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Judicial Corrosion: Outlines of a Theory

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JUDICIAL CORROSION: OUTLINES OF A THEORY

Some judiciaries—perhaps we can count the Australian among them—manifest a fairly high degree of conformity to the ethical standards that one expects from a judicial system. That is, they display a fairly high degree of relevant kinds of independence, impartiality, and integrity. And we may wish to add effectiveness, efficiency, and competence to that list. Although it is possible to identify lapses from such standards, they are generally seen as lapses rather than as expressions of systemic failure.¹ The achievement of a generally high level of ethical performance is no mean feat, usually something that has taken many years and much effort to create, and to the extent that the Australian judiciary has accomplished this, there are solid grounds for confidence in it. Nevertheless, even though, once created, the momentum generated by its internal professional ethos may be significantly self-sustaining, it may also be dissipated or lost.

The purpose of this paper is to offer something of a theoretically-based warning against institutional complacency, in particular, the idea that a generally well-functioning judiciary can rest on its laurels. It taps into some wider work in organizational behavior relating to what is sometimes spoken of as *institutional entropy*. This is the idea that even successful institutions will have a ‘natural’ tendency to decline and that, unless certain proactive measures are adopted, they will regress. Moreover, if they do regress, unless there are reactive measures available to rectify that deterioration, they will regress further. Drawing on that organizational behavior literature, the paper seeks to identify certain sources of institutional decline or corrosion, and, even if not to suggest novel remedies, it seeks to encourage certain forms of watchfulness.

First of all, I explain my use of the term ‘judicial corrosion.’ Second, I provide a more detailed characterization of the notion of ‘institutional entropy.’ Third, I outline some possible causes of institutional entropy that might be salient to the judiciary. And finally, I briefly canvass some remedies or prophylactics.

I wish to emphasize, however, that this paper is still a work in progress and in places highly exploratory. Although similar endeavors may exist, I am not aware of any other attempts to apply the literature of institutional entropy to the judiciary, and my own

¹ Among Australian cases, the following might be included: the 1989 removal of Judge Vasta of the Supreme Court of Queensland; year 1998 complaints against NSW Supreme Court Justice Vince Bruce for taking too long to hand down judgments; year 2000 complaint about the appointment of Chief Magistrate Hugh Bradley in the Northern Territory; year 1998 complaints that the federal Attorney General Daryl Williams threatened the independence of the judiciary; year 2001 complaint against Victorian Attorney General for threatening the independence of the judiciary; year 2000 resignation of Michael Adams from office after vote of no confidence by Victorian Magistrates Association; complaints that NSW District Court Judge John Foord and High Court Justice Murphy had attempted to pervert the course of justice; 198 conviction of Chief Stipendiary Magistrate Murray Farquhar for perverting the course of justice. See Campbell and Lee, *The Australian Judiciary* (2001).

discussion is meant to be suggestive rather than assertive. In addition, much of my thinking has been developed against the background of the US judiciary, and not everything I say may be easily translatable into the Australian context.

I. Judicial Corrosion

First of all, a word about the term ‘judicial corrosion.’ We are much more familiar with the notion of judicial corruption—a serious problem in many countries—where what we have primarily in mind is the use of public office for private or political gain.² Its traditional archetype is the bribe, though in non-democratic societies its archetype may be the hegemonic threat. Although the insertion of private interest and political pressure are also corrosive in the sense that I wish to use the term, my interest is really in a more fundamental erosion of the judicial process. What I refer to as judicial corrosion harks back to a classical sense of corruption in which it refers to any form of degeneration or decay—the failure of some object, whether a person or an institution, to live up to the standards by which it is appropriately judged. It is with judicial corrosion in this sense that I am here concerned. Even though it might sometimes express itself in instances of garden-variety corruption, it often reflects a broader kind of failure of the institution (rather than just the individuals who populate it) to live up to the legitimate expectations we have of it. And although such failures may be failures with respect to the classical judicial virtues of independence, impartiality, and integrity, they also include bureaucratization, failures of efficiency and competence, and inertia when it comes to dealing with its own problems.

Judicial corrosion will tend to have both internal and external manifestations. Internally it is likely to manifest itself in dissension that becomes excessively ideological or personal, in the proliferation of conflicts of interest, incompetence, and in various forms of inefficiency. Externally, it will eventually manifest itself in ineffectiveness and diminished social trust in the institution or lack of confidence in the administration of justice.

What kinds of things would count as judicial corrosion? There are many, but perhaps one of the most serious forms of judicial corrosion is constituted by a failure of the judiciary to recognize and respond to its own shortcomings—where the institution has lost sight of its public role and trust.

II. Institutional entropy

My awareness of the idea of institutional entropy was first awakened by Albert Hirschman's 1970 classic of political economy, *Exit, Voice and Loyalty: Response to Decline in Firms, Organizations and States*. In that book, Hirschman outlined a theory of institutional recuperation that had as its background premise a theory of institutional decline (though he does not use the language of entropy).³ Although he did not explicitly extend his argument to judiciaries, he might well have done so.

² Though even that well-worn characterization of corruption does not adequately capture everything that might be subsumed under it. For example, private positions may also be corruptly used.

³ Although Hirschman's subtitle highlighted firms, organisations and states, he made it clear that the scope of his argument encompassed *all* kinds of social groupings—families, educational and religious institutions, political parties, trades unions, voluntary organizations in general, government bureaucracies, and international corporations.

Part of Hirschman's own fascination with institutional decline lies in the fact that although he sees it as endemic to organizations and institutions,⁴ they do not ordinarily suffer the kind of outcome that market theory would lead one to expect—namely, replacement by some more efficient or responsive institution. This is not because—as it is in some cases, such as government monopolies—that institutions cannot be easily replaced even if they are inefficient. But even market-sensitive institutions often display what he calls ‘organizational slack,’⁵ a space within which they can weather downturns and have room to recuperate without the ‘social losses and human hardship’ of extinction that classic economic theory appears to predict as the inevitable result of institutional decline.⁶

We can liken judiciaries to largely monopolistic institutions, though one sign of judicial decline can be found in the search for and use of extra-judicial ways of solving problems that have traditionally been within their province—the development of extra-judicial mediation and dispute resolution programs, some restorative justice initiatives, other localized or neighborhood justice initiatives, and so on. The development of such alternatives often reflects the costliness, complexities, and drawn-out nature of traditional judicial processes.

Hirschman's own focus is on strategic responses to institutional decline rather than on its causes, and I will return to his discussion after I have said a bit more about the matter of causes. But first, I want to make a few observations on the general idea of institutional decline or entropy. Although the sizable literature on the phenomenon of organizational decline frequently makes reference to institutional entropy, the metaphor may not be the most helpful one for understanding the causes of institutional decline. Its primary home seems to belong in the physical sciences, where it refers generally to ‘the tendency for all matter and energy in the universe to evolve toward a state of inert uniformity.’ Entropy has, however, come to be applied more broadly to institutions as ‘the inevitable and steady deterioration of a system or society.’⁷ If one thinks of a system or society in such terms then one will probably think of the causes of institutional decline in fairly mechanistic or physicalist fashion—that is, as something over which one has little control.

It is better—though still somewhat problematic—if institutions are thought of organically—much as one might think of an organism possessing a life cycle through which it passes. Using an organic metaphor, institutions may be conceived of as going through a process of birth, development, growth, decline, and sometimes death. Within

⁴ Hirschman himself does not do much to identify the sources of endemic decline. Perhaps he sees a tension between individual self-centeredness (personal maximization) and group well-being. But it is only a tension rather than a conflict because individual well-being is bound up with group membership. Nevertheless, various forms of free-ridership are a constant problem in any association requiring collective action or mutual participation. See Mancur Olson, Jr., *The Logic of Collective Action*, New York: Schocken, 1968.

⁵ Hirschman, *Exit, Voice, and Loyalty, I Off*.

⁶ *Ibid.*, 3. Nor should we forget—as indeed Hirschman does not—that in some organizations, especially monopolies and government bureaucracies, decline can be weathered almost indefinitely.

⁷ *The American Heritage Dictionary of the English Language*, Fourth Edition (New York: Houghton Mifflin, 2000; updated 2003).

that process there may be periods of health and periods of illness, of premature decline or particular longevity. And there are likely to be activities of the organism that contribute to its well-being or decline and over which the organism or its component parts may exercise some control.

There are of course dangers that the organic metaphor will be taken too literally, and that institutions will be viewed as real organisms in much the same way as people have sometimes seen organizations as persons. It is best that we stick with such characterizations as metaphors—valuable for helping us understand their workings but not as instances of that which we use to understand them. If we take the metaphor too literally we may lock ourselves into inappropriate ways of thinking. As Edith Penrose noted over 50 years ago, if we use the organic metaphor literally, then we will start thinking of organizational decline as a function of age rather than as a function of decisions made over a period of time.⁸

The ongoing debate about whether mechanistic or organic models are more appropriate and how literally they might be understood in each case is also reflected in a debate about the various ‘stages’ through which institutions or organizations might pass. Although there is a certain passion for systemic neatness that seeks to distinguish discrete, sequential stages, the reality of institutional growth and decline is in fact much messier, at best no more precise than the boundaries between childhood, adolescence, maturity, and old age. And even that is probably too simple to capture the complexity which, as some writers have argued, is more like a sequence of problems that need to be addressed, and that need to be addressed at a number of different levels in the evolution of an institution or organization.

III. Causes of institutional decline

Much of the organizational literature focuses on factors that contribute to growth rather than decline, though obviously a number of factors that are relevant to growth also help us to understand the sources of decline. There are, of course, also factors influencing decline that organizational behavior literature is that many of the institutions under review are competitive marketplace organizations, and it is not always easy or appropriate to extrapolate from them to other institutions that are less dependent on a competitive market.

Nevertheless, the literature is extensive and general enough to enable productive inferences to be made to judiciaries. The factors that contribute to institutional growth, flourishing and decline can be somewhat artificially distinguished into those that are external or environmental and those that are internal or organizational. The two of course are often intertwined.

The external/environmental factors that bear on growth and decline often refer to either an expanding or shrinking or a stable or shifting resource base. In the judicial context this might be seen as the incorporation of additional social functions within the judicial

⁸ Edith Penrose, ‘Biological Analogies in the Theory of the Firm,’ *American Economic Review* 4(1952): 804-19.

purview or their removal. Or it might be seen in the development of alternatives to judicial resolution.

(1) Institutions normally come into being and develop as a response to some kind of socially perceived cluster of needs or opportunities. To the extent that the institution shows itself to be well-adapted to such needs or opportunities it will tend to flourish. But there is often no presumption that the needs and opportunities that initially inform an institution's development will remain in perpetuity or, should they do so, that they will retain the same form over an extended period of time. A once-thriving institution may find itself in decline if it shows itself to be inflexible or otherwise unresponsive to changes in broader social needs and opportunities.

(2) An institution that meets the needs and opportunities presented to it well enough may find itself presented with or well-positioned to offer additional services. What started as a limited response and provision may lead to its becoming a more comprehensive provider of services and benefits.

So, if we think of courts as institutions that have come into being primarily as vehicles for negotiated or rule-based private and public dispute resolution, their institutional success will be in part measured by their success in securing closure that is widely accepted. That is likely to be the case if they are seen as resolving the disputes they take on efficiently, effectively, and fairly. If that is the case, there may be demands or opportunities for them to take on additional social functions. If, however, people see those who judge as too detached from or even hostile to the circumstances of those on whom or for whom they pass judgment, disappointment and distrust may result and other avenues of adjudication may develop or be pursued.

This has some implications for judicial self-review as well as the broader assessment of judicial institutions. We need to consider the extent to which courts are, on the one hand, meeting a set of social expectations in terms of what they do and whether there are additional services they might reasonably provide, or whether, because of institutional decline, certain functions are being lost to alternative institutional responses.

The growth of market-sensitive institutions is often associated with four factors: increasing monopolization, greater diversification, the appropriation of technological developments, and improved managerial strategies. Some analogue of each of these may be linked to judicial success and decline. Judicial institutions will come to be or remain the providers or sole providers of certain social services; they will or will not avail themselves of technological resources such as legal databases and other streamlining technologies, they will or will fail to organize their work to deal more efficiently with the demands that are placed upon them.

(3) To some extent, the ability of an institution to address the needs and opportunities that are presented to it—and with that its ability to grow and flourish—will depend on the resources which it has available to it. Public institutions such as courts that are seriously under-resourced will find it difficult to deliver what they are intended to.

In the broader organizational world, an institution that successfully meets the social needs and opportunities presented to it is also likely to benefit from increased resources, and those resources might be devoted—at least in part—to enabling the organization to do what it does even better. Its ‘doing it better’ may include not only increasing efficiency and effectiveness in service delivery but also increased resistance to outside forces that might tend to derail it. We might hope that such would also be the case with courts.

There is, however, a complication here, grounded in the theory of the separation of powers and the potential for courts to bite the hand that feeds them.

In an influential book on *The State as a Firm*,—Richard Auster and Morris Silver view the state as (*inter alia*) a service firm that provides a variety of social services.⁹ The judiciary may be viewed as one of those state-provided services. As such it may be well or poorly resourced by the state. It will be well-resourced to the extent that what the state provides enables the judiciary to be independent and impartial. It will be poorly resourced if, say, its personnel are subjected to increasing workloads or demands without commensurate resources. A declining state may inadequately resource its judiciary or—to conceal its decline—may seek to interfere with its processes in certain ways. In at least one study—and the only one of which I am aware—it is argued that when institutions fall into decline ethical decline will also be facilitated, perpetuated, not be secured against, and this of course may be reflected in an erosion of judicial independence.¹⁰

(4) Varying social opportunities and resources are not the only external factors affecting the growth or decline of institutions. Social good or ill will may also impact on institutional well-being. Thus, public confidence in or populist and specific interest criticism of the courts may also contribute to their flourishing or corrosion. In relation to the latter, criticism of the judiciary may take forms that tend to intimidate members of the judiciary into abandoning their best judicial judgment. Media lynchings or politicians misusing their parliamentary privilege do not serve the cause of an independent or impartial judiciary.

This is naturally a very tricky area, and one to which I return in the final section. On the one hand, the judiciary is a public service. It serves a critical public need for impartial judgments within the rule of law. And so if it—or members of it—fails to operate in a recognizably impartial or competent or consistent manner public criticism of the judicial process may well be legitimate. The problem is to distinguish legitimate from illegitimate public responses.

Among the internal or organizational factors that bear on an institution's growth or decline, we might mention the following:

(1) If an institution is to flourish, it needs to be organized in a way that is not only efficient but also satisfying to those who have to work within it. This is likely to involve not only economic rewards but also personal satisfactions. The more impersonal an

⁹ Richard D. Auster & Morris Silver, *The State as a Firm: Economic Forces in Political Development* (1979).

¹⁰ Dwight Lemke, ‘Ethics in Declining Organizations,’ *Business Ethics Quarterly* (1991): 235-48.

organization becomes, the fewer the personal satisfactions it is likely to provide. Institutional growth, therefore, is likely to bring with it increasing pressures for depersonalization (such as increasing delegation, an increasing use of formal systems and procedures, and a growing number of people involved in administrative or staff functions), a fragmented sense of the institutions animating visions, and thus a weakening of institutional commitment. Thus, what often begins as a shared and holistic conception of institutional purpose is lost as those who work within the institution become increasingly specialized in their tasks. And institutional visions can come to be replaced by much more self-centered ones. Personal ambitions may overwhelm any public service purposes that the institution possesses.

Of course, judicial institutions are not like startup companies that begin with a burst of entrepreneurial enthusiasm and later become weighed down by the bloat of success. Nevertheless the overconfidence and self-satisfaction that often accompanies success and that can be found in high status but less growth-oriented institutions may lead to a neglect of improvement, a lack of concern for quality, immunity to negative feedback, a failure to monitor trends, and a discounting of the seriousness of short-term failures. The theory of institutional entropy should warn us—and of course the judiciary—against complacency.

Along with the depersonalization that comes with size, other internal factors that may contribute to institutional decline include:

(2) Increasing formalization and bureaucratization usually comes with size, along with fragmentation. Insofar as these are functions of growth, they show how the seeds of decline are sown in the soil of success, even if that success is hard and slowly won. To the extent that it is, the decline may for a long time be imperceptible, and when perceived may be addressed in ways that increase bureaucratization and inefficiency. There is also a good deal to be learned from anti-corruption studies of large bureaucracies, where attempts to address corrosion frequently spiral into inefficiency and diminished efficacy and public confidence.¹¹

(3) With these and depersonalization, internal conflict often follows success; differences harden into internecine struggles. Courts are not immune to such. Sometimes they remain pretty informal and internal, and we need a Bob Woodward or Edward Lazarus to inform us about them.¹² But when we see them we can also appreciate how they sap energies and detract from the institution's larger public purposes. At other times such divisions are reflected in a pattern of narrow decisions (and angry dissents) that make the judiciary sound more like a partisan political voice than it ought to be. That of course then comes to be reflected in external battles over judicial appointments, battles that reinforce the sense of the judiciary as a fundamentally partisan political institution.

¹¹ See Frank Anechiarico & James B. Jacobs, *The Pursuit of Absolute Integrity: How Corruption Control Makes Government Ineffective* (Chicago: University of Chicago Press, 1996).

¹² Bob Woodward & Scott Armstrong, *The Brethren: Inside the Supreme Court* (NY: Simon & Schuster, 1979); Edward P. Lazarus, *Closed Chambers: The First Eyewitness Account of the Epic Struggles Inside the Supreme Court* (NY: Random House/Crown, 1998).

(4) Not only may growth carry within itself the seeds of its own decline, so too may decline. Although a recognition of decline may stimulate institutional renewal by shocking the institution into reform, it may bring with it further causes of decline. It often tends to breed or escalate conflict, secrecy, rigidity, centralization, formalization, scapegoating, and conservatism.¹³ And it will tend to diminish morale, innovation, participation, the influence of leaders, and long-term planning.

IV Countering judicial corrosion

Decline, even if endemic to institutions, need not always be irreversible. Sometimes, of course, external factors may eliminate the need or desire for what the organization requires, but that is not likely to happen on any large scale in the case of the judiciary. Although some functions may be relocated or even become redundant, the social need for judicial services is likely to remain permanent. The question is how judicial corrosion is to be managed and reversed. Can we learn something from the organizational behavior literature?

This is the time to return to Hirschman's *Exit, Voice, and Loyalty*. Although Hirschman does not address the specifics of institutional prophylaxis and reform—his strategy is much more general—he provides a highly suggestive framework for responses to institutional corrosion. Basically, he divides them into two, which he characterizes as *exit* and *voice*, responses that may be exercised either separately or together. *Exit*, the response predicted by traditional economic theory, occurs when those who participate in or make use of particular institutions leave them to create or find alternatives. One might see some evidence of this in judicial institutions when, for example, because of the expense involved or protractedness of the process, people abandon courts as a venue for resolving their grievances and go instead to mediators or alternatively create and make use of extrajudicial vehicles—such as the Mafia. If the ailing institution is only minimally sensitive to market concerns, exit may sometimes serve to alert it to the seriousness of its decline and it may thus be given an incentive to pull itself together and improve its performance. In the worst case, though—and this is the particular and classic risk of an exit response—the institution will eventually collapse and be replaced. Its replacement may be better—or even worse, as seems to have occurred with the burgeoning of private militias in present-day Iraq.

Hirschman's distinctive contribution is to be found in his focus on *voice* as the preferred initial response to institutional decline. Voice is the critically constructive expression of dissatisfaction either from those within the institution or from those who value and make use of its products or services. Although Hirschman believes that exit is sometimes or may eventually be the most appropriate response to institutional decline, he also thinks that because particular institutions offer considerable social benefits when they are functioning well, it is better that they be maintained, restored and improved than that they be allowed to decline and even disintegrate. And voice facilitates this.

Judging when voice is appropriate, and when exit becomes the better response, is a complex matter and, in a discussion I will leave to one side, Hirschman devotes some

¹³ David A. Whetten, 'Organizational Growth and Decline Processes,' *Annual Review of Sociology*, 13 (1987): 344.

attention to the factors that will show one or the other or some particular combination of them to be the most appropriate for institutional recuperation. Hirschman does, however, argue that we are often more inclined to take the exit option when it would be better to give voice. Our institutional life would more often be strengthened were we to try to work for its improvement rather than exiting and thus leaving it to chance whether the institution will get the message and have sufficient opportunity to revitalize itself.

One of the valuable things about Hirschman's discussion is his recognition that the health and recuperative potential of an institution requires loyalty to it—loyalty by those who operate or run the institution and loyalty by those who use its services. Central to the use of voice and critical to its recuperative power is institutional loyalty—a commitment by either or both those who work within the institution or make use of it to further its interests and to work for its betterment. In the present context, that would presume the institutional loyalty of judicial personnel as well as of those who use judicial services. Because of their commitment to its recuperation, loyalists not only give an institution more breathing space—that is, an increased opportunity for reform—but are also likely to exercise their voice more constructively and effectively than would otherwise be the case. Loyalty is important, because the imaginative and effective exercise of voice may involve greater personal costs than exit; reform often depends on the presence of people who feel some loyalty to the institution and will thus put themselves out for it.¹⁴ If I have a problem with Hirschman's account, it is that he does not appear to fully appreciate how easily the object of loyalty may itself be corrupted—as occurs, for example, when the institutional loyalty of those who administer it is conflated with a loyalty to people or to ways of doing things that no longer express the institution's animating vision. Institutional loyalty ought not to be the blind, complaisant, or self-serving loyalty that distorts, covers up, or turns away from an institution's shortcomings but rather the critical or oppositional loyalty that recalls an institution to its primary vision and purposes.

Institutional loyalty, when focused on the institution's socially valued purposes, functions as a restorative and preservative. It involves an active disposition to stick with, sustain, and renovate a valued institution. It creates space for the regenerative criticism of the institution, enabling it to counteract or overcome its endemic tendency to deteriorate as a source of value and thus to realize again the values that give it its *raison d'être*.¹⁵

By way of observation, I think there is an underlying connection between Hirschman's discussion of the importance of institutional loyalty and the confidence in the courts with which this conference is concerned. Unless we have a degree of confidence in the courts that will generate a commitment to making them work as they should or better than they do, their failings will tend to be exacerbated. Or, to put it rather more starkly, our confidence in the adjudicative value of courts should translate into ensuring that particular courts realize what we legitimately expect of them.

¹⁴ In his later article, Hirschman qualifies some of his claims about the high cost of voice. Voice, he there suggests, may have an intrinsic as well as merely instrumental value for some people.

¹⁵ There is rather more to Hirschman's position than I cover here. And there is also a literature that is critical of details of Hirschman's argument. See, in particular, Brian Barry's review essay, 'Exit, Voice, and Loyalty,' *British Journal of Political Science*, 4 (1974): 79-107, reprinted in Brian Barry, *Democracy and Power: Essays in Political Theory* (Oxford: Clarendon Press, 1991), 1, 187-222. That too I shall ignore. It does not seriously affect the broad contours of his position.

However, unlike many other institutions, there is a paradoxical dimension to judicial improvement or recuperation. For one of its major virtues is that it and its personnel remain independent of a range of pressures—some internal to it¹⁶ but most often pressures outside it. Hirschman's voice, by means of which an institution such as the judiciary may be held accountable by those outside as well as those within, may also be construed as a threat to its independence.

Although the paradox may be partially addressed by Hirschman's presumption of loyalty—the commitment that voice expresses to the institution's animating concerns. Nevertheless, even benign criticism from outside may infringe the judiciary's legitimate claim to independence.

What we need to develop or avail ourselves of are ways of expressing voice that will not compromise legitimate independence. That is almost certainly possible if the workings of the judiciary are sufficiently transparent. We may, for example, develop a complaint system in which, even though complaints are reviewed and dealt with internally, they are monitored by means of a suitably detailed annual report. Open courts and written opinions also constitute other means whereby independence can be sustained but accountability served, though there is probably an argument for a more extensive use of written or other records of judicial proceedings.

This is not the place to engage in a detailed discussion of the extent to which various kinds of voice are compatible with and even foster an appropriate judicial independence. I would say, though, that independence as a value rather than as a policy presumes the accountability of those for whom it is advocated. To the extent that those who claim it show themselves accountable to the legitimate expectations associated with their role, especially their impartiality, their independence should be secure and secured.

Even though some fine-tuning is probably appropriate, I am not sure whether we need more vehicles for accountability than we already have. What I think is important is that the ones that we have be made to work. And ultimately this is not a matter of mechanisms so much as goodwill. The mechanisms are there to support and sustain goodwill, and good will should see that the mechanisms work as they should.¹⁷

¹⁶ We do not want judicial bullying whereby some members of the judiciary intimidate or improperly favor some over others. Nor do we want some currying favor with or otherwise inappropriately influencing or seeking to influence others.

¹⁷ I want to acknowledge the very valuable research assistance provided by Sarah Hoffman.