

## Book Review

Laura Underkuffler, *Captured by Evil: The Idea of Corruption in Law*. New Haven: Yale University Press, 2013, pp. 334, \$60.00.

Reviewed by Jennifer W. Reynolds

A government official calls in sick to work, even though she is not sick. Another official takes a bribe to expedite an application. A third uses her office to secure a favorable contract for her spouse's business.

Can we distinguish these three officials? Each engages in self-seeking behaviors that deprive the public of services. Each takes intentional steps to improve her position in derogation of the public trust. Intentional self-seeking behavior by government officials in derogation of the public trust sounds a lot like corruption. Are all three of these officials corrupt?

Likely we would hesitate before answering this last question because, as Laura Underkuffler explains in her recent book, *Captured by Evil: The Idea of Corruption in Law*, corruption is not a tidy legal label but instead often implicates unmanageable extralegal concerns—unbridled emotions, rampant moralism, public panic, prosecutorial excess—not to mention the numerous and often inconsistent moral, political, literary, and religious associations that have accumulated around the idea of corruption for millennia in societies the world over. Underkuffler, an expert in property law, has wide-ranging scholarly interests, and this book reflects her fascination with the interplay among legal rules, cultural norms, religious traditions, and the practical demands that go into building communities, institutions, and states. Legal scholars interested in law and culture, especially with respect to notions of morality in civil and criminal contexts, will recognize the definitional concerns raised in Underkuffler's discussion, even if these scholars are unfamiliar with the diverse evidence (much of it from philosophy, political science, and mainstream media) she marshals in support of her argument. As we know, corruption is not an easy fit for the law, and Underkuffler draws on an impressive breadth of sources and strategies to take on this elusive, challenging concept.

Underkuffler starts by showing how efforts to analyze corruption within conventional legal frameworks are unsatisfactory (7-53). Corruption resists traditional legal line-drawing, standards of professional accountability, and economic theories of market failures and incentives. This is in part because

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corruption simply is difficult to define. As Underkuffler points out, when we try to explain why calling in sick is not the same as wielding political influence for material gain, we may find ourselves drawing on unfamiliar rhetoric, tending toward the evocative and seemingly springing from the collective unconscious:

We are deeply convinced that corruption is not simply an act that may be forgiven, punished, or regretted, or an attitude that may prevail in someone's mind one day and be gone the next. We believe it to be far more powerful. It is a virus, a contamination, an external, destroying force that must be purged if ever it is to be eradicated. It is the capture of a human being by evil. It is the purchase, by the devil, of one's soul (72).

Corrupt behavior, therefore, is no ordinary moral wrong. We are not prepared to call all thieves corrupt, Underkuffler argues, even if we believe that theft is morally wrong (11).<sup>1</sup> Corrupt behavior is a particular kind of moral wrong, the kind that creates and in turn emanates from an individual who is forevermore "tainted" (82) and "rotten to the core" (77). Corrupt people evince an excessive self-regard and immoderate preference for their own personal gain that, at some point, cross over from the commonplace into the unacceptable (58). Such people must be removed from public life, because corruption is an incurable and "irrevocable moral status" (80) that will infect others and corrode organizations if left unchecked (88). Even one corrupt person with relatively little influence eventually could derail an entire organization, if others observe the corrupt behavior and follow suit. Put another way, corruption is the zombie bite of legal harms, and corrupt people are the zombies—once wholesome, but after being bitten, becoming an insatiable force of destruction and spreading the zombie condition to everyone they encounter.

Mindful of this moral-historical dimension, Underkuffler settles on a definition of corruption as "the capture, by evil, of one's soul" (69). To illustrate this capture by evil, Underkuffler takes the reader through a series of high-profile cases of corruption, recounting these cases primarily by way of reproducing substantial excerpts from newspaper articles that contain salacious details and moral outrage. She highlights the dissolute acts of corrupt politicians (e.g., Eliot Spitzer) (164-69); the depredations of corrupt societies (e.g., Russia) (224-26); the shameless opportunism of those involved in corrupt campaign contribution cases (e.g., *McCutcheon v. Federal Election Commission*<sup>2</sup>); and the social devastation wrought by corrupt judges (e.g., *Caperton v. A.T. Massey Coal Co.*<sup>3</sup>). On this last point, Underkuffler observes that

1. Underkuffler notes generally that "A has broken the law" is not the same as "A is corrupt" and providing examples of burglars and bank robbers—criminals, but not necessarily corrupt.
2. *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434 (2014).
3. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009). For those seeking even more examples, see ZEPHYR TEACHOUT, CORRUPTION IN AMERICA: FROM BENJAMIN FRANKLIN'S SNUFF BOX TO CITIZENS UNITED (2014).

corrupt judges are “perhaps the most deeply and viscerally offensive” (169) immoral actors in public life because we believe that judges, unlike politicians and businesspeople, are supposed to conform to a higher ethical standard. She provides several examples of judges who feathered their own nests at the expense of other people’s freedom, as in the recent case of two Pennsylvania judges who sent teenage first-time offenders to private juvenile detention facilities in exchange for kickbacks (197-200).

In these examples and throughout the book, Underkuffler noticeably uses conventions that suggest widespread convergence around social understandings of corrupt behavior and corrupt actors. Whenever she makes a descriptive or normative assertion, for example, she speaks in the generalized first-person plural (we, our) and thus presses her case as one of common knowledge, not of contextualized or subjective academic opinion. The above quote, for example, is remarkable for its emphatic declarations of shared conviction (“We are deeply convinced ...”; “We believe ...”). And consider the way she concludes her discussion of corruption as a historical and moral phenomenon associated with evil:

Perhaps our approach to evil in contemporary thought and discourse might be best summed up this way. We are leery of evil’s claim to exemption from examinations for postmodern moral relativity, and we are uncomfortable with its long religious legacy and religious roots. At the same time, however, we find evil both conceptually and linguistically indispensable in the meaning it conveys (96).

Using “the royal we” allows Underkuffler to imply that we (society) can rely upon collective understandings of these broad concepts (corruption, evil) because we recognize and share a common moral baseline.<sup>4</sup> Likewise, Underkuffler’s reliance on newspaper articles as evidence of community norms underscores that sense of shared experience and collective response because, presumably, journalists are reflecting the public’s reactions to corrupt behavior—and not, say, exacerbating or even perhaps manufacturing those reactions.

This brings us to a central puzzle in the argument. Corruption is a social phenomenon in two different and mutually dependent ways: first, how the actor behaves in enriching herself (through some sort of encumbrance on relationships); and second, whether we believe that this behavior rises to the level of corruption (presumably drawing on community norms of morally acceptable behavior). This is why calling in sick is not the same as making sure that one’s spouse gets the contract. Though both actions encumber relationships in the sense that they unfairly disadvantage someone somehow, both are not similarly positioned in what might be considered

4. For a different view of our current moral baseline, see Edward Rubin’s review of *Captured by Evil* in Edward L. Rubin, *Corruption, Governance, and Morality*, 92 TEX. L. REV. 943, 965-71 (2014) (referring to his ideas around the “new morality” in EDWARD L. RUBIN, SOUL, SELF, AND SOCIETY: THE NEW MORALITY AND THE MODERN STATE (2015)).

the general hierarchy of moral behaviors, and so diverge on the second prong. By emphasizing “our” reactions and what “we” value, Underkuffler suggests that this second prong may present some definitional challenges but no real substantive difficulties. In other words, we know it when we see it. Yet depending on the circumstances—if the official calls in sick to play golf, or avoid talking to the press, or meet a paramour, or smoke marijuana, or whatever else her reasons may be—the “is it corruption?” community norms may not deploy in predictable or consistent ways. Context becomes paramount, which then creates a case-by-case approach to possible instances of corruption, which in turn may undermine the public’s confidence that general community norms govern our collective response to potentially corrupt behavior. Indeed, experience shows that those general community norms often are not as widely held as we might hope or as Underkuffler suggests.<sup>5</sup> Corruption, therefore, is less an act or a status but is instead a contingent, shifting inquiry that sits at the intersection of the particular behavior in question, the relevant laws, the (indeterminate) community norms, and the intervention of media actors, whose diverse incentives and multiple outlets make them much more than simply a reflection of public opinion.

Why would Professor Underkuffler frame her discussion so explicitly in terms of shared experience and common understanding, when she undoubtedly recognizes the discontinuities of context and subjectivity here? One possible answer, of course, is that she is imposing a normative vision on the reader so that her argument remains manageable amid potentially chaotic differences of opinion and experience. Another possibility, and one that hints that Underkuffler may have a more progressive agenda in mind, is that she uses the “royal we” not so much to impose upon the reader as to include the reader. On this view, Underkuffler’s “we” approach is a strategic, forward-looking emphasis on collective power, a reminder that even if a problem cannot be precisely defined, people of good will may still need to act. Such a stance is especially important in the context of corruption, given how personally demoralizing and socially devastating widespread corruption can be. By framing her observations and analyses as existing within “our” communities

5. Examples abound in the present moment. Claims of “fake news” from both mainstream and alternative news outlets have made it clear that there is no convergence around how “the public” understands what is going on. Moreover, even when people agree on the facts, they often differ in how they interpret them. Take as an example the coverage of *McCutcheon*. What some may consider corruption, others may construe as protected First Amendment speech. Reconciling these divergent interpretations in favor of a collective understanding of corruption seems impossible, and for some “predict[ ] the collapse of our democracy.” Jan Baran, *McCutcheon and the Future of Campaign Finance Regulation*, SCOTUSBLOG (Apr. 4, 2014, 2:59 PM), <http://www.scotusblog.com/2014/04/symposium-mccutcheon-and-the-future-of-campaign-finance-regulation/> (also noting that “the ultimate goal should be to promote transparency, avoid unnecessary burdens, and provide avenues for sufficient funding of political debate and associational activities. The *McCutcheon* decision simply underscores that such goals can be accomplished without violating the First Amendment and without jeopardizing democracy.”).

and subject to “our” thinking, then, Underkuffler perhaps suggests that only by working together will any lasting positive reforms be possible.

On this reading, it makes sense that Professor Underkuffler does not provide much prescriptive advice in her book.<sup>6</sup> When it comes to capturing corruption, in both senses of the word “capture” (defining and constraining), no new legal definition or three-part test can possibly be as effective as an engaged polity, active in public life and willing to hold themselves and others to acceptable standards of personal and professional behavior. In 2017, given the manifold conflicts of interest in the current administration, the loss of confidence in the press, and the apparent fracturing of society, Underkuffler’s implicit call to action is particularly timely. By presenting the reader with an ostensibly shared moral history and investment in resisting corruption—even if that history and investment are not consistent, coherent, agreed upon, or even actually shared—Underkuffler reminds readers of their connections to others and their responsibility for the well-being of the collective. She helps us remember that corruption is, in the final analysis, a problem we ourselves must address. In this way, Underkuffler’s book not only explores the historical and modern challenges of accounting for corruption in law, but also creates new space for prescription, coordinated action, and positive change.

6. She does provide some examples of moral suasion and case studies of communities, such as Hong Kong, that have intentionally resisted systemic corruption through the strategic deployment of anti-corruption legal rules and cultural norms. (229-38).