance. The totality of her description destabilises the individual norm-violative status of individual access money transactions, even if by standard generic definitions and expert perceptions they are corrupt.

There is an initial appeal to categorising access money as a symptom of institutional corruption. As an established practice that achieves governance by appealing to the self-interest of officials rather than relying on civic integrity, access money fits the general definition. But this claim is likewise complicated by Ang's holistic description of Chinese governance. Ang's (mostly)<sup>42</sup> laudatory, socially integrated description of access money does not indicate systemic decay, but a 'normal' or 'sound' condition of governance. This may not be the case, but to argue this Ang must specify to what terms of governance China *should* conform. In politics where there is broad consensus regarding legitimate civic norms, an argument for institutional corruption may require less normative groundwork.<sup>43</sup> Lessig and Teachout, for example, can advert to widely accepted principles of liberal democracy to describe how plutocratic deviance of American constitutional governance from popular accountability is corrupt.<sup>44</sup> The baseline of healthy Chinese governance is not as clear, particularly given that Ang describes a regime flourishing thanks to a practice that she paradoxically categorises as corrupt. She could argue that access money is corrupt because it violates some terms of 'ideal' governance, buttressing her analysis with norms of liberal market democracy that explain why self-enriching payoffs are inferior as a means of economic coordination and politically immoral. Indeed, if Ang adopted typical liberal democratic norms, she might be able to declare access money an unequivocal sign of institutional corruption.<sup>45</sup> Ang wisely hesitates to do so – it would impose alien values<sup>46</sup> and muddy her core thesis. The illegality of access money may indicate institutional corruption, insofar as divergence be-

41 See n 3 above. Ang relies on an unbundled corruption index, the methodology described in *China's Gilded Age*, 216–217.

42 *ibid*, 145–148 (summarising how access money may cause inefficiency and inequality, but concluding the harm cannot be quantified, and challenging the prevalent corruption-as-generating-inequality view to conclude that access money also encourages 'competent and development-promoting' governance).

43 Thompson, n 20 above, 498–502, describes differing theories of institutional corruption, but all presume liberal democratic foundations.

44 Lessig, n 9 above, 231; Teachout, n 9 above, 292–293.

45 The definition provided by Thompson, n 20 above, 496 fits access money well, except in that access money also confers clear private gain, making it a potential crossover type. Thompson however is primarily concerned with developed democratic societies, and his (generally accurate) characterisation of developing countries, 508, does not fit Ang's account of China.

46 This would encounter the critique of being culturally relativistic and morally colonialist. See Scott, n 1 above, 5–6; Johnston, n 7 above, 17–18. Ang's unique empirical methodology, *China's Gilded Age*, 25–26, recognises this problem.

tween articulated legal rules and substantive norms indicates a political structure that does not perform its asserted role (a point reinforced by evidence that corruption prosecutions in China are often pretextual and politically motivated).<sup>47</sup> It may also demonstrate how formal law and ‘true’ norms of political integrity can cleave apart at the core. But these deficiencies are distinct from the role of access money, and Ang does not explore much how it may indicate a distinct type of structural corruption in China.

The ironic upshot of Ang’s insightful analysis of conventionally corrupt behaviour in China is to undermine the classification of access money as either conventionally or institutionally corrupt. This is a result of Ang’s own willingness to critically examine the frequently elided normative underpinnings of the conventional definition.<sup>48</sup> Were she to adopt an analytically complacent (or resigned) conventional approach,<sup>49</sup> and uncritically correlate corruption to standard proxies of law-breaking or public opinion, she could rely on a conventional account with few complications. Her willingness to investigate the nature of the category, inspired by the institutional approach, destabilises it by querying the substantive norms at issue. Yet her turn to the institutional approach does not widen the net of identifying corruption in China, but narrows it: it is critical application of the institutional lens that shows that access money might align with good governance. The result of Ang’s engagement with the institutional account is to highlight the reliance of even conventional ideas of corruption upon substantive norms. Her own analysis draws out these tensions, rather than resolves them. Because Ang does not specify substantive norms of integrity for China nor advert to universal principles of good governance, she relies upon the default, individual-conduct oriented, normatively indeterminate definition. This conventional approach is useful for her precisely because it does not require normative foundationalism. But her own novel conclusions undermine her application of it.

### AMERICA BESET BY GREED: THE APPEAL AND LIMITATIONS OF INSTITUTIONAL CORRUPTION

With its comprehensive moral vision, *Tyranny of Greed* unabashedly commits to the institutional approach. It exemplifies how a dedicated institutional approach relies on a substantive moral vision. Kuhner asks ‘In what kind of democracy could Donald Trump become president?’<sup>50</sup> Rather than typical social scientific<sup>51</sup> or constitutional explanations,<sup>52</sup> Kuhner turns to political

47 *China’s Gilded Age*, 159–160, 170.

48 *ibid.*, 204.

49 Indeed, a long-running tendency is to recognise the challenges of defining corruption, but then to throw up ones’ hands and adopt a conventional definition. Scott, n 1 above, 4; Nye, n 2 above, 419.

50 *Tyranny of Greed*, 35.

51 G.C. Jacobson, ‘The Triumph of Polarized Partisanship in 2016: Donald Trump’s Improbable Victory’ (2017) 132 *Political Science Quarterly* 9.

52 J. Yoo, ‘A Defense of the Electoral College in the Age of Trump’ (2019) 46 *Pepperdine Law Review* 833, 835–837 summarises one vein of such criticism.

theology: Trump is a demon of greed, ‘Mammon’,<sup>53</sup> ‘the Antichrist’.<sup>54</sup> He recounts Trump’s personal history and character (crass materialism, relentless self-promotion, sexual crudeness, an affinity for plutocrats).<sup>55</sup> Yet Kuhner’s real interest in Trump is analogical. Trump possesses none of the mystical power by which Mephistopheles tempted Faust. Trump was elected president because his all-consuming avarice matches the ‘fundamental disorder’<sup>56</sup> of America. Like Trump, America is tainted by greed, ‘from the plantation owners who pulled the strings of Southern governments to the great industrialists who influenced both major political parties for decades’.<sup>57</sup> Trump’s appetitive disregard of civic norms and moral decency parallels the deterioration of Americans into morally delimited beings, ‘single-minded in their pursuit of economic self-interest’.<sup>58</sup> Trump’s mastery of artifice and illusion suits the manipulative and degraded media environment.<sup>59</sup> Trump’s vast and lineal wealth exemplifies the scourge of American economic inequality,<sup>60</sup> and his self-aggrandising, appetitive egoism had popular appeal because it matched voters’ feelings of powerlessness and moral aimlessness under neoliberalism.

Substantively, *Tyranny of Greed* indicts American society for deviating from egalitarian civic virtue. Kuhner’s theological framing fits the institutional approach because theology claims substantive moral knowledge. The need for moral substance to fully define corruption is a familiar one to both conventional and institutional corruption scholars.<sup>61</sup> Kuhner’s treatment is remarkable for so forthrightly rising to the challenge. With its singular and system-defining critique, *Tyranny of Greed* levels a claim that widely held norms and accepted practices of American governance have cleaved apart from moral integrity and justice.<sup>62</sup>

Trump’s ascendance to the presidency despite his own rotten character exemplifies America’s institutional failure. Kuhner develops this through a totalising mode of analysis that perceives symptoms of Trump’s corruption in conduct that is sleazy or distasteful as well as deviations from political integrity or legality. Trump’s licentiousness and misogyny is classed along with accusation of sexual assault,<sup>63</sup> his tendency for brazen self-promotion and selling a diverse line of shoddy products is classed along with allegations of fraud and illicit self-dealing. Using Trump’s moral character to reflect upon the American polity, Kuhner shows how Trump has exploited the degradation of American institutions to achieve personally corrupt ends. Trump has leveraged the legal system

53 *Tyranny of Greed*, 19.

54 *ibid.*, 25.

55 *ibid.*, 6–7, but they receive fullest treatment in Chapter 2, ‘The Demon’. Kuhner at times veers into territory that seems less relevant for his systemic critique as when undertakes, for example, prolonged criticism of his subject’s last name, *ibid.*, 19–26.

56 *ibid.*, 136 (quoting Underkuffler).

57 *ibid.*, 34.

58 *ibid.*, 111.

59 *ibid.*, 99; 75–85 (describing the effect of the campaign finance regime on media integrity)

60 *ibid.*, 107.

61 Friedrich, n 12 above, 15; Lessig, n 9 above, 228.

62 Other institutional accounts have done this without such an absolute distinction between the two. Lessig, *ibid.*, 236–238; 271; Teachout, n 9 above, 280; Underkuffler, n 26 above, 9–11.

63 *Tyranny of Greed*, 23.

in particular, exploiting confidentiality settlements and protracted litigation to avoid justice and achieving formal rule-compliance but wicked self-enrichment through constructs such as trusts.<sup>64</sup> Trump's use of formal machinations to evade appropriate moral consequences do not exonerate him, but rather condemn the system that has failed to discipline him.

Kuhner treats Trump and his success as a representative symbol of the systemic decay of American institutions. Given the respect normally afforded the American legal system, his boldest claims are directed against the judiciary. Kuhner declares that the Supreme Court's undermining of campaign finance regulation and of protections for minority voters illustrates that doctrine and moral integrity are misaligned.<sup>65</sup> Kuhner directs special vitriol towards recent campaign finance decisions. In Kuhner's view, the Court lionises greed by (in)famously denying the wrongfulness or illegality of obtaining political influence over public officials through wealth.<sup>66</sup> The problematic consequences of the American campaign finance regime have been well-documented by Kuhner's earlier work<sup>67</sup> and by others.<sup>68</sup> However, Kuhner attributes the legal outcomes to the moral corruption of the judiciary, specifically the political self-interest of the conservative justices. Other scholars have observed that judges may be influenced by ideology,<sup>69</sup> and how, if true, this is problematic for the constitutional order.<sup>70</sup> But Kuhner is unique in indicting the judges as having relinquished integrity, as opposed to merely engaging in inaccurate or ideologically inflected constitutional reasoning.

This critique of the American Supreme Court clarifies why institutional corruption compels differentiation between unreflective assertions regarding instances of corrupt conduct, its manifestation in law, and the genuine corruption of a polity. Kuhner does not suggest that conservative Supreme Court justices have participated in explicit *quid pro quo* bribery that would constitute a crime or a conventionally corrupt trade of public power for private gain. Rather, like the rest of America, Supreme Court judges have been pervaded by greed, their cognitive processes and personal characters distorted. Through this moral lapse, norms of judicial reasoning have become corrupted, such that judges cease to differentiate between appropriate and inappropriate behaviour, and their decisions no longer advance political integrity. What appear, internal to the American legal system, to be the reasonable outcomes of common law process are by true moral lights corrupt outcomes.

Much as the Supreme Court produced legal reasoning tainted by greed, voters tainted by avarice selected Trump. Like the tainting of judges, this occurred

64 *ibid.*, 20, 30.

65 *ibid.*, 92.

66 'The fact that speakers may have influence over or access to elected officials does not mean that those officials are corrupt'. *Citizens United v Federal Election Commission* 558 US 310, 359 (2010).

67 T. Kuhner, *Capitalism v. Democracy* (Stanford, CA: Stanford University Press, 2014).

68 Lessig, n 9 above, 91–225; Teachout, n 9 above, 227–245. Kuhner's own analysis of politicians' interest in public welfare being displaced by private interest, *Tyranny of Greed*, 77, parallels Lessig's theory of dependence corruption.

69 J. Segal and H. Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (New York, NY: Cambridge University Press, 2002).

70 E.B. Cross, 'Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance' (1997) 92 *Northwestern University Law Review* 251.

as a deviation internal to reason, rather than as a rational but normatively transgressive transaction; voters selected Trump because they have internalised deviant political morality. The root of the problem is distortion of the cognitively and socially constructed reality which members of a community experience.<sup>71</sup> Such contextualising distortions make a conventional view of corruption inadequate. The problem is not that established norms of integrity are contravened, but rather that every possible source of established norms – the state apparatus, the legal system, citizens' beliefs – is deficient and thus incapable of articulating a legitimate notion of integrity. Kuhner thereby offers a valuable insight into the ontology of institutional corruption. It operates by bad values infiltrating the rationality of participants in social organisation.

Kuhner's indifference to widely held norms and established rules shows the paired virtue and frailty of the institutional approach. The capacity to define corruption through reference to a substantive morality, and independent of established practices, enables critique of entrenched pathologies which have become internalised as conventional norms and rules.<sup>72</sup> It also demonstrates that the institutional critique necessarily asserts a substantive moral vision regarding the organisation of the polity at issue. The institutional conception of corruption thus lacks the cross-contextual applicability of conventional definitions. Furthermore, an institutional claim of corruption is only as convincing as the specific moral vision, rather than appealing to quasi-universal and less contestable (if indeterminate) standards of public integrity. Kuhner's own totalising commitment to a moralised vision shows these limitations. His condemnation is only as valid as the assertion that neoliberal economic self-interest is a pathology in a just democracy. Moreover his principled account lacks general applicability beyond America under the Trump presidency. It is difficult to generalise cross-cultural standards of behaviour if the bedrock of American corruption is that citizens are materialist neoliberal drones.

## CORRUPTION, MORAL CERTITUDE, AND PERSONAL CULPABILITY

Ang and Kuhner demonstrate, contra to the claim of some institutional corruption scholars,<sup>73</sup> that a robustly developed account of institutional corruption entails a substantive vision of good governance. Much of the institutional corruption scholarship introduces its substantive commitments by presuming the legitimacy of liberal democracy,<sup>74</sup> and indeed, this presumption may constrain how widely the institutional conception has been applied.<sup>75</sup> Neither Ang

71 *Tyranny of Greed*, 100.

72 See L. Lessig, 'What Everybody Knows and What Too Few Accept' (2009) 123 *Harvard Law Review* 104, 109 (observing the complacency regarding the influence of money in Congress).

73 Thompson, n 20 above, 506.

74 *ibid*, 497 (describing theories that substantively inform institutional corruption).

75 Leading advocates of the institutional approach, such as Lessig and Teachout, tend to presume liberal constitutional democracy as a starting point. As Thompson suggests, *ibid*, 508, the reliance of institutional corruption on a liberal democratic framework differentiates it from the preva-

nor Kuhner can do so, Ang because China is not a liberal democratic state and Kuhner because he claims America under Trump fails to qualify as a sound liberal democracy. Both explicitly elicit the reliance of institutional corruption on foundational political morality. In doing so, they reveal how institutional corruption, as a mode of analysis, could be applied far more broadly, but also its demanding prerequisite of a substantive moral account of good governance when it is deployed.

The reliance of institutional corruption on substantive morality answers the bedrock challenge that bedevils the conventional approach: how should the norms that delineate corruption be ultimately informed? The institutional answer is to substantively define the values and practices of good governance. This is a radical transformation in the function of corruption as a social science and legal tool. The traditional idea of corruption indicates general characteristics (misuse of civic power for private gain) of conduct,<sup>76</sup> but does not fully specify the norms at issue. This lack of specification generates its indeterminate boundaries, and means that the conventional conception fails to offer a bedrock moral ontology of why corrupt conduct is wrongful. Yet this lack of normative specification and the indeterminate boundaries yield a concept that can be applied across polities and which can be adapted or modulated within a polity. By defining corruption by direct reference to substantive morality, institutional corruption resolves these problems of moral specification and indeterminacy. Yet it also relinquishes the analytic universality of corruption and deprives it of intrinsic flexibility.

Conventional and institutional corruption do not offer an exclusive choice, especially given that institutional corruption is meant to identify systemic deficiencies rather than individual wrongdoing. Yet the accounts of Ang and Kuhner show how the two approaches can be in tension: where an institutional account is extensively developed, it comprehensively informs norms of political conduct. This would include an account of when persons deviate from their civic duties through misuse of public power for private gain. In other words, a fully developed institutional account will lay out the terms of good governance for a polity. In doing so it will not only describe systemic pathologies, but also indicate when individuals have violated norms by using state power to achieve self-enrichment. This would make the functionally-useful-but-normatively-indeterminate conventional definition superfluous. This suggests the following: where an institutional account that specifies substantive norms of integrity is available, it should be deployed to identify both individual instances of corruption as well as systemic deterioration; but where such a full account is lacking, or there is the need for cross-polity comparison, the conventional account offers a useful if under-specified definition.

Prioritising the institutional account, however, comes at a cost. Institutional corruption can marginalise the role of individual freedom in the identification of corruption. It identifies conduct as corrupt when it contributes to the devi-

---

lent approaches in developing countries, which tends to rely on conventional conceptions and empirical research.

76 Lowenstein, n 21 above, 798–799 observes that anti-corruption laws, even if they have a requirement of corrupt character, do not define what ‘corruptly’ means.

ation of a polity from normatively legitimate governance, regardless of whether such deviation is intentional or culpable. This is because the marker of institutional corruption is the collective normalisation of deviant conduct as part of governance. As Thompson observes, while the personal gain of conventional corruption reflects bad motives through norm-defiance, ‘in institutional corruption the connection runs through the practices and norms of the legislature ... An individual member may (even knowingly) contribute to such a tendency without having the corrupt motive that characterizes individual corruption.’<sup>77</sup> Kuhner incorporates ‘innocent’ corruption into his narrative with characteristic radicalness: the taint he describes inheres in externally determined persons’ character, and thus it would be perverse to hold them individually responsible. For Trump this inhering of corruption in character is spiritual. As Trump is a demon, he is intrinsically evil; by Kuhner’s characterisation, it seems impossible that he could have behaved otherwise. For rank-and-file Americans, the distortion is not as damning, but still a matter of involuntary, situational character. Americans are corrupt because they have been ‘socialized under neoliberal conditions.’<sup>78</sup> The institution is both the thing that is corrupted, and the source of corruption for individuals who live within it. Ang’s blended account likewise reflects this tradeoff between moral certitude and individual culpability. A conventional definition could condemn access money transactions uncontroversially as the highly familiar public-for-private trade of bribery. However, the more Ang incorporates an institutional conceptualisation, the less fair it is to morally condemn individuals for participating in access money. By Ang’s account, participation in access money is a legitimate aspect of Chinese governance, and participation in access money transactions could be characterised as blameless. It may be that the entire Chinese system is institutionally corrupted (though this would require a substantive view that Ang does not articulate), such that access money transactions are still ultimately wrongful. But this cannot be used to attribute bad intent to individual actors operating within that system.

Without individual culpability, persons engaging in accepted but institutionally corrupt practices in a corrupted system cannot be blamed as the same way as those who violate civic norms to self-enrich. The explanation for the possibility of corrupt but innocent conduct through institutional corruption is deontological. Such a violation may not reflect a free choice to violate a norm, but simply the bad luck of failing to accord with the ‘right’ systemic values while engaging in normalised practices of governance. The ‘corrupt’ actor is not immoral, but (insofar as their conduct may be condemned) just unlucky. Thus institutional corruption faces a dilemma: either avoid individual judgments, or fail to respect individual free will.

77 Thompson, n 10 above, 103. This is echoed by other institutional corruption scholars, such as Lessig, n 9 above, 231 contrasting institutional corruption with ‘individuals who are corrupted within a well-functioning institution.’

78 *Tyranny of Greed*, 111.



## CONCEPTIONS OF CORRUPTION AND RULE OF LAW

Because it hangs less on personal moral culpability, the institutional view may be less compatible with rule of law. Rule of law demands that rules be *ex ante*, stable, and accessible to those whom they govern. In doing so it protects individual liberty. Defined as individual violations of widely held expectations of civic duty, conventional identification of corruption tends to be readily accessible and familiar in substance and form. It can thus satisfy rule of law requirements when directly asserted against a person as a norm violation, or when used to inform legal anti-corruption enforcement. Because of this conformity to rule of law, if a state generally respects rule of law, reliance on conventional definitions of corruption is less likely to intrude upon liberty of individual persons. Institutional corruption enquires into the organising values of an entire polity, and can identify corrupt behaviour even where there is no intentional wrongdoing. Less necessarily perceptible to those in a polity (who may themselves, as Kuhner demonstrates, labour under false moral worldviews) and less focused on individual wrongdoing, it is less innately compatible with rule of law values if used to direct charges of corruption. The completeness of the moral account that characterises the institutional approach thus means, if used as the mechanism for anti-corruption enforcement, it can infringe on liberty. Law is central – as a methodological source and as a subject of critique, respectively – for Ang and Kuhner, and their own engagements with law evoke these problems. They offer a valuable perspective on a debate within the corruption scholarship: if the power of an explicitly moralising institutional ideal of corruption is worth weakening rule of law protections.<sup>79</sup>

Rule of law is a contested and subtle concept, but two of its widely-agreed upon features are prominent in anticorruption law: fairness and neutrality of arbitration,<sup>80</sup> and clarity of enunciated rules.<sup>81</sup> Conventional corruption scholarship has emphasised the first feature: application of anticorruption law must reflect ‘impartial[ity]’, ‘competence’, and ‘honesty’ by those responsible for enforcing it.<sup>82</sup> Because anti-corruption law can be weaponised to ‘neutralis[e] political opponents’,<sup>83</sup> it is especially important in anticorruption arbitration ‘to distinguish strong, legitimate cases from those that are weak or politically

79 Underkuffler, n 26 above, 246, explicitly argues that ‘enforce[ing] critically important norms’ is a higher priority than rule of law.

80 S. Rose-Ackerman, ‘Independence, political interference and corruption’ in Transparency International, *Global Corruption Report 2007: Corruption in Judicial Systems* (Cambridge: Cambridge University Press, 2007) 16, 24. The necessity of neutrality in rule of law scholarship is epitomised by L.L. Fuller, *The Morality of Law* (New Haven, CT: Yale University Press, 1965) 81 (congruity between ‘the law as declared and as actually administered’).

81 Rule of law requires that laws have certain qualities in their construction and articulation: ‘open, stable, clear, and general’, to be ‘prospective’ rather than ‘retroactive’, to be readily understandable, and to yield congruity between rules as articulated and effects of rules as enforced. J. Raz, *The Authority of Law* (Oxford: OUP, 1979), 214–215; Fuller, *ibid*, 39.

82 Rose-Ackerman, n 80 above, 16.

83 H.O. Yusuf, ‘Rule of Law and Politics of Anti-Corruption Campaigns in a Post-Authoritarian State: The Case of Nigeria’ (2011) 22 *King’s Law Journal* 57, 65. In politics where the rule of law actors are clientelist, anti-corruption enforcement loses its moral legitimacy, either because enforcement and outcomes are identified as pandering to political powerholders (either by being used against opponents of powerful actors, or for refusal to convict powerful actors, Yusuf, *ibid*,

motivated.<sup>84</sup> Corruption scholarship has traditionally been less focused on the procedural requirements of rule of law, but as Susan Rose-Ackerman has noted ‘well-drafted, relatively clear, and generally available’<sup>85</sup> rules facilitate combatting corruption, by making accessible the norms of public-regardingness. These rule of law features are also essential if charges of corruption are to track individual moral responsibility. Laws implemented by a partisan enforcer or which are vague and ill-defined say little about the moral standing of violators.

Conventional corruption has the potential to readily conform to rule of law proceduralism. Conventional corruption is conceived as culpable individual behaviour motivated by wilful bad intent. The norm-violation that comprises it, exploitation of public power for private gain, is familiar and broadly condemned. Further, the norms that inform conventional definitions tend to be derived from or related to the popular views within the polity: widely held views of public interest or public welfare, or laws that articulate anti-corruption (at least where there is rule of law integrity within a polity generally, and laws have some correspondence to popular will). While these sources are not wholly determinate or normatively fully informed, they derive from and are familiar to the constituent members of the polity. Together, these attributes – a focus on individual conduct; general familiarity of the type of transgression; basis in broadly held norms – make it readily possible for the norm-violation that defines conventional corruption to satisfy rule of law requirements. The legal rules themselves will never fully exhaust the corruption-delineating norm.<sup>86</sup> But if the legal rules seek to advance the familiarly sourced, familiarly formulated, individual-focused expectations of civic conduct, they can bring anti-corruption identification into approximate conformity with known expectations, and adjudication can resolve close cases.<sup>87</sup> While this is imperfect, the familiarity of that conventional definition will facilitate the rule of law value of preventing ‘the government ... from stultifying individual efforts by ad hoc action.’<sup>88</sup>

This has manifested in the doctrine, as rule of law norms have tended to confine anti-corruption criminal offenses to traditional conventional conceptions of norm-violative behaviour. This is especially salient with regards to US anti-corruption law. The Supreme Court has imposed narrow construction on US anti-corruption legislation,<sup>89</sup> exemplified by the treatment of the honest

78), or simply because actors are capable of being bribed, C.H. Stefes, ‘Clash of Institutions: Clientelism and Corruption vs. Rule of Law’ in C.P.M. Waters, (ed), *The State of Law in the South Caucus* (London: Palgrave, 2005) 12.

84 Rose-Ackerman, n 80 above, 16.

85 Rose-Ackerman, n 1 above, 154.

86 See n 4 above.

87 It is widely accepted that adjudication performs this function, even if it is disputed how this occurs. cf H.L.A. Hart, *The Concept of Law* (Oxford: OUP, 2012) 144 (describing adjudication of close cases given the ‘open texture’ of law) and R. Dworkin, *Law’s Empire* (Oxford: Hart, 1998) 255 (describing normative resolution of hard cases).

88 F.A. Hayek, *The Road to Serfdom* B. Caldwell (ed) (London: The University of Chicago Press, 2007) 112. Raz, n 81 above, 210, cites this passage as exemplary.

89 The Court has ‘narrowed’ the definition of corruption and enforced a transactional conceptualisation regarding other types of anti-corruption law, including campaign finance law. See J. Eisler, ‘The Unspoken Institutional Battle over Anticorruption’ (2010) 9 *First Amendment Law Review* 363 and J. Eisler, ‘McDonnell and Anti-Corruption’s Last Stand’ (2017) 50 *UC Davis Law Review*

services statute 18 USC 1341 and related provisions. 18 USC 1341 is an extraordinarily broadly worded provision, criminalising ‘any scheme or artifice to defraud.’<sup>90</sup> Yet in 2010 the Court in *Skilling v United States* decisively pruned the honest services statute, concluding that it was too vague to capture any wrongdoing other than bribery and receipt of kickbacks.<sup>91</sup> Read broadly, the criminalisation of the ‘intangible right to honest services’ legislated by 18 USC 1341 would risk unconstitutional vagueness. The statute could only be saved by construing it to only include transactional bribery-like conduct. This vagueness concern, and the Court’s subsequent enforcement of a transactional definition of corruption, reflects archetypal rule of law norms. A vague law (particularly a vague criminal law, which can confer significant stigma and wreak harm upon individuals) lacks the qualities of clarity, prospectivity, and limited scope. In confining the law to clear offenses, the Court acted to advance rule of law proceduralism, and ensure that individuals would only risk criminal sanction when they undertake behaviour that is unequivocally wrongful. A similar interest in clarity was present in the legislative construction of the UK’s Bribery Act 2010, which replaced all statutory and common law bribery offenses with very clearly defined conduct-based offenses,<sup>92</sup> albeit for reasons that reflect a concern with mutual intelligibility rather than a first-order normative concern with rule of law.<sup>93</sup> Laws of such explicit and limited scope allow individuals to know with clarity when their conduct risks criminal sanction, and thus to act freely in practice and with moral autonomy in principle.

Institutional definitions of corruption have less innate compatibility with rule of law. Institutional corruption is identified from an external critical perspective that describes the morally legitimate arrangement of a political system. As Underkuffler notes, if corruption is at root a moral failing, it may be difficult to satisfy the ‘neutral[ity], rational[ity], general[ity], and impartial[ity]’ of rule of law in anti-corruption enforcement.<sup>94</sup> By defining corruption through a substantive moral vision, the institutional account is not necessarily accessible to, or defined by reference to the views of, members of a polity. Indeed, where institutional corruption is most pervasive or ingrained, persons are less likely to find normative standards immediately familiar, as one effect of prevalent institutional corruption is confusion regarding appropriate norms of governance.

1619, 1633. For broader contextualisation in American corruption law, see P. Gerson, ‘The Return of the King: Corruption Backsliding in America’ (2020) 3 *International Comparative, Policy & Ethics Review* 985.

90 The breadth of 18 USC 1341 as drafted made it a widely deployed tool in federal prosecutors’ arsenals, as famously described by J.S. Rakoff, ‘The Federal Mail Fraud Statute (Part I)’ (1980) 18 *Duquesne Law Review* 771.

91 *Skilling v United States* 561 US 358 (2010). The Court had previously adopted a limited construction of 18 USC 1341 through *McNally v United States*, 483 US 350 (1987), which excluded the intangible right to honest services altogether, but Congress restored the provision to its former breadth the following year with 18 USC 1346 (1988). For the full back-and-forth history of honest services, see Eisler, ‘The Unspoken Institutional Battle’ n 89 above, 413–418.

92 P. Alldridge, ‘The U.K. Bribery Act: “The Caffeinated Younger Sibling of the FCPA”’ (2012) 73 *Ohio State Law Journal* 1181, 1183.

93 The Bribery Act was instigated by the need to bring UK law into conformity with international standards advanced by the Paris Convention and the United States’ Foreign Corrupt Practices Act, inspired by intra-jurisdictional uniformity, *ibid* 1187–1188.

94 Underkuffler, n 26 above, 245.

Legal code that defines corruption is unsatisfactory, given the impossibility of reducing the norms of integrity to legal rules.<sup>95</sup> Attempting to fully articulate the norms of institutional corruption through such codification will yield the same shortcoming that faces attempts to fully define conventional norms of public-regardingness through law. Furthermore, the individual behaviours that contribute to institutional corruption do not necessarily demonstrate wilful norm or rule violation. These properties show that claims of institutional corruption may be unanticipated and unfamiliar to particular persons who might be condemned (rank and file American citizens, for example, might be surprised to learn that having been tainted by neoliberalism much of their behaviour is unknowingly corrupt; or Chinese participants in access money might have internalised that it is an acceptable practice). This makes it less likely that a claim formulated by reference to institutional corruption will satisfy rule of law. As institutional corruption is focused on systemic integrity, this does not necessarily contravene its own priorities (or its focus on normative completeness of the definition). But it does elicit a tension with the individual-protecting value of rule of law.

The accounts of Ang and Kuhner reflect this tension between institutional corruption and rule of law values. Ang's treats violation of legal rules as equivalent to corruption for her empirical analysis.<sup>96</sup> By conventional lights this is an acceptable and oft-used proxy.<sup>97</sup> But the institutional consideration of the broader norms of Chinese governance may suggest that access money is not in fact corrupt, and thus these formal indicia of illegality do not track norm-violation.<sup>98</sup> Once Ang adopts a critical institutional frame, it is harder to identify instances of corrupt conduct with clarity (at least without clearly specified alternative norms that inform the institutional frame). This demonstrates how the institutional frame can undermine the predictability and stability of identifying corrupt acts, both as norm-violations and as correlative of legal violations, as well as how a fuller normative account may have surprising results for those facing a claim of corrupt conduct. The loss of such predictability and stability from deploying an institutional frame is indicative of how it yields a conception that is less likely to accord with rule of law. Intriguingly, Ang's own evidence implies that anti-corruption enforcement in China itself does not conform to rule of law (which would be compatible with the institutional conclusion that access money is not in fact corrupt, even if it is formally illegal). Ang demonstrates that the political fates of Chinese officials track the political standing of their patrons<sup>99</sup> rather than corrupt behaviour.<sup>100</sup> This suggests that anti-corruption enforcement in China is politically pretextual rather than neutral application

95 See n 21 above; Philp, n 3 above, 46.

96 See notes 32 and 34 above.

97 See n 4 above.

98 In a parallel vein, there have been concerns that the Bribery Act 2010, s 1 could condemn as corrupt conduct that conforms to broadly held civic norms, see n 21 above. The difference is that the text of the Bribery Act (which piggybacks on foreign law) may have unintentionally overbroad consequences, whereas the Chinese measures at issue suggest direct substantive contradiction between accepted practice and legal classification of conduct.

99 *China's Gilded Age*, 159–160, 170.

100 *ibid*, 165, 170 (lack of correspondence to NERI indicia).

of law.<sup>101</sup> This may suggest some malady in Chinese governance (which may deserve being denoted institutional corruption itself), and certainly indicates that violation of legal rules does not accurately track corruption. Thus neither uncritical conventional definitions (because access money is corrupt by the generic conventional definition, but contestably not corrupt through critical consideration of institutional values) nor formal anti-corruption rules are a reliable indicator of corruption in China. If Ang uncritically adopted a posited conventional definition, these complexities would not arise (though her analysis would be much less compelling).

Kuhner's own moralising analysis makes this tension between rule of law norms and institutional identification of corruption more explicit. One salient manifestation is his treatment of judicial reasoning. Kuhner's critique of the campaign finance regime (raising the question of whether free speech rights protect campaign expenditures) does not differentiate between good political outcomes and the appropriately neutral constitutional adjudication. He indicts the Supreme Court as corrupt for having the wrong values (serving 'greed instead of truth'),<sup>102</sup> rather than framing his critique as the failure to interpret the Constitution inaccurately (the legal interpretation of the Court's failing). Kuhner thus does not differentiate between judges having the correct moral vision, and judges engaging in accurate law-making. His account contains no space for a concept of substantively neutral, as opposed to morally laden, adjudication. His solution to the structural decay of corruption is an explicit call for revolution (though his proposal of a new 'legal architecture'<sup>103</sup> with firmer barriers between the public and private sector does not seem to match the ambition of his critique). Revolutionary change precisely defies the characteristics of legal change, operating outside of the predictable and stable structures of a settled legal system.

The final consequence of evaluating Kuhner's account in light of rule of law shows its alarming consequences, at least by typical liberal values. He attributes no value to whether behaviour conforms to law, and nor could he, given that corruption undermines the moral standing of formal law. Yet not only does this reinforce the detachment between individual guilt and corrupt status, it shows how few protections there are for individuals facing a claim of corruption in the institutional account. There is no defence a person, charged with suffering from greed that deviates from the condition of a 'healthy' America, could raise to a charge of institutional corruption – other than an alternative substantive characterisation of the morality of the conduct at issue, or by offering an alternate system of values. Individual will is not only subsumed to a collective moral judgment, but the capacity of an individual to resist a claim of corruption is lost.

101 Rule of law in China has an ambiguous status. By one prominent account, Chinese elites have embraced rule of law, but not necessarily core Western rule of law features of ideological neutrality and universality. S. Seppänen, *Ideological Conflict and the Rule of Law in Contemporary China* (Cambridge: Cambridge University Press, 2016) 32, 68.

102 *Tyranny of Greed*, 70.

103 *ibid*, 151.

Kuhner's value-laden notion of corruption, however, returns to the basic paradox facing even the conventional approach. Even a conventional claim ultimately adverts to public norms, and thus moralising is intrinsic to any assertion of corruption. Conflict with the clarity and neutrality of rule of law thus seems inevitable in identifying corruption.<sup>104</sup> This elicits the bedrock dilemma in conceptualising corruption. The conventional conception leaves the moral foundations of corruption unspecified, but by doing so allows corruption to be identified by individuals' adherence to more readily accessible expectations. In doing so, it allows individuals to enjoy the transparency and liberty afforded by rule of law. Conversely, the institutional account makes judgments by conformity to a set of external values. Individual culpability and personal opportunity to recognise these values and thereby conform to norms of integrity plays little role in identifying it.

### IMPLEMENTING ANTI-CORRUPTION AND PROTECTING PERSONAL FREEDOM

The conceptual completeness of the institutional role must be counterbalanced against its possible consequences for personal liberty and moral responsibility. That the institutional approach is less compatible with rule of law values is a call for contextualisation of its use. Institutional identification of corruption subsumes individual culpability to the asserted teleology of a society. The distinctive value of the institutional approach is to identify when systems themselves are corrupted. In this role, it can be a valuable tool, and its weaker conformity to rule of law values is less problematic.

Institutional corruption is clearly the more valuable frame where systems of anti-corruption identification or law enforcement are normatively misaligned. In such contexts, official censure will not identify individual instances of corrupt conduct. In such a misaligned system, deploying the conventional definition does not offer rule of law conformity, because formal charges of corruption do not match substantive violations of civic norms. Ang and Kuhner exemplify this in their characteristic ways. The need for Kuhner to resort to an institutional critique is straightforward. American governance is dysfunctional and neither formal structures of governance nor popularly held beliefs accurately identify corrupt behaviour. An institutional critique that can guide systemic reform is a prerequisite to any granular identification of corruption conduct. Ang's relationship to the institutional lens is more subtle. Her holistic analysis suggests that access money, despite being illegal, may not be norm-violative. While Ang does not condemn the broader structures of Chinese governance (and the jewel of her analysis is a novel explanation of its unique success), her treatment of access money suggest divergence between the formally articulated rules of corruption and substantive political norms. This suggests a possibility that Ang does not fully pursue of deeper institutional deficiencies within Chinese governance and perhaps a need for rule-of-law enhancing reforms.

104 Teachout, n 9 above, 296-297.

However, where the structures of governance satisfy the baseline of rule of law integrity, measures that directly regulate or target individual behaviour ought to rely upon conventional understandings of corruption. This would include anti-bribery measures, but also wider-ranging measures that could yield individual criminal sanction, such as restrictive campaign finance and anti-lobbying rules.<sup>105</sup> The accessibility and familiarity notion of corruption so advanced will ensure predictability and transparency in legal enforcement, and protect individual liberty by preventing corruption law from being used to advance ideologically partial ends. The indeterminacy in the definition generates a need for further specification in marginal cases, but the ability of adjudication to resolve such cases is well-established.<sup>106</sup> Where such systemic integrity is lacking (a problem some in the social sciences have alluded to by characterising corruption as a collective action problem), there is a need for society-shifting structural reforms.<sup>107</sup> This requires a substantive vision of a good political order characteristically informed by claims of institutional corruption. Because such system-transforming efforts do not target individual persons but rather collective practices, however, standard rule of law concerns such as *ex ante* enunciation and stability are less central. The goal of such reforms is to create background conditions that allow rule of law practice to be possible at all (among other markers of civic integrity).

The nuances and ramifications of adopting an institutional approach to corruption, and how to integrate it into practice, should be the subject of further significant scholarly attention. Ang and Kuhner offer two compelling and distinctive engagements with the idea, simultaneously raising fresh questions regarding the standard scholarly treatment of corruption, and how to integrate it with other values central to justgovernance.

---

105 The possibility of overbroad criminal sanction contributed to the decision in *Citizens United v Federal Election Commission* to constrain campaign finance regulations, n 66 above, 337.

106 See n 87 above.

107 Persson, Rothstein, and Teorel, n 12 above, 465 (characterising pervasive corruption as a mutualist collective action problem, and describing the need for 'revolutionary' change to address it); Lessig, n 9 above, 290 (calling for foundational constitutional reform); *Tyranny of Greed*, 151.