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The Twin Faces of Judicial Corruption: Extortion and Bribery

Ian Ayres
Yale Law School

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IAN AYRES*

Men won't do much for a shilling.
For a pound they may be willing.
For twenty pounds the verdict's in the sack.[1]

INTRODUCTION

On January 25, 1990, I stood in a Cook County Circuit Court and accused the presiding judge, the Honorable Thomas J. Maloney, of extortion. I was filing a final amended post-conviction petition on behalf of Dino Titone.[2] Titone had been convicted and sentenced to death in bench trials by Judge Maloney for participating in the murders of Aldo Fratto and Tullio Infelise.[3] My post-conviction petition alleged that Titone's own lawyer had solicited money from Titone on behalf of Judge Maloney, and that Titone with the help of his father had ultimately paid Judge Maloney $10,000.[4] The petition alleged that after Judge Maloney received the money, an FBI investigation of judicial corruption in Cook County—code name "Operation Greylord"—became public and that Judge Maloney convicted and sentenced Titone to death in order to cover up Maloney's felonious conduct.[5]

Accusing a sitting judge frightened me.[6] And I brought my own counsel,

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* William K. Townsend Professor, Yale Law School. J.D., Yale University, 1986; Ph.D. in Economics, Massachusetts Institute of Technology, 1988. Akhil Amar, Jennifer Brown, Tom Geraghty, Gideon Parchamovsky, and Susan Rose-Ackerman provided helpful comments.

1. BERTOLT BRECHT, THE CAUCASIAN CHALK CIRCLE 102 (1947).

2. Rule 1.6 of the ABA Model Rules of Professional Conduct mandates that "a lawyer shall not reveal information relating to representation of a client unless the client consents . . . ." Titone has given me "permission to write, discuss and/or publish for any media any description, account, opinion or other information or material about and relating to my prosecution or his subsequent representation of me—except information covered by the attorney client privilege." Letter from Dino Titone to author (Feb. 3, 1997) (on file with author).

3. People v. Titone, 505 N.E.2d 300, 300 (Ill. 1986) Two codefendants, Robert Gacho and Joseph Sorrentino, were convicted in severed trials. *Id.*

4. The petition was based on affidavits of Titone and his father. The affidavits alleged that money was paid to Titone's lawyer, Bruce Roth, who was to pass it along to Judge Maloney's bagman, Robert McGee. People v. Titone, Third Amended Petition for Post-Conviction Relief, Ind. No. 83-127 (Cook County Ill. Cir. Ct., Jan. 25, 1990).

5. *Id.*

6. The requirement that post-conviction petitions (the Illinois analog to habeas corpus petitions) must be heard before the original judge itself has an interesting history. The Illinois legislature in its wisdom determined that post-conviction petitions should be heard before a new judge, Illinois Post-Conviction Hearing Act, Ill. Rev. Stat. ch. 38, ¶ 122-8 (1984 Supp.), but the Illinois Supreme Court struck down this statute as violating the state constitution's separation of powers limitation and held that the courts will determine the venue for post-conviction petitions without

Tom Geraghty, in case Judge Maloney held me in contempt. When he read the allegations,[7] Maloney went ballistic. He forced me to answer a series of personal questions regarding my age and place of birth.

The case was ultimately transferred to another Circuit Court judge who vacated Titone's death sentence[8] but refused to grant Titone an evidentiary hearing to establish his claim of judicial corruption. I unsuccessfully appealed the latter ruling to the Illinois Supreme Court[9]—which brings me to the subject of this essay.

Even though I repeatedly characterized the deal between Judge Maloney and my client as "extortion," the Illinois Supreme Court insisted on referring to the underlying transaction as a "bribery conspiracy."[10] So which was it: bribery or extortion? And should the characterization of a conspiracy as "bribery" or "extortion" determine whether a convicted defendant earns a new trial?

My answers to these questions are straightforward. First, it will often be impossible to distinguish "bribery" and "extortion," because conspiracies will routinely combine elements of both deals. Second, deciding whether to grant a new trial should not turn on this characterization. Any defendant who can show that a judge accepted money (or negotiated for money) should be granted a new trial—regardless of whether the conspiracy seems more like bribery or extortion.

The *Titone* case squarely presents this "convicted payor" problem[11]—whether a convicted payor should receive a new trial? But judicial corruption creates at least two related problems: the "acquitted payor" problem is whether an acquitted payor should be able to avoid a new trial (because of the double jeopardy prohibition) and the "convicted non-payor" problem is whether a convicted non-payor should receive a new trial (because of judicial incentives to unfairly convict non-payors).[12]

Unfortunately, Maloney's pattern of corrupt practice has raised all three of these hypothetical problems not just in actual cases—but in murder cases.[13]

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legislative interference. People v. Joseph, 495 N.E.2d 501, 506 (Ill. 1986).

7. Along with the petition I simultaneously filed a motion to place the court papers under seal, and a motion that Judge Maloney be removed for cause. Judge Maloney—without reading any of the papers—initially resisted placing any of the documents under seal. He repeatedly asked me to state in open court why I wanted the proceedings private. When I finally succeeded in getting him to read a crucial paragraph of the complaint alleging judicial corruption, he then kept me standing before him for twenty minutes as he carefully read the paper.

8. The judge found that Titone's own lawyer, Bruce Roth, intentionally sought the death penalty for his client (in order to induce appellate courts to review the underlying conviction more seriously). The judge found that this all-or-nothing strategy represented an abnegation of the adversary process and constituted ineffective assistance of counsel. *See* Strickland v. Washington, 466 U.S. 668 (1984).

9. People v. Titone, 600 N.E.2d 1160 (Ill. 1992).

10. *Titone*, 600 N.E.2d at 1164.

11. Even though this article describes Dino Titone as a "convicted payor," evidence suggests that Titone's father was in fact the payor. Affidavit of Salvator Titone (Oct. 12, 1994).

12. Although this essay is focused on the issue of judicial corruption, the ideas also apply to issues of juror or prosecutor corruption. Because jurors are not repeat players it will be more difficult for them to establish a credible pattern of accepting bribes or extorting money. But the actions of jurors (and the decision of prosecutors not to prosecute) are less reviewable than many judicial decisions and hence may give these other actors more opportunity for corruption.

13. Maloney is one of 18 judges from the Cook County Circuit Court who have been con-

Before taking the bench, lawyer Maloney facilitated the payment to a judge who subsequently acquitted Harry Aleman of murder.[14] In *People v. Aleman*,[15] an Illinois district court struggled with the acquitted payor problem—whether the double jeopardy clause prohibited Aleman's retrial.[16] The court held that double jeopardy protection did not apply in part because Aleman faced no risk of conviction in the initial trial.[17] This article, however, will argue that *Aleman*'s logic is incomplete. At a minimum, a court would need more fact finding to conclude that double-jeopardy should not apply.

The United States Supreme Court is now grappling with the convicted non-payor problem created by Judge Maloney's pattern of corruption. William Bracy and Roger Collins were convicted of murder and sentenced to death in a jury trial over which Judge Maloney presided.[18] Although "[t]here is no suggestion that Bracy and Collins bribed or offered to bribe [Maloney],"[19] the defendants seek a new trial arguing that Judge Maloney's corruption in other cases gave him an incentive to be biased against defendants who did not pay him—in part "to avoid suspicion that he was on the take."[20] Judge Richard Posner rejected the defendants' substantive claims and even denied defendants' claim for limited discovery to prove Judge Maloney's bias.[21] The Supreme Court subsequently granted certiorari in the case and at this writing has just heard oral argument on the limited question of discovery.[22] The convicted non-payor problem is admittedly vexing, but Judge Posner's opinion is uncharacteristically unnuanced—piling on arguments against the defendants' position without seeing the benefit of at least granting limited discovery.

This essay is divided into three parts. In the first, I extend Jim Lindgren's useful analysis of the difference between bribery and extortion.[23] Part II then examines how courts should respond to motions for new trials when there is an allegation of judicial corruption. Part III analyzes the acquitted payor problem raised in *Aleman*. And Part IV briefly analyzes the convicted non-payor

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victed of corruption in the last decade. Bracy v. Gramley, 81 F.3d 684, 704 (7th Cir. 1996) (Rovner, J. dissenting), *rev'd* 117 S. Ct. 1793 (1997), *cert. granted sub nom.* Collins v. Welborn, 117 S. Ct. 2450 (1997). Maloney "has the dubious distinction of being the only Illinois judge ever convicted of fixing a murder case." Bracy v. Gramley, 117 S. Ct. 1793, 1795 (1997).

14. People v. Aleman, 667 N.E.2d 615 (Ill. App. Ct. 1996), *appeal denied*, 671 N.E.2d 734 (1996), *cert. denied*, 117 S. Ct. 986 (1997), *habeas corpus denied sub nom.*, United States *ex rel.* Aleman v. Circuit Court, 967 F. Supp. 1022 (N.D. Ill. 1997).

15. *Aleman*, 667 N.E.2d 615.

16. *Id.* at 623-25.

17. *Id.* at 626.

18. *Bracy*, 81 F.3d 684.

19. *Id.* at 688.

20. *Id.*

21. *Id.*

22. *Bracy*, 117 S. Ct. 941. *See* Linda Greenhouse, *Justices Consider How the Taint of a Corrupt Judge Should Be Measured and Remedied*, N.Y. TIMES, Apr. 15, 1997, at A18 (noting that the Court granted certiorari only to consider whether petitioners were entitled to "discovery to support his claim that he was denied the right to a trial before an impartial judge").

23. James Lindgren, *The Elusive Distinction Between Bribery and Extortion: From the Common Law to the Hobbs*, 35 UCLA L. REV. 815, (1988) [hereinafter Lindgren, *Elusive Distinction*]; James Lindgren, *The Theory, History, and Practice of the Bribery-Extortion Distinction*, 141 U. PA. L. REV. 1695 (1993) [hereinafter Lindgren, *Theory*].

problem raised in *Bracy*.[24]

I. A THEORY OF BRIBERY AND EXTORTION

In distinguishing between bribery and extortion, it is useful to distinguish between procedure and substance. The crudest procedural theory would define extortion as conspiracies initiated by judges and bribery as conspiracies initiated by defendants.[25] Of course, one can define words as one likes. But a defendant's right to a new trial should not turn on who initiated a conversation. A procedural definition of bribery or extortion might only poorly correlate with the clean hands of a defendant. For example, if it becomes generally known that judges take money, then defendants may feel pressure to initiate the negotiation.[26]

Indeed, when intermediaries are involved, it may be very difficult to decide which side initiated the negotiation. In the *Titone* case, Bruce Roth was likely the instigator. But in beginning the negotiation, Roth (nominally Titone's lawyer) might have been acting as Judge Maloney's agent—after all Roth (who, like Maloney, served time for a pattern of corruption) had an ongoing illicit relationship with several Cook County judges.[27]

It is, however, possible to develop a substantive theory of bribery and extortion that more clearly correlates with moral desert. Imagine a defendant who in a fair trial—given the available evidence and the "proof beyond a reasonable doubt" standard—would have a 50% chance of conviction.[28] For such a defendant, a pure bribe would be an agreement to lower the probability of conviction. As Jim Lindgren has succinctly defined: "Bribery consists of paying for better than fair treatment."[29] By contrast, a judge extorting money would threaten to unfairly increase the probability of conviction unless she was paid. Under this definition, extortion consists of paying to avoid worse than fair treatment.

Both extortion and bribery agreements entail payments from a defendant

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24. *Bracy*, 81 F.3d 684. *See* Greenhouse, *supra* note 22.

25. In *Evans v. United States*, the Court held that:

> (1) there's no requirement of inducement for official extortion; (2) official extortion doesn't require coercion; (3) bribery isn't a defense to extortion; (4) official extortion isn't limited to false pretenses; and (5) the Government "need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts."

Lindgren, *Theory*, *supra* note 23, at 1708 (quoting Evans v. United States, 504 U.S. 255, 268 (1992)). An inducement requirement could be related to a procedural definition of extortion to the extent that inducement required the government official to initiate the negotiation.

26. Lindgren, *Elusive Distinction*, *supra* note 23, at 828.

27. United States v. Roth, 860 F.2d 1382, 1383 (7th Cir. 1988) (Easterbrook, J.), *cert. denied*, 490 U.S. 1080 (1989). Bruce Roth, the defendant in this Greylord prosecution, was a crooked lawyer. *Id.* He made a living bribing crooked judges. *Id.* Often Roth played the broker's role, matching lawyers who did not know which judges would take money with judges who did not know which lawyers would pay it. *Id.*

28. Titone was such a defendant. Titone had three alibi witness testifying on his behalf. People v. Titone, 115 Ill.2d 413, 425 (1986). The prosecution, in contrast, had only one, severely impeached witness—an uncharged, admitted accomplice who had fled the jurisdiction—linking Titone to the crime. People v. Titone, 505 N.E.2d 300, 300-01 (Ill. 1986).

29. Lindgren, *Elusive Distinction*, *supra* note 23, at 824.

to a judge, but there is—in the lingo of classical contract theory—a different substantive consideration. A substantive definition of bribery and extortion asks whether the defendant was paying to receive better than fair treatment or paying to avoid worse than fair treatment. The benchmark of expected treatment in the absence of agreement is crucial.[30] When a pure bribe is being negotiated, the defendant expects in the absence of agreement to receive a fair trial. When a pure extortion is being negotiated, the defendant expects in the absence of agreement to receive an unfair trial.[31] This substantive definition is identical to the threat/offer dichotomy which has been so central to the philosophical discussion of coercion.[32]

This substantive definition of bribery and extortion illuminates the moral desert of the payor/defendant. The judge's action in agreeing to receive money is morally repugnant regardless of whether the agreement is an extortion or a bribe. But from the payor's perspective, paying to receive better than fair treatment is clearly more repugnant than paying to avoid unfair treatment. If we could nicely separate judicial corruption into these two boxes, we might want to treat more favorably a defendant who paid to avoid injustice than someone who was purchasing injustice (in her favor).[33]

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30. *See* Alan Wertheimer, *Remarks on Coercion and Exploitation*, 74 DENV. U. L. REV. 889, 900 (1997) (discussing moralized baseline). Fred McChesney has powerfully analyzed the potential for government shakedowns backed by the threat of unjust treatment. Fred S. McChesney, *Rent Extraction and Rent Creation in the Economic Theory of Regulation*, 16 J. LEG. STUD. 101 (1987).

31. Jim Lindgren's two articles on bribery and extortion are path-breaking. He clearly sees the clean, substantive distinction between bribery and extortion, but then needlessly muddies the distinction by unhelpfully complicating the definition of extortion:

> [C]oercive extortion by a public official is the seeking or receiving of a corrupt benefit paid under an implicit or explicit threat to give the payor worse than fair treatment or to make the payor worse off than he is now or worse than he expects to be. . . . Thus, while bribery has only one baseline (fair treatment), coercive extortion has at least three baselines (fair treatment, expected treatment, and the status quo).

Lindgren, *Theory*, *supra* note 23, at 1701. Lindgren's triple benchmark for extortion leads him to unhelpfully find an "overlap" between bribery and extortion:

> Now what about government officials who have a duty to arrest criminals? Here coercive extortion and bribery overlap. If a police officer suggests that he will not arrest a criminal if he is paid off, this is extortion, because he is threatening to make the criminal worse off than he is now. But it's also bribery, because the criminal is paying hush money for more than fair treatment.

Id. (footnotes omitted). *See also* Lindgren, *Elusive Distinction*, *supra* note 23, at 827. It seems more useful to describe this hypothetical as a pure bribe. Fair treatment would be for the official to arrest the criminal; here, the criminal is purchasing better than fair treatment. The criminal's actions are no less repugnant because the official was threatening to change the status quo. Indeed, the status quo was that the criminal was rightfully subject to arrest—so that threatening arrest is not clearly a change in the status quo. Like Lindgren, I will argue that pure bribery and extortion are often combined in the same agreement, see *infra* p. 35, but Lindgren's hypothetical is not a good example of this blending.

32. *See, e.g.*, John Lawrence Hill, *Moralized Theories of Coercion: A Critical Analysis*, 74 DENV. U. L. REV. 907 (1997).

33. There are three types of favorable treatment that might be afforded criminal defendants that pay an extortion:

1. if they were originally convicted, we might be more willing to grant them a new trial;
2. if they were originally acquitted, we might be less willing to retry them; or
3. we might be less likely to prosecute them for participating in judicial corruption.

The second possibility will be discussed in the acquitted payor section.

Unfortunately, there are strong structural reasons why we should often expect to see combinations of bribery and extortion. Just as a consumer could simultaneously buy a hamburger and a soda, a defendant's payment to a judge will often be for the purpose of *both* (1) avoiding worse than fair treatment (if the payment is not made) *and* (2) inducing better than fair treatment (if the payment is made).[34] Philosophers have already seen the possibility of these combined "threat" and "offer" and conveniently dubbed them "throffers."[35]

But previous authors have not seen that there are strong reasons to suspect that each side will prefer agreeing to a combination of bribery and extortion instead of a pure extortion agreement—*even if the price to be paid does not change*. It is easy to see that the defendant/payor would prefer to purchase better than fair treatment for the same price—not only because it is better to be assured acquittal, but also because structurally it will often be easier for the defendant to verify whether the judge is performing her side of the bargain. Under what I have defined as pure extortion, the judge upon payment merely agrees to judge fairly. But it will often be difficult to objectively assess what is fair treatment. If a judge after agreeing to pure extortion goes ahead and convicts in a bench trial, it will often be difficult for the defendant to know whether the conviction was warranted.

What is somewhat more surprising is that the judge might prefer a combination of bribery and extortion to simple extortion—even if the size of the defendant's payment does not change. Assuring the defendant's acquittal—regardless of the evidence—is likely to reduce the chance that an unsatisfied customer will complain to the authorities. If the judge merely extorts, defendants who are fairly convicted are more likely to inform authorities about the illicit agreements. By gratuitously combining bribery together with extortion, extorting judges reduce the chance that a defendant will testify against them.

This, however, is not an *a priori* proof that all extortion agreements will be combined with bribery. In some cases, an extorting judge would be disinclined to assure acquittal because doing so would tip off investigators.[36] When the threat that third-parties will uncover judicial corruption is low, there are strong reasons to suspect that combined agreements will tend to dominate either pure bribery or pure extortion.[37] Extorting judges will tend to overshoot

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34. Lindgren clearly saw this possibility. Lindgren, *Theory*, *supra* note 23, at 1700 ("The same envelope filled with cash can be both a payment extorted under a threat of unfairly negative treatment and a bribe obtained under a promise of unfairly positive treatment."); *see also* Lindgren, *Elusive Distinction*, *supra* note 23, at 826.

35. *See* ALAN WERTHEIMER, COERCION 204 (1987); MICHAEL TAYLOR, COMMUNITY, ANARCHY, AND LIBERTY 12 (1982).

36. Bracy v. Gramley, 81 F.3d 684, 689-90 (7th Cir. 1996). The court stated:

> While a corrupt judge might decide to tilt sharply to the prosecution in cases in which he was not taking bribes—to right the balance as it were—it is equally possible that he would fear that by doing so he would create a pattern of inconsistent rulings that would lead people to suspect he was on the take.

Id. Also the foregoing arguments ignore the impact that criminal law of bribery and extortion itself can have on the parties. For example, if judges and/or defendants were subject to higher penalties for combination agreements, combined agreements might not dominate extortion agreements.

37. It's harder to say that bribery agreements will tend to throw in extortion elements. My

in the defendant's favor—providing not just a fair trial but assuring acquittal.

As the threat of third party scrutiny increases however, judges will have smaller incentives to assure acquittal. For example, when the Operation Greylord investigation became public, corrupt judges suddenly began to fear federal scrutiny more than the possibility that defendants would turn them in. Even judges who had entered into pure bribery agreements might prefer to overshoot in breaching their agreements—not merely retreating to a fair trial, but convicting regardless of the evidence. Judge Posner has suggested that unusually harsh judicial conduct may tip off authorities just as much as unusually lenient conduct.[38] But with regard to discretionary decisions—such as whether to convict in a bench trial—a corrupt judge is much more likely to divert investigative attention by calling close decisions against the defendant.

This analysis of judicial incentives should inform our normative rule-making. First, we should realize that even when there is evidence of bribery, it may be part and parcel of a defendant's effort to avoid injustice if money is not paid. And second, the possibility that an extorting judge could *insist* on giving better than fair treatment reduces the defendant's moral culpability for participating in a combination of bribery and extortion. If paying to avoid unfair treatment is excusable, the payment becomes no less excusable if the judge, for her own reasons, wants to make sure that the defendant is acquitted. Here, I may part company with Jim Lindgren who has suggested that "there is no reason to let off a briber just because he was also a victim of extortion."[39]

Finally, a dramatic increase in the threat of third party detection may lead judges to convict the very defendants who had paid them money. Many people ask me why my client would have been *unjustly* convicted if he had paid the judge money. The increased threat of federal scrutiny provides the answer. When judges have more to fear from third-party detection than from a defendant disclosing a payment, they may decide that the safer course is to convict regardless of the evidence.[40]

Even if a defendant was morally culpable for entering into a pure bribe, the slow, public development of Operation Greylord raises the possibility that she would receive worse than fair treatment from the very judge she paid. It may be appropriate to separately punish a defendant for agreeing to bribe—and my previous argument suggested why such pure bribes would be difficult to identify—but we can no longer be confident that the underlying convictions of paying defendants are just.

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earlier argument was that if the parties were inclined to enter into an extortion agreement, they would routinely throw in an agreement for assured acquittal if the money were paid. But having agreed to a bribe (i.e., assured acquittal), it is harder to think what it would mean to combine elements of extortion.

38. *Bracy*, 81 F.3d at 689-90; *see infra* text accompanying note 51.

39. Lindgren, *Theory*, *supra* note 23, at 1700; *see also* Lindgren, *Elusive Distinction*, *supra* note 23, at 826. Lindgren, however, was not considering the specific context of judicial corruption in criminal cases. Given our general constitutional protection for criminal defendants, I imagine that Lindgren might well agree with the thesis of this paper that defendants who had entered into combination deals should receive new trials.

40. Indeed, once the first wave of Greylord indictments became public judges could say that defendants claiming to have paid money were merely concocting stories of judicial corruption.

A potentially stronger way to distinguish instances of bribery from instances of extortion—that is to say instances where the defendant/payor is more culpable for paying a judge—is to independently assess the probability of conviction at a fair trial. If the probability of conviction at a fair trial was virtually nil, then we might be confident that the defendant/payor was only being extorted—for example, paying money to avoid an unfair conviction. On the other hand, if the probability of conviction (given the requirement of proof beyond a reasonable doubt) was virtually certain, we might be confident that the defendant/payor was only bribing the judge for better than fair treatment. As the benchmark of uncorrupted treatment tends toward one extreme or the other (certain acquittal or conviction), there is only "room" to sell one type of consideration. But such independent assessment amounts to a quasi-retrial.

II. WHEN SHOULD A CONVICTED PAYOR RECEIVE A NEW TRIAL?

Always. Whenever a judge takes money, or negotiates to take money, the defendant should receive a new trial. The characterization of the agreement as extortion or bribery should not matter. Unfortunately, this is not the current state of the law. Courts tend to require that a convicted defendant show not merely that the judge accepted money, but that the judge's corruption caused judicial error. This section will argue that this prejudice requirement is an inappropriate vestige of our concern that bribers not profit from their bribe.

In *People v. Titone*,[41] the Illinois Supreme Court rejected a preliminary claim[42] that Titone should be given a new trial because of Judge Maloney's corruption.[43] The Court adopted the dual requirements of the Pennsylvania Supreme Court in *Shaw v. Commonwealth of Pennsylvania*[44] that:

> (1) "petitioner must establish a nexus between the activities being investigated and the trial judge's conduct at trial"; and
>
> (2) "petitioner must establish actual bias resulting from the trial judge's extrajudicial conduct."[45]

While unartfully drafted and somewhat redundant, the *Shaw* standard seems to require a showing that corruption *caused* error.

This requirement should be rejected because it cannot be squared with a long line of Supreme Court holdings on judicial bias. For example, in *Aetna Life Insurance Co. v. Lavoie*,[46] the Supreme Court held that a justice was acting as a "judge in his own case" when he participated in proceedings where the decision directly affected a case that the justice had independently filed.[47] The Supreme Court made clear that it was not required to decide whether in

41. 600 N.E.2d 1160 (Ill. 1992).
42. Titone has renewed his claim based on additional evidence of Judge Maloney's corruption.
43. People v. Titone, 600 N.E.2d 1160, 1166 (Ill. 1992).
44. 580 A.2d 1379 (Pa. Super. Ct. 1990).
45. *Titone*, 600 N.E.2d at 1166 (citing Shaw v. Commonwealth of Pa., 580 A.2d 1379, 1381 (Pa. Super. Ct. 1990)).
46. 475 U.S. 813 (1986).
47. Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 824 (1986).

fact the justice was influenced, but only whether sitting on the case "would offer a possible temptation to the average . . . judge" leading the judge "not to hold the balance nice, clear and true."[48] The Due Process Clause "may sometimes bar trial by judges who have no actual bias and who would do their best to weigh the scales of justice equally between contending parties."[49] But to perform its high function in the best way, "justice must satisfy the appearance of justice."[50]

Judge Posner, with his usual clarity, has elucidated the concept of judicial bias:

> [J]udicial bias is one of those "structural defects in the constitution of the trial mechanism," as distinct from mere "trial errors," that automatically entitle a petitioner for habeas corpus to a new trial. What is bias? Defined broadly enough, it is a synonym for predisposition, and no one supposes that judges are blank slates. There are prosecution-minded judges, and defense-minded judges, and both sorts have predispositions—biases that place an added burden on one side or the other of the cases that come before them. Yet no one supposes that the existence of such biases justifies reversal in cases where no harmful errors are committed. The category of judicial bias is ordinarily limited to those predispositions, real or strongly presumed, that arise from some connection pecuniary or otherwise between the judge and one or more of the participants in the litigation. . . . [F]or bias to be an automatic ground for the reversal of a criminal conviction the defendant must show either the actuality, rather than just the appearance, of judicial bias, "or a possible temptation so severe that we might presume an actual, substantial incentive to be biased."[51]

But as argued above, a judge who has taken money may have a substantial incentive to be biased to convict—to avoid third-party detection or to punish a defendant who the judge feels has not fully performed (read: paid). This liberty incentive is much stronger than the financial incentives involved in *Aetna* or *Tumey*.

Yet the *Shaw* standard requires a convicted defendant to prove more in the case of corruption-induced bias than the Supreme Court's *Aetna* decision required in the case of financially induced bias. I believe this disparate treatment is a continuing vestige of the concern that defendants should not benefit by their bribery.[52] The additional requirement in *Shaw* that corruption cause

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48. *Id.* at 825 (citations omitted), *discussed in* Ruling on Petitioners' Motion for Post-Conviction Relief, at 12, People v. Hawkins & People v. Fields, Nos. 85-C-6555 & 85-C-7651 (Cook County Ill. Cir. Ct., Sept. 18, 1996) (Dooling, J.).

49. *Lavoie*, 475 U.S. at 825.

50. *Id.*

51. Bracy v. Gramley, 81 F.3d 684, 688 (7th Cir. 1996) (quoting Del Vecchio v. Illinois Dep't of Corrections, 31 F.3d 1363, 1380 (7th Cir. 1994) (en banc)).

52. Ruling on Petitioners' Motion for Post-Conviction Relief, at 16, People v. Hawkins & People v. Fields, Nos. 85-C-6555 & 85-C-7651 (noting that "those who attempt to corrupt the judicial system may not later hide behind the very constitution they subvert"); *see also* Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 COLUM. L. REV. 1, 55 (1995).

error cannot be explained by a smaller judicial temptation—if anything, a judge who has received money has much more at stake. Instead, I believe the causal error requirement in *Shaw* and *Titone* grows out of a misguided sense that the requirement will distinguish failed extortion deals from failed bribery deals; a briber who is convicted has nothing to complain about unless she can show judicial error. Yet, the causal error requirement is unlikely to distinguish failed bribery and failed extortion agreements. The two types of agreements will often be combined and judges involved in either pure bribery or extortion may have incentives to convict regardless of the evidence in order to divert attention (or punish incomplete defendant performance).

Thus, even for courts that do not explicitly base their analysis on the distinction between bribery and extortion, the perceived dirty-hands of defendants who pay judges—evidenced in part by the Illinois Supreme Court's repeated characterization of Titone's claim as a "bribery" conspiracy even though I repeatedly characterized it as an extortion conspiracy—lead courts to impose harsher prerequisites for new trial.

Titone and *Shaw* should be overruled and those jurisdictions should instead follow the Third and Fifth Circuits, which have come closer to giving per se relief to convicted defendants who have established that they have paid off judges or jurors. For example, in *United States v. Forrest*,[53] the Fifth Circuit granted a new trial to a defendant who had attempted to tamper with a jury. And in *Zilich v. Reid*,[54] the Third Circuit remanded for an evidentiary hearing on the voluntariness of a defendant's guilty plea where the defendant alleged he was promised a sentence of probation in exchange for a $4,000 bribe to a trial judge.[55] Where surrender of a fundamental constitutional right is concerned, the court's inquiry should not focus upon the "clean hands of the defendant."[56]

My preferred new trial standard would make everything turn on whether a payment was made, or on whether an unreported payment negotiation occurred. Accordingly, much will turn on what evidence is required to prove that it is more likely than not that a judge was paid. This should remain an open-ended (and conventional) question of fact, but *Titone* has provided sufficient evidence.

The *Titone* case is clearly not a "me too" allegation of corruption—cobbled together only after Judge Maloney was indicted in the Greylord sweep. Rather, Titone was the first to accuse Judge Maloney of extortion.[57] Moreover, key facts in our accusation preceded and paralleled the proof beyond reasonable doubt that later convicted Judge Maloney of extortion from other defendants.[58] In 1990, Titone alleged that Judge Maloney had been paid

53. 620 F.2d 446 (5th Cir. 1980).
54. 36 F.3d 317 (3d Cir. 1994).
55. Zilich v. Reid, 36 F.3d 317, 318 (3d Cir. 1994).
56. Ruling on Petitioners' Motion for Post-Conviction Relief, at 18, People v. Hawkins & People v. Fields, Nos. 85-C-6555 & 85-C-7651.
57. People v. Titone, Third Amended Petition for Post-Conviction Relief, Ind. No. 83-127 (Cook County Ill. Cir. Ct., Jan. 25, 1990).
58. *Id.*

$10,000 in Titone's murder case, the payment was made through Maloney's bagman Robert McGee, and Judge Maloney convicted Titone to divert the attention of federal Greylord investigators.[59] It was not until 1991 that Judge Maloney was indicted for extortion. The evidence establishing Judge Maloney's extortion of Earl Hawkins is eerily similar. The government alleged that Judge Maloney received $10,000 from the defendant in a murder case, that Robert McGee served as Judge Maloney's bagman, and that Judge Maloney convicted Hawkins to divert Greylord investigators.[60]

More important, one of the lead Greylord prosecutors, Scott T. Mendeloff, has sworn in an affidavit that Titone's father, Salvatore Titone, was the first to identify Judge Maloney's bagman:

> At the time Salvatore Titone gave his proffer in 1990, the government's investigation had not yet established that McGee acted as "bagman" for Maloney. It was only two years after Salvatore Titone first provided information regarding McGee's role as a "bagman" for Judge Maloney, that William Swano first identified McGee as Maloney's bagman.[61]

While a showing of judicial error or trial misconduct should not be a separate prerequisite for retrial, such judicial misconduct is certainly probative of judicial corruption. And indeed such misconduct is present in the *Titone* case. Strong evidence shows that after convicting Titone, Judge Maloney told Titone's lawyer, Bruce Roth, not to take a bench trial for the sentencing stage (of the bifurcated litigation) because Judge Maloney would sentence Titone to death.[62] This admonishment is probative of a prior deal. Judge Maloney, in effect, was telling Roth that Maloney would have to sentence Titone to death in order to avoid investigation.[63]

Yet in the face of all this circumstantial evidence, the Illinois courts have refused to grant Titone an evidentiary hearing or limited discovery to prove his allegations. At such a hearing Judge Maloney, Robert McGee and Bruce Roth would likely invoke their Fifth Amendment rights, allowing a trier of fact to infer an agreement from their refusal to speak.[64]

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59. *Id.*

60. Superseding Indictment, *U.S. v. Thomas J. Maloney, Robert McGee and William A. Swano*, 91 CONG. REC. 477 (June 25, 1991).

61. Affidavit of Assistant United States Attorney, Scott Mendeloff, at ¶ 5 (Oct. 12, 1994), *appended to* Fourth Amended Petition for Post-Conviction Relief, People v. Titone, No. 83-127 (Cook County Ill. Cir. Ct., Oct. 12, 1994).

62. Findings of Circuit Judge Earl Strayhorn, People v. Titone, Ind. No. 83-127 (Cook County Ill. Cir. Ct., Sept. 7, 1990) (vacating Titone's death sentence).

63. Judge Maloney wanted to avoid deciding; if a jury decided, Judge Maloney could not be blamed for the result by either Titone or the federal investigators. Trying to induce Titone to opt for a sentencing jury was Maloney's way of balancing the threat of Titone going public against the threat of federal scrutiny.

64. Baxter v. Palmigiano, 425 U.S. 308, 318-20 (1976) (stating that in civil proceedings the Fifth Amendment does not forbid fact finders from drawing an adverse inference). If state courts continue to deny an evidentiary hearing, Titone should file a § 1983 or RICO suit against Judge Maloney—in part to force Judge Maloney in deposition to face the question of whether he or his bagman received money from Titone. Titone's ability to file a civil action now, however, may be hampered by the statute of limitations or by qualified judicial immunity.

III. WHEN SHOULD AN ACQUITTED PAYOR AVOID A NEW TRIAL?

The last section explored how courts should respond when a payor/defendant attacks a conviction because of judicial corruption, but prosecutors may have a parallel incentive to attack acquittals that are the product of judicial corruption. While the double jeopardy clause normally precludes an acquitted defendant from being retried for the same offense, Akhil Amar and Jonathan Marcus have suggested that a defendant who pays for an acquittal (pursuant to what I have called a pure bribe agreement) may not deserve the same constitutional protection.[65] Amar and Marcus consider the hypothetical of "a defendant on trial for murder bribes his jury and wins acquittal, and in a subsequent prosecution this bribery is proved beyond a reasonable doubt."[66] Judge Maloney's corrupt ways have forced an Illinois court to grapple with a very similar fact pattern.

In 1977, Thomas J. Maloney was not yet a judge, but he played a crucial role in brokering a corruption deal between his client Harry Aleman and Judge Frank Wilson.[67] Judge Wilson ultimately acquitted Aleman of murder charges in a bench trial.[68] Fifteen years later, the State reindicted Aleman for the same murder. In response to Aleman's motion to dismiss the indictment, the State argued that double jeopardy was inapplicable because Aleman had paid Judge Wilson $10,000 to acquit him.[69]

In this subsequent proceeding, the trial court found beyond a reasonable doubt that Judge Wilson had been bribed during the 1977 trial. The court refused to dismiss the second indictment and an Illinois appellate court affirmed.[70] In what it characterized as being an issue of first impression,[71] the appellate court adopted without citation the basic argument of Amar and Marcus (published a year earlier in the Columbia Law Review)[72]—holding that Aleman could be retried.

Amar and Marcus suggest that a bribery exception to the double jeopardy clause might be grounded in part on the concept of risk:

> If the jury was bribed, the defendant was never truly in jeopardy. The fix was in, and *he ran no risk*, suffered no jeopardy—from the French jeu-perdre, a game that one might lose, and the Middle English iuparti, an uncertain game. On this theory, a second trial would

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65. Amar & Marcus, *supra* note 52, at 54-57.

66. *Id.* at 55.

67. Maloney was Aleman's counsel when the agreement with Judge Wilson was struck and Maloney subsequently withdrew from the case at Judge Wilson's request because the two were such close friends that Judge Wilson did not want to show favoritism in a case in which Maloney was the defense attorney. *Id.* at 3.

68. *See* People v. Aleman, 667 N.E.2d 615, 619 (Ill. App. Ct. 1996).

69. *Aleman*, 667 N.E.2d at 617.

70. *Id.* at 627.

71. The court noted: "No case has been cited by Aleman or the State involving the application of double jeopardy principles to circumstances presented here: the alleged bribery of a judge resulting in acquittal of a defendant who the state seeks to retry for the same offense." *Id.* at 623.

72. Amar & Marcus, *supra* note 52. Amar tells me that he also informally advised the prosecutor in the case.

> truly put defendant in jeopardy not "twice" but only once, in keeping with the textual command.[73]

The *Aleman* decision similarly emphasized risk: "Of particular importance here is that '*[j]eopardy denotes risk.* In the constitutional sense, *jeopardy describes the risk* that is traditionally associated with a criminal prosecution.'"[74] The court ultimately concluded:

> Given [the defendant's] involvement in the bribery of Judge Wilson in order to procure an acquittal in his 1977 murder trial, we conclude that Aleman clearly was not subject to the risk normally associated with a criminal prosecution. The principles of double jeopardy do not bar the instant reindictment and reprosecution.[75]

The Court seems to reason that once the judge was paid there was no risk of conviction.

But this reasoning is flawed for two reasons. First, both the appellate court and Amar and Marcus ignore the possibility of extortion. If the agreement concerned pure extortion, then full performance of the agreement would have exposed the defendant to exactly the same risk that would have been "normally associated with a criminal prosecution." Accordingly, there should not be a double jeopardy exception with regard to pure extortion agreements.

The *Aleman* opinion cites to enough testimony to suggest that the substantive consideration for the $10,000 was at least in part bribery (a promise to acquit regardless of the evidence).[76] But as argued previously, there are strong structural reasons to expect that extortion agreements will often be combined with bribery agreements. The court's failure to mention the relevance of extortion (in subjecting defendant to risk of conviction) suggests that they did not consider this possibility in undertaking its fact finding.

Second, the court's (and the authors') risk reasoning is flawed because it does not consider the defendant's risk of "diverting" or "retaliatory" convictions. Even if the substantive agreement was a pure bribe or a combination of bribery and extortion, the defendant risked conviction because the judge might breach the agreement "in order to cover up and conceal original payments of the bribe"[77] or to retaliate against a perceived breach on the part of the defendant. Judge Maloney's later reaction to the Operation Greylord investigation vividly illustrates how a judge who has promised (and been paid) to acquit might nonetheless convict in order to divert third-party scrutiny. These are not just the allegations of Dino Titone, but parallel allegations were proven be-

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73. *Id.* at 55 (footnotes omitted) (emphasis added).

74. *Aleman*, 667 N.E.2d at 624 (emphasis in original) (quoting Breed v. Jones, 421 U.S. 519, 528 (1975)). The court similarly concluded for double jeopardy to apply "that a defendant must be 'subjected to the hazards of trial and possible conviction.'" *Id.* at 624 (quoting Green v. United States, 355 U.S. 184, 187 (1957)).

75. *Id.* at 626.

76. For example, before his initial trial, Aleman had told Vincent Rizza (a former Chicago police officer and bookmaker) that "his murder indictment 'was all taken care of,' and that 'committing murder in Chicago was okay if you killed the right people.'" *Id.* at 618.

77. Ruling on Petitioners' Motion for Post-Conviction Relief, at 5, People v. Hawkins & People v. Fields, Nos. 85-C-6555 & 85-C-7651.

yond a reasonable doubt at Judge Maloney's criminal trial with regard to Maloney's conviction of Earl Hawkins and Nathson Fields.[78]

Moreover, the risk of a "retaliatory" or "disgruntled" conviction can be found in the *Aleman*'s decision own description of Judge Wilson's conversations with Robert Cooley, a lawyer for "the mob in Chicago" who had personally negotiated the initial $10,000 deal:

> On the second day of trial, Judge Wilson and Cooley met. Wilson was very upset and voiced his concern that the case was not as weak as Cooley had initially represented. . . . Cooley met Wilson again. Wilson was even more upset this time because the prosecutors had informed him that a witness was receiving $10,000 for testifying falsely. Wilson was amazed that he was only receiving $10,000 although he was a "full circuit judge." Wilson explained that he may lose his job and asserted, "that's all I get is ten thousand dollars? I think I deserve more." Wilson blamed Cooley because he would receive "all kinds of heat" for this trial. He again requested more bribe money. Cooley told Wilson he would see what he could do.[79]

Even though the court found that "Wilson never expressed any intention not to fulfill his end of the deal,"[80] the judge's repeated concern and upset and his repeated attempts to bargain for more money (especially after learning that a mere witness was being paid the same amount) created a risk that Wilson might have convicted the defendant notwithstanding the agreement.[81]

A closer look at the facts suggests that bribery is far from a sure thing. Even though Amar and Marcus imagine that when the "fix was in, [a defendant] ran no risk,"[82] Chicago's unhappy history of corruption teaches, there are unlikely to be easy "no risk" cases to fit a double jeopardy exception. Instead, courts will need to grapple with how much risk and what kinds of risk are sufficient to put a defendant in jeopardy.[83]

Indeed, Amar and Marcus might respond that the risk of "retaliatory" or

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78. *Id.*; United States v. Maloney, 71 F.3d 645, 656-57 (7th Cir. 1995).

79. *Aleman*, 667 N.E.2d at 619.

80. *Id.*

81. If the agreement had been a sale of goods, there would be a sufficient risk of Wilson's non-performance that Aleman would have reasonable grounds for seeking additional assurances. U.C.C. § 2-608 (1994).

82. Amar & Marcus, *supra* note 52, at 55.

83. David Rudstein has previously argued that bribery does not eliminate the risk of conviction:

> [A] judge bribed by the defendant in a bench trial might change his mind after the start of the trial, return the bribe money, and, after hearing all the evidence, convict her. Or the judge might double-cross the accused and convict her while keeping the bribe money. . . . In none of these situations can it be argued that, because the defendant paid off the judge . . . prior to her trial, she was never in "jeopardy" at her trial. For she in fact was convicted. . . . Thus, even in a case in which the defendant bribed the judge in a bench trial, one or more jurors, or the prosecutor, she still runs the risk—albeit a reduced one—of being convicted.

David S. Rudstein, *Double Jeopardy and the Fraudulently Obtained Acquittal*, 60 MO. L. REV. 607, 639-40 (1995). Rudstein backs up his analysis, of course, by discussing Judge Maloney's willingness to convict and sentence to death defendants who had paid him money. *Id.* at 640 n.136.

"diverting" conviction does not count as a double jeopardy risk because only the risk of conviction at a fair trial counts in the constitutional calculus. For example, in discussing race-stacking, the authors suggest that "a stacked jury is, constitutionally speaking, no jury; its acquittal, no acquittal; and so defendant . . . was never constitutionally in jeopardy."[84]

This argument, however, ignores the realities of the last section. Defendants like Aleman not only ran the risk of initial conviction, but they ran the substantial risk that any conviction would be affirmed on appeal.[85] In the current world, a convicted defendant in Illinois has virtually no chance of winning even an evidentiary hearing or limited discovery to establish that her judge had received money. Regardless of what Amar and Marcus have in mind as minimal requisites for a fair trial, Illinois courts are currently likely to affirm convictions where a judge has taken money.[86]

Our assessment of whether Aleman was at risk in this initial trial must then turn not only on the likelihood of his being convicted at trial, but also on the likelihood that appellate courts would affirm when confronted with allegations that the judge had taken money. If Illinois changed its current law and began automatically granting new trials where paying defendants were convicted (as suggested in the previous section), there would be a much stronger case for a bribery exception to the double jeopardy rule—that is granting new trials where paying defendants are acquitted.[87]

The Illinois court's disparate treatment of the "convicted payor" and the "acquitted payor" problem is dramatically shown in the following passage from *Aleman* in which the court asks: "[Was the defendant] not subjected to 'the risk that is traditionally associated with a criminal prosecution'? The answer must be in the affirmative considering analogous circumstances."[88] The analogous circumstances to which the *Aleman* court is referring are the pecuniary interests cases discussed above—including *Lavoie* and *Tumey*.[89]

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84. Amar & Marcus, *supra* note 52, at 56.

85. It is inconsistent to treat corrupt acquittals as a nullity when corrupt convictions are treated as being valid.

86. As Rudstein has noted:

> [N]o appellate court would accept the claim by the defendant that her conviction should be reversed because a crooked judge, a corrupt juror, or a dishonest prosecutor failed to keep his end of the bargain and acquit her, vote to acquit her, or present a weak case against her, respectively.

Id. at 640.

87. Defendants would still run the risk that after being convicted they would not be able to prove that the judge had been paid.

88. *Aleman*, 667 N.E.2d at 624 (quoting Breed v. Jones, 421 U.S. 519, 528 (1975)).

89. The analogous circumstances are detailed in this annotated string citation that follows the passage quoted in the text:

> *See* Aetna Life Insurance Co. v. Lavoie, 475 U.S. 813 (1986) (invalidating a judgment of the Alabama Supreme Court because a justice on that court was a party to a similar case pending in an Alabama trial court and, therefore, the judge's pecuniary interest in the outcome of the case required new proceedings); Breed v. Jones, 421 U.S. 519, 528 (1975) (where pecuniary interests of judges have been involved in the cases, the results must be invalidated); In re Murchison, 349 U.S. 133, 136 (1955) (recognizing that "[f]airness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where

Bizarrely, these pro-defendant constitutional holdings are not sufficient to nullify Titone's conviction (or even assure him an evidentiary hearing) but they are sufficient to nullify Aleman's acquittal—notwithstanding the double jeopardy clause to the Illinois and United States constitutions.

Amar and Marcus, however, identify the defendant's malfeasance as a second possible basis for a bribery exception: "Call it what you will—estoppel, fraud, unclean hands, waiver, or forfeiture—the basic idea, rooted in general legal principles, is that defendant's own prior misconduct bars him from asserting a double jeopardy claim."[90] The authors admirably identify what is lurking below the surface of corruption cases. They explain that this line of argument "never gets to the Double Jeopardy Clause. It simply prevents a defendant from raising the issue."[91]

But as a normative matter, a defendant's prior misconduct by itself should not be sufficient to nullify the effect of an initial acquittal. First, it will often be difficult to determine the defendant's culpability. As emphasized above, judges will routinely insist on combining elements of bribery and extortion. A defendant who agrees to bribe as part and parcel of a deal to avoid unfair treatment is less culpable than the image of a pure briber that the *Aleman* court and Amar and Marcus have in mind. And at times it will be unclear whether the defendant or a third-party negotiated and paid the judge.[92]

To clarify the interaction of risk and estoppel, it is useful to consider two stylized hypotheticals. In the first, imagine that (unbeknownst to a defendant) the defendant's sibling enters into a pure bribe with a judge who subsequently acquits the defendant.[93] In the second, imagine a defendant who pays his lawyer to bribe the judge, but unbeknownst to the defendant the lawyer pockets the money and at a fair trial the defendant is acquitted. In the first case, there is no risk of conviction, but no defendant misconduct. In the second, there is defendant misconduct, but the normal risk of conviction. I cannot imagine a theory that would allow retrial under the second scenario.[94] Defendant misconduct may be a necessary condition for a bribery exception but it should not be a sufficient condition.

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he has an interest in the outcome"); Tumey v. Ohio, 273 U.S. 510, 521-32 (1927) (holding that defendant was entitled to a new trial where the trial judge received $12 by statute for each case which resulted in a conviction because "officers acting in a judicial . . . capacity are disqualified by their interest in the controversy to be decided . . .").

Id. at 625-26 (parallel cites omitted).

90. Amar & Marcus, *supra* note 52, at 55.

91. *Id.*

92. In the *Aleman* case, there is some uncertainty about the extent to which Aleman, himself, knew about and/or participated in the judicial corruption. The opinion merely says that two "1st Ward figures Pat Marcy and John D'Arco, Sr." asked Robert Cooley ("a former Chicago police officer and an attorney") "if he 'had a judge at 26th Street who could handle or take care of a case.'" *Aleman*, 667 N.E.2d at 618. It was Cooley who negotiated the deal with Judge Wilson. Even the opinion indicates that Aleman had illegal dealings with Cooley and Aleman bragged that "his murder indictment 'was all taken care of.'" *Id.* It is not clear that Aleman instigated the deal or knew of it in advance.

93. Akhil Amar in private conversation suggested this line of argument.

94. I can imagine, however, prosecuting the defendant for the independent crime of attempted bribery.

In sum, like Amar and Marcus, I can imagine a narrow bribery exception to a defendant's normal double jeopardy protection that turns on a prosecutor proving not only that money was paid but that (a) the payment virtually eliminated the risk of conviction at the initial trial and that (b) defendant is culpable for this initial corruption. But corruption Chicago-style teaches that purchasing a judge does not guarantee acquittal. Particularly in jurisdictions that make it extremely difficult for convicted payors to receive new trials, we should make it extremely difficult for prosecutors to retry acquitted payors. Indeed, this section has shown that proving that a judge was paid falls far short of proving the defendant was culpable or not at risk. Given the grave difficulties involved in proving these elements, the Double Jeopardy Clause may be better served without admitting a bribery exception.

The acquitted payor and the convicted payor problems need to be answered together. Giving the convicted payor an absolute right to a new trial, while subjecting the acquitted payor to a relatively small risk of retrial might induce more defendants to try to bribe judges. But the social cost of the convicted payor rule is relatively small: an absolute right to a new trial will often only mean an absolute right to be convicted a second time. Barring reprosecutions of acquitted payors may more substantially increase defendants' incentives to bribe. Yet a rule making it difficult to reprosecute acquitted payors might also reduce judges' incentives to extort or accept bribes. An acquitted payor would have more freedom under such a rule to subsequently disclose the identity of corrupt judges. This is not to say that these proposed rules would not have predictable costs. It is only to suggest that the cost in increased corruption may not be as great as it initially appears.

IV. WHEN SHOULD A CONVICTED NON-PAYOR RECEIVE A NEW TRIAL?

This section analyzes a much more difficult problem created by Judge Maloney's corruption—a problem with which Judge Posner recently grappled and for which the United Supreme Court has recently granted certiorari. In *Bracy v. Gramley*,[95] defendants who were convicted and sentenced to death by Judge Maloney sought a new trial because they did *not* have (nor did they ever discuss) a deal with Judge Maloney.[96] The defendants claimed that Judge Maloney had an incentive to convict defendants who did not pay him in order to (1) divert the attention of prosecutors and the electorate and (2) to create a reputation as a tough judge so as to more easily extort money from defendants who did pay.[97] At this point, it might be useful to point out that Judge Maloney sentenced more people to death than any other judge in Cook County.[98]

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95. Bracy v. Gramley, 81 F.3d 684, 688 (7th Cir. 1996).

96. *Bracy*, 81 F.3d at 688.

97. *Id.*

98. An Assistant United States Attorney, Scott Mendeloff, described Maloney's reputation for ruthlessness:

> As a judge [Maloney] was tough and hard-nosed. . . . But one of the things that I have heard over and over again from lawyers in the community is that he took it far too far; that he was ruthless; that he heartlessly meted out sentences without any compassion.

In one sense, the *Bracy* defendants' claim is more sympathetic than Titone's because there is no possibility that they participated in a bribery conspiracy. The *Titone* and *Aleman* decisions show how defendants' misconduct might make courts less likely to grant them a new trial or more likely to grant the prosecutor a new trial. The *Bracy* facts put to the test whether a defendant's clean hands can lead to a more lenient judicial approach.

The case is difficult, however, because it leads to an all-or-nothing result for a potentially large class of defendants. Indeed, as Judge Posner observed while rejecting the defendants' claim, a rule of automatic reversal "would thus require the invalidating of tens of thousands of civil and criminal judgments, since Judge Maloney alone presided over some 6,000 cases during the course of his judicial career and he is only one of eighteen Illinois judges who have been convicted of accepting bribes."[99]

While the case presents a difficult problem, Judge Posner's decision systematically minimizes the benefits and overstates the cost of granting relief. His rhetorical strategy makes a hard case seem implausibly easy. Posner minimizes the benefits of granting a new trial by arguing that it is unlikely that Judge Maloney would have unjustly convicted the defendant: "The fact that Maloney had an incentive to favor the prosecution in cases in which he was not bribed does not mean that he did favor the prosecution in such cases more than he would have done anyway."[100] It is striking to hear one of the parents of law and economics argue that incentives do not, on the margin, affect behavior.

And Judge Posner even questions whether Judge Maloney on net would have an incentive to unjustly convict:

> While a corrupt judge might decide to tilt sharply to the prosecution in cases in which he was not taking bribes—to right the balance as it were—it is *equally possible* that he would fear that by doing so he would create a pattern of inconsistent rulings that would lead people to suspect he was on the take.[101]

> The only time there was compassion that we can see has to do with the times in which money was being passed.

Bracy, 81 F.3d at 700 n.1 (Rovner, J., dissenting) (quoting United States v. Thomas J. Maloney & Robert McGee, No. 91 CR 477, Sentencing Tr. 559-60 (N.D. Ill. July 21, 1994) (remarks of Assistant United States Attorney Scott Mendeloff)).

99. *Id.* at 689. During oral argument, Justice O'Connor echoed this concern: "This judge handled 6,000 criminal cases. By [defendants'] standard, they are all out the window. We're talking about a lot of cases." Greenhouse, *supra* note 22, at 18.

100. *Bracy*, 81 F.3d at 689.

101. *Id.* at 689-90 (emphasis added). During oral argument before the Supreme Court, Justice Scalia has echoed Judge Posner's concern:

> Justice Antonin Scalia, who said that Mr. Bracy's case "rests on a series of assumptions that are not necessarily self-evident."
>
> Addressing Mr. Levy, the inmate's lawyer, Justice Scalia said he thought it just as likely that rather than punishing those who did not pay bribes, a judge taking bribes to favor some defendants would be lenient in other cases as well to avoid calling attention to his behavior.
>
> "He would look worse if he were a hanging judge in most cases and a bleeding heart in some," Justice Scalia said, adding: "The fact that he was dishonest when he was given money doesn't mean he was dishonest when he was not given money."

This cannot be true. On the margin, it would benefit Judge Maloney (financially, in avoiding prosecution, and in winning reelection) to decide all close or discretionary questions against such defendants.[102]

Finally, Judge Posner minimizes the benefits of granting new trials by assuming that such defendants are guilty: "[T]he automatic rule must be interpreted circumspectly, with due recognition of the cost to society of overturning the convictions of the guilty in order to vindicate an abstract interest in procedural fairness."[103] But given Judge Maloney's predisposition for corruption, how can Judge Posner be so sure that he would be "overturning the convictions of the guilty"?

Against the "abstract interests in procedural fairness," Judge Posner sees a parade of horrible consequences. As earlier quoted, Judge Posner imagines that thousands of cases would need to be reopened. But his analysis is inflated because many of the defendants would have served their complete sentence (or it might be possible to limit new trials to defendants convicted while Judge Maloney was known to be engaged in a pattern of corruption).[104]

Judge Posner also suggests that granting new trials in this case might require granting new trials for any defendant when the judge is facing reelection:

> The assumption underlying [defendants'] argument is that a judge's corruption is likely to permeate his judicial conduct rather than be encapsulated in the particular cases in which he takes bribes. The assumption is plausible but the consequences are unacceptable. If we were to inquire into the motives that lead some judges to favor the prosecution, we might be led, and quickly too, to the radical but not absurd conclusion that any system of elected judges is inherently unfair because it contaminates judicial motives with base political calculations that frequently include a desire to be seen as "tough" on crime.[105]

But as a doctrinal matter, it is easy to distinguish reelection bias from extortion bias. Judge Posner himself notes that courts entertain a general presump-

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Greenhouse, *supra* note 22, at 18.

102. As Judge Rovner observed:

> A judge who wishes to be tough on the defendant need not adopt the manner of the Tasmanian Devil to do it. Maloney was by no account stupid. . . . [I]f he wanted to cultivate a pro-prosecution record to protect his interests as a bribetaker, he had the ability to do so discretely, without appearing to have abused his discretion as a trial judge. . . . In this case there were plenty of issues that implicated Judge Maloney's discretion and thus his ability to influence the case against Bracy and Collins: the credibility questions presented by the petitioners' motion to suppress key evidence; the bolstering of prosecution witnesses; the collateral impeachment of defense witnesses; improper prosecution argument to the jury; the denial of a continuance prior to the sentencing hearing; and the refusal to sever the sentencing hearings.

Bracy, 81 F.3d at 698-99, 701 n.3 (Rovner, J., dissenting).

103. *Id.* at 689.

104. However, given Maloney's willingness to broker corrupt deals as a lawyer in *Aleman*, Maloney's pattern of corruption may have extended through out his judicial tenure.

105. *Bracy*, 81 F.3d at 689.

tion that "judicial officers perform their duties faithfully."[106] Posner admits that this presumption is "obviously inapplicable" under the facts of *Bracy*, but it could still adequately distinguish reelection bias.

A more balanced assessment would admit the difficulty of the problem. It might be more consistent with general judicial bias precedents to grant new trials to any defendant convicted while a judge was engaged in a pattern of receiving money. But at a minimum, courts should vacate the most important discretionary decisions of Judge Maloney that disfavored defendants—in particular, sentences and bench trial convictions. Or one might place a burden on the prosecution to prove that there was such overwhelming evidence of guilt that any judicial misconduct was harmless. In any event, defendants convicted by Judge Maloney should automatically be given an evidentiary hearing and a right to ask Judge Maloney under oath whether his pattern of judicial corruption affected their case. Sadly, both the *Titone* and *Bracy* litigation show that victims of Judge Maloney's extortion rarely can convince Illinois courts that they have good cause to be permitted either discovery or an evidentiary hearing.

CONCLUSION

Thomas Maloney's malfeasance in a murder case provides a pragmatic lens through which to evaluate the three core problems of judicial corruption: concerning the convicted payor, the acquitted payor and the convicted nonpayor.[107]

In this paper I have presented a theory to substantively distinguish bribery and extortion, and suggested reasons why bribery will often be combined with extortion. However, this article's more important insights are not derived from theory, but from what can be learned from the judicial corruption unearthed by Operation Greylord: Defendants who paid judges still ran substantial risks of conviction. Judges used the continuing threat of conviction to renegotiate higher bribes (as in *Aleman*) and judges convicted to divert the Operation Greylord investigation (as in *Titone*, *Hawkins* and *Fields*).

These insights throw new light on the "convicted payor" and the "acquitted payor" problem. Understanding that a paid judge might convict notwithstanding the evidence diminishes our confidence in such convictions and strongly argues for granting such defendants new trials. It also suggests that retrying an acquitted payor does create double jeopardy problems because there is always some risk that a paid judge will convict notwithstanding the

106. *Id.* at 688 (citing Del Vecchio v. Illinois Dep't of Corrections, 31 F.3d 1363, 1372-73 (7th Cir. 1994)).

107. The three covered categories suggest a fourth problem of judicial corruption concerning acquitted non-payors: to wit, when can an acquitted non-payor be reprosecuted notwithstanding the Double Jeopardy Clause? While it would seem obvious that the correct answer should be "never," the logic of Judge Posner's *Bracy* opinion might suggest otherwise. If it is "equally possible" that a corrupt judge would avoid "creat[ing] a pattern of inconsistent rulings" by acquitting non-payors, *Bracy*, 81 F.3d at 689, then Posner might argue that prosecutors should have a right to attack the validity of acquittals not procured by payment. Hopefully readers can see that the errors in this argument further undermine the persuasiveness of Posner's original decision.

payment.

Dino Titone and Thomas Maloney are currently both in prison. Titone is awaiting resentencing on his murder conviction and has filed a subsequent post-conviction petition seeking a new trial based on additional compelling evidence of Judge Maloney's extortion. Judge Maloney is serving a 15-year sentence for his pattern of bribery and extortion.

In rejecting the claims in *Bracy*, Judge Posner said that the defendants' death sentences were legally irrelevant to the question of whether they should receive new trials: "The fact that this is a death case magnifies the appearance of impropriety but is irrelevant to an issue that goes to the propriety of conviction rather than merely to that of the sentence."[108] Should our society be willing to execute someone where the convicting judge was paid money? There are strong reasons to believe that (1) there was agreement between Titone and Maloney; (2) the agreement involved elements of extortion;[109] and (3) Judge Maloney had reasons to convict Titone regardless of the evidence. I cannot fathom a justice system that would deny him an evidentiary hearing to prove these allegations and, if proven, grant him a new trial.

Judge Maloney is despicable. He repeatedly sold his office in death penalty cases for a pittance. It sickens me that I had to submit myself to his authority. Judge Maloney, where were you born?

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108. *Bracy*, 81 F.3d at 689.

109. Maloney's willingness to extort—backed up by his willingness to convict notwithstanding the evidence if he was not paid—is vividly illustrated in his treatment of lawyer William Swano. As described by Judge Rovner in her *Bracy* dissent:

> [T]he notion that Maloney was deliberately tough on defendants who did not bribe him finds support in the testimony presented at Maloney's trial. Defense attorney William Swano arranged several of the bribes for which Maloney was prosecuted and was a key government witness against him. In 1985, Swano represented James Davis, whom the state had charged with armed robbery. The case was assigned to Maloney for trial. By this time, Swano had already bribed Maloney on a number of occasions. But after investigating the prosecution's case against Davis, Swano concluded that it would be unnecessary to bribe Maloney in order to obtain an acquittal in this case: three witnesses to the robbery knew the two perpetrators and said that Davis was not one of them; Davis had an alibi; and the victim of the crime, who had initially identified Davis as one of the perpetrators, had confessed uncertainty about the identification. Swano was confident that "the case was a not guilty in any courtroom in the building." United States v. Thomas J. Maloney and Robert McGee, No. 91 CR 477, Tr. 2528 (N.D. Ill. March 24, 1993). To Swano's surprise, however, Maloney convicted his client after a bench trial. Swano took this as a lesson that "to practice in front of Judge Maloney . . . we had to pay." Tr. 2530. . . . One may infer from Swano's testimony that Maloney saw the Davis prosecution, in which no bribe was tendered, as an opportunity to teach Swano a lesson that would ensure bribes in future cases. . . . [F]ixed cases were a source of illicit profit, whereas unfixed cases were an opportunity, as Bracy puts it, to "advertise" in the defense bar (*Bracy* Reply at 1).

Id. at 697 (Rovner, J., dissenting). While Judge Rovner acutely understands that Maloney used the *Davis* case to induce Swano to pay in future cases, she insists on referring to these payments as "bribes" instead of "extortion."

POSTSCRIPT

Good news. Since drafting the initial essay, subsequent decisions in *Bracy*, *Titone* and *Aleman* have moved toward more fully protecting defendants' constitutional right to an impartial judge.[110]

The Supreme Court reversed Judge Posner's *Bracy* opinion.[111] Justice Rehnquist writing for an unanimous court found Bracy had established "good cause" for discovery on his claim of actual bias.[112] The opinion left unanswered what Bracy would need to prove to win a new trial, but at the very least the court found the "Due Process Clause of the Fourteenth Amendment establishes a constitutional floor" for "a judge's qualifications to hear a case."[113] Justice Rehnquist emphasized that the petitioner had met his burden not only because "Maloney was shown to be thoroughly steeped in corruption," but also because petitioner had provided evidence suggesting "that Maloney was actually biased in petitioner's own case."[114] Thus, the opinion stops short of creating a per se discovery rule for any defendants convicted during Maloney's reign of corruption.

In response to the Supreme Court's decision in *Bracy*, Illinois Circuit Court Judge Earl Strayhorn decided to vacate Titone's murder conviction and grant a new trial.[115] Judge Strayhorn's decision is remarkable not only procedurally—because the judge granted Titone's motion on the papers without an evidentiary hearing—but also substantively. After quoting Judge Rovner's eloquent dissent in *Bracy*,[116] Judge Strayhorn expressed the disquiet the Titone case had caused him:

> I cannot truly articulate the pain that I have borne in listening to the horrible things that went on in this case in what is supposed to be a courtroom of law and justice. And no amount of procrastination on my part, no amount of reluctance on my part can wipe out the fact that under the circumstances that have been presented here what went on in that courtroom as to Dino Titone was not justice. And that Dino Titone did not receive the kind of a fair, impartial trial before a fair,

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110. Bracy v. Gramley, 117 S. Ct. 1793 (1997); People v. Titone, Circuit Court of Cook County, Ind. No. 83 C 127, Report of Proceedings heard before the Honorable Earl E. Strayhorn (July 25, 1997) [hereinafter *Titone Proceedings*]; United States *ex rel.* Aleman v. Circuit Court of Cook County, 967 F. Supp. 1022 (N.D. Ill. 1997).

111. *Bracy*, 117 S. Ct. at 1796. I had overnight mailed a draft of this paper to each of the justices shortly before this opinion was announced.

112. *Id.*

113. *Id.* at 1797.

114. *Id.* at 1799.

115. *Titone Proceedings*, *supra* note 110.

116. The court in *Bracy* stated:

> No right is more fundamental to the notion of a fair trial than the right to an impartial judge. "The truth pronounced by Justinian more than a thousand years ago, that 'impartiality is the life of justice,' is just as valid today as it was then." The constitutions of our nation and of our states, the rules of evidence and of procedure, and 200 years of case law promise a full panoply of rights to the accused. But ultimately the guarantee of these rights is no stronger than the integrity and fairness of the judge to whom the trial is entrusted.

Bracy, 81 F.3d at 696 (Rovner, J., dissenting) (quoting United States v. Brown, 539 F.2d 467, 469 (5th Cir. 1976)).

> unbiased, impartial judge that his constitutional right as a citizen required.[117]

The State of Illinois in its wisdom has chosen not to appeal this decision and the parties are preparing for a new trial.[118] Judge Strayhorn's words capture the simple idea that we can no longer have confidence that convictions of paid judges are the product of the defendant's guilt and not instead some effort to divert suspicion or bargain for more money.

Finally, Harry Aleman's claim has for the first time been considered by a federal court. Judge Suzanne Conlan denied Aleman's petition for habeas corpus, thereby upholding his reprosecution.[119] But in so doing, the court at least acknowledged that paying a judge does not extinguish the risk of conviction:

> While Aleman did not completely eliminate the risk of conviction, Aleman dramatically and illegally altered the playing field on which the decision would be made. It is sufficient that "Aleman clearly was not subject to the risk normally associated with a criminal prosecution." Aleman II, 667 N.E.2d at 626. For that reason alone, jeopardy did not attach in Aleman's 1977 trial.[120]

While this decision represents an improvement over the previous court's risk analysis, the decision continues to ignore the possibility of pure extortion—which would have subjected the paying defendant to exactly the same risk "normally associated with a criminal prosecution." And Maloney's own response to the evolving Greylord investigation suggests that even bribing defendants may be subjected to a risk that is not only substantial, but possibly greater than that of a fair trial. The *Aleman* decision is much more defensible in a world where convicted payors, like Titone, are also retried—but still more attention needs to be given to assess the quantum and quality of risk to which the acquitted paying defendants are exposed.

The Supreme Court's *Bracy* opinion avoids the dreaded e-word. Bracy had explicitly argued that Maloney might have convicted non-payors notwithstanding the evidence in order both (1) to deflect suspicion that he was taking money in other cases and (2) to better extort money in other cases.[121] But Rehnquist could not bring himself to consider the second possibility. Even though there was substantial evidence that Maloney extorted money from defendants,[122] Rehnquist—like the judges in *Titone* and *Aleman*—could not conceive of the possibility that defendants would pay judges to avoid unfair treatment. Until we are willing to admit the possibility of extortion as well as bribery, we are unlikely to respond properly to the multifaceted problems of judicial corruption.

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117. *Titone Proceedings*, *supra* note 110, at 12.
118. Conversation with Thomas Geraghty (Sept. 18, 1997).
119. United States *ex rel.* Aleman v. Circuit Court of Cook County, 967 F. Supp. 1022 (N.D. Ill. 1997).
120. *Id.* at 1026 (citation omitted).
121. *See Bracy*, 81 F.3d at 697 (Rovner, J., dissenting).
122. *See supra* note 109.