The Justified and the Indefensible Gap:

Reconciling the Rule of Law with the Demands of Ethics

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Abstract

The law is a floor, not a ceiling. It marks the minimum a society will tolerate, not the height to which it aspires, and the distance between the two is the space in which the question of integrity is decided. This article examines that space: the gap between what the law permits and what ethics demands. It argues that the gap is not one thing to be condemned or excused as a whole, but two things that must be told apart. Part of it is justified, the deliberate restraint of a legal order that will not punish what it cannot define with fair notice, and that restraint is itself a moral commitment. Part of it is indefensible, conduct that betrays impartiality and the public trust yet escapes sanction by accident of statutory wording. Drawing upon the masters of jurisprudence and moral philosophy, this article reckons with the human cost borne by those who live within the indefensible gap while the law catches up, and it closes with matched remedies that close that gap while preserving the justified one. The analysis is offered without partisan purpose; its cases span officials of differing affiliations, corporations, and regulators, because the gap operates with equal force no matter who holds power.

Keywords: Rule of Law, Legal Positivism, Natural Law, Non-Domination, Impartiality, Public Trust, Institutional Corruption, The Compliance Paradox, Quid Pro Quo, Behavioral Ethics, Legitimacy

Introduction: The Lawful and the Wrong

Few convictions are as widely shared, or as deeply felt, as the sense that an act may be perfectly legal and still be wrong. A regulator retires on a Friday and joins the board of the company she policed on a Monday. A corporation books its profits through a subsidiary taxed at a fraction of a single percent. An official accepts a payment from the very firm whose contract he has just approved. Each of these may survive every legal test that can be put to it, and each may still strike an ordinary citizen as a betrayal of trust. The space between what the law permits and what conscience condemns is the subject of this article.

Consider one documented instance, decided at the highest level. In *Snyder v. United States* (2024), the Supreme Court of the United States held that the principal federal statute reaching state and local officials, 18 U.S.C. § 666, criminalizes bribes but not gratuities, that is, rewards given for official acts already performed, absent any prior corrupt agreement. The petitioner had been the mayor of Portage, Indiana, when the city awarded a local truck dealership roughly 1.1 million dollars in contracts for five garbage trucks. The following year, the dealership paid him 13,000 dollars. He called the money a consulting fee; federal prosecutors called it a reward for the contracts; a jury convicted him. The Court reversed, reasoning that a gratuity for a past act, unaccompanied by a quid pro quo, falls outside the statute (Snyder v. United States, 2024). After the ruling, the payment was lawful. Whether it was ethical is an entirely different question, and the difference between those two questions is the whole of the matter.

The title of this article makes two commitments, and the argument is bound to honor both. The first is to a distinction. The gap between law and ethics is not a single, undifferentiated failing. Some of it is justified, the unavoidable and even honorable consequence of a legal order that refuses to punish what it cannot define clearly and in advance. Some of it is indefensible, the product not of principle but of drift, in which conduct that any reasonable ethics would condemn

escapes sanction through nothing more than the accident of statutory language. A serious treatment must separate the two rather than celebrate or lament the gap as a whole. The second commitment is to reconciliation. The purpose here is not to crown a victor between the rule of law and the demands of ethics, but to show how a mature legal and civic order may honor both at once: closing the indefensible portion of the gap while protecting the justified portion that liberty requires.

The argument proceeds in ten further parts. The next section, "Two Inheritances," recovers the inheritances, jurisprudential and moral, that make the lawful-but-wrong intelligible at all. "The Convergence" describes how the modern state sought to govern ethics by statute. "The Divergence" traces the recent divergence through cases that actually occurred. "A Test for Sorting the Gap" offers an explicit test for sorting the gap. The two sections that follow present, in their strongest and mutually conceding forms, the case for the justified gap and the case against the indefensible one. "The Compliance Paradox" names the mechanism that connects the doctrine to the harm. "Applying the Test" sorts the documented cases. "Reconciliation" proposes reconciliation through remedies matched to the harm, and the Conclusion closes the argument.

A Note on Stance. *This article takes no side in partisan politics and is not a criticism of any party, administration, or movement. Its examples are drawn deliberately from across government, the private sector, and the regulatory state, and they involve actors of differing political affiliations, for one reason: the divergence between law and ethics is structural, not the property of one faction. Where the analysis relies on judicial decisions, it emphasizes that several of the most consequential of them were unanimous, which is itself evidence that the phenomenon is institutional rather than political.*

Two Inheritances: The Masters of Jurisprudence and of Ethics

The Separability of Law and Morals

The engine of the dilemma was set turning in the *Harvard Law Review* in 1958, in the exchange between H. L. A. Hart and Lon Fuller. Hart defended the positivist thesis of separability: whether a rule is law is one question, and whether it is good is another, so that an unjust rule may be perfectly valid law (Hart, 1958; Hart, 1961). Fuller answered that law carries an inner morality of its own, a set of procedural virtues, generality, publicity, prospectivity, clarity, and consistency, without which a system is not law at all, so that fidelity to law and the judgment of its goodness cannot be cleanly severed (Fuller, 1958; Fuller, 1964). The poles were refined by those who followed. Joseph Raz grounded the authority of law in its claim to give reasons for action that do not depend on their content (Raz, 1979); John Finnis revived a natural-law account anchored in the basic goods of human life (Finnis, 1980); and Ronald Dworkin argued that law includes the principles that best justify it, so that the hardest cases are decided by moral reasoning internal to the legal practice itself (Dworkin, 1986).

The lesson is double, and both halves matter to this article. Positivism makes the gap *intelligible*: because validity and merit are distinct, a thing may be legal and wrong without contradiction. The natural-law and interpretivist traditions make the gap *troubling*: because law aspires to do justice, a divergence that persists is evidence of legal failure, not merely of conceptual neatness. As the test set out below will show, it is Fuller's insight, that the procedural virtues of legality are themselves moral commitments, that finally permits the reconciliation the title promises.

The Moral Traditions and the Reach of Law

The moral inheritance is no less double-edged, and it is the same inheritance that grounds professional ethics across the disciplines. Aristotle located the good in *eudaimonia*, the flourishing achieved not through pleasure or wealth but through the habitual exercise of virtue, an active condition of the soul rather than a passive routine. "We become just by doing just acts," he wrote, and the claim is as true of an institution as of a person (Aristotle, *Nicomachean Ethics*, Book II). Kant grounded duty in respect for persons as ends and in maxims that could be willed as universal law (Kant, 1785/1997). Mill measured the right action by the good it produces for the greatest number (Mill, 1863). Rawls invited the decision maker to choose as if from behind a veil of ignorance, not knowing which role they would occupy when the choice took effect (Rawls, 1971). These traditions often disagree on the verdict. They converge, however, on a structural truth: ethics reaches motive, character, and the spirit of an obligation, while law can compel only outward conformity. The law asks whether a line was crossed. Ethics asks who a person, or an institution, became in approaching it. That asymmetry guarantees that even a flawless statute will leave a moral remainder.

The Contemporary Turn: Non-Domination, Trust, and Institutional Purpose

The classical inheritance does not stand still, and the contemporary conversation deepens it in ways that bear directly on the gap. Philip Pettit's republican theory reframes freedom not as the absence of interference but as the absence of *domination*, the condition in which one is not subject to the arbitrary will of another (Pettit, 1997). The insight reaches further than conventional liberty analysis. On Pettit's account, a citizen who lives under the unaccountable power of a captured regulator or an official whose favor can be purchased is dominated even if no rule is broken, because the power that shapes her life is not answerable to her. The revolving door, the undisclosed gratuity, the self-certifying manufacturer: each represents a structure in which public power

escapes the control of those it governs, and that structural condition is itself a wrong, not merely a risk factor for one.

Onora O'Neill's work on trust complements the republican frame. O'Neill argues that the loss of public trust is not cured by stacking one layer of accountability upon another; indeed, complex systems of compliance and audit can themselves corrode the trust they are meant to restore, by substituting bureaucratic verification for the demonstrated trustworthiness that earns confidence in the first place (O'Neill, 2002; O'Neill, 2014). The argument is a philosophical echo of the behavioral finding discussed below under the Compliance Paradox: compliance is not integrity, and the apparatus of compliance, when it becomes the whole of an institution's moral life, may be its undoing. Seumas Miller's applied-philosophical treatment of institutional corruption advances the analysis still further by insisting that corruption is not reducible to individual wrongdoing; it is a property of institutional structures themselves, structures that may remain formally lawful while systematically defeating the purposes they were created to serve (Miller, 2017). Miller's framework, developed through detailed case studies in government, policing, and finance, provides the conceptual warrant for the claim this article presses in the regulatory-capture context: that the Boeing delegation was not merely unfortunate but institutionally corrupt, even though no single statute was broken by the delegation arrangement itself.

The Convergence: The Effort to Govern Ethics Through Law

For the better part of a century, the response to that remainder was to enlarge the law, to convert the moral expectations placed upon officials and firms into enforceable prohibitions. The resulting architecture is dense and familiar. The bribery statute, 18 U.S.C. § 201, criminalizes the corrupt exchange of a thing of value for an official act. The program-bribery statute, 18 U.S.C. § 666,

extends federal reach to state and local bodies that receive federal funds. The mail- and wire-fraud statutes, through the honest-services theory of 18 U.S.C. § 1346, were turned against undisclosed self-dealing and kickbacks. The Foreign Corrupt Practices Act of 1977 carried the project abroad by forbidding the bribery of foreign officials; the Ethics in Government Act of 1978 built a preventive scaffolding of financial disclosure and, in time, the Office of Government Ethics; and the STOCK Act of 2012 added transparency obligations aimed at self-enrichment in Congress.

This was the convergence: a sustained attempt to make the law coextensive with the public's ethical demands. The comparative and economic scholarship treats such legal machinery as central to the control of corruption, while it cautions, rightly, that statutes alone are never sufficient and must be embedded in a broader institutional reform (Rose-Ackerman & Palifka, 2016). The effort was real, and it was valuable. But it carried an implicit promise that the law could not keep: that legality and ethics would move together.

The Divergence: How the Law Came to Permit the Wrong

The Judicial Narrowing of Corruption

Over ~fifteen years, the Supreme Court has steadily contracted the legal definition of corruption, and it has done so, for the most part, with a striking unanimity in three cases that cross the usual ideological lines. In *Skilling v. United States* (2010), arising from the collapse of Enron, the Court confined honest-services fraud to bribery and kickback schemes and cut away a broad theory of undisclosed self-dealing. In *Citizens United v. FEC* (2010) and *McCutcheon v. FEC* (2014), the Court recognized only quid pro quo corruption, the direct trade of dollars for official acts, as grave enough to justify limits on political spending, and it declined to treat the cultivation of access and influence as a cognizable form of corruption at all. The practical sequel, the rise of independent-expenditure committees and undisclosed money, has been pursued with equal vigor by groups

aligned with every part of the political spectrum, which is precisely why the development is best read as structural rather than partisan.

Several later decisions sharpen the point, because in each the conduct was, by any ordinary moral measure, troubling. In *McDonnell v. United States* (2016), a unanimous Court vacated the conviction of a former governor of Virginia who, with his wife, had accepted roughly 175,000 dollars in loans and gifts, among them a Rolex watch, the use of a Ferrari, designer clothing, and assistance with a daughter's wedding, from a businessman who sought state university studies of his company's dietary supplement. The Court did not bless the conduct. It held only that an official act requires a formal exercise of governmental power, so that arranging meetings and hosting events did not qualify, and federal prosecutors ultimately declined to retry the case (McDonnell v. United States, 2016). In *Kelly v. United States* (2020), the matter known as Bridgegate, a unanimous Court reversed the fraud convictions of two officials who had engineered days of gridlock by realigning bridge toll lanes to punish a mayor for withholding a political endorsement. The Court openly acknowledged that the scheme involved "deception, corruption, abuse of power," and yet held that it was not federal fraud, because its object was political retribution rather than money or property (Kelly v. United States, 2020). In *Ciminelli* and *Percoco* (2023), the Court discarded the right-to-control theory and rejected open-ended honest-services duties for private citizens, and in *Snyder* (2024) it completed the arc by reading Section 666 to exclude gratuities.

Recent scholarship reads these decisions as a single line of reasoning: a textualist insistence that criminal liability rest upon precise statutory language, animated by concern for fair notice, the separation of powers, and federalism (Tuli & Arafa, 2025). Whatever one concludes about the soundness of that reasoning, its effect is to enlarge the field of conduct that is corrupt in the ordinary moral sense and lawful all the same. The legal definition of corruption has been narrowed faster than the public's.

Beyond the Criminal Law: Revenue and Regulation

The divergence is not confined to the criminal courts. Aggressive corporate tax structuring exploits the distance between the letter of tax law and its purpose. The most consequential recent illustration is the Apple matter. For years the company routed its European profits through Irish subsidiaries, attracting effective rates the European Commission placed as low as 0.005 percent, while Apple maintained throughout that it paid what it owed and received no special arrangement. In September 2024, the Court of Justice of the European Union held the arrangements to be unlawful state aid and directed Ireland to recover some 13 billion euros (Commission v. Ireland and Apple, 2024). The episode captures the structure of the dilemma exactly: conduct designed to be lawful, defended as lawful, and yet the object of a sustained moral objection that no single statute resolves (de Colle & Scarpa, 2020; Goldman & Lewellen, 2020).

Regulatory capture supplies the gravest illustration, because here a lawful arrangement produced lethal harm. Under the Federal Aviation Administration's Organization Designation Authorization program, a framework Congress itself encouraged, aircraft manufacturers were delegated the authority to certify aspects of their own designs; by the agency's own data, designated organizations approved roughly 94 percent of the certification activities for their companies (U.S. DOT Office of Inspector General, 2021). After two crashes of the Boeing 737 MAX, Lion Air Flight 610 in 2018 and Ethiopian Airlines Flight 302 in 2019, which together took 346 lives, a congressional investigation found a culture of deference and conflicts of interest, and the same Inspector General report identified weaknesses in the certification and delegation processes (U.S. House Committee on Transportation and Infrastructure, 2020; U.S. DOT Office of Inspector General, 2021). No statute was necessarily broken by the delegation itself. The harm flowed from a lawful structure of dependence, the very condition the literature on regulatory capture and on institutional corruption describes (Carpenter & Moss, 2014; Lessig, 2011; Thompson, 1995). The

claim of that literature fits the case precisely: institutional corruption need not involve any illegal, or even any individually unethical, act; a lawful system of dependence can divert an institution from its purpose and dissolve the trust on which it depends (Lessig, 2013; Miller, 2017).

A Test for Sorting the Gap

If the gap is to be divided rather than condemned or excused as a whole, the division must rest upon stated criteria rather than upon instinct or distaste. The test that follows is announced before it is applied, so that the reader may measure each verdict against the standard rather than against the writer's preferences. It has two parts, and each is grounded in the traditions recovered above.

A gap is *justified* when permitting the conduct protects a genuine value of the rule of law, a value whose abandonment would itself carry a moral cost. Four such values recur, and each is a moral commitment in its own right, not merely a procedural convenience. The first is *fair notice*: a free society does not punish what was not clearly forbidden in advance, a commitment expressed in the doctrine against vagueness and in the maxim that there is no crime without law. This is a Kantian requirement at its core; to punish where no clear rule was announced is to treat the person punished as a means to the state's ends rather than as a rational agent entitled to order her own conduct. The second is the *separation of powers*: it is for legislatures, and not for prosecutors or judges, to define crimes, and to read a statute to reach whatever seems corrupt is to transfer that authority to those who enforce it. This is a structural commitment to non-domination in Pettit's sense; concentrated and unaccountable power over the definition of offenses is arbitrary power, even when exercised with good intentions (Pettit, 1997). The third is *federalism*: conduct that one community tolerates should not be made a federal felony without a clear command. Behind this lies a Rawlsian recognition that reasonable communities may differ on the boundaries of acceptable political behavior, and that forcing a single standard from the center imposes a

uniformity that the veil of ignorance does not require. The fourth is *protected liberty*: lawful tax planning is widely regarded as a legitimate ordering of one's affairs, and independent political expression as protected speech, so that the gap in these zones is the space in which recognized freedoms are exercised. These four values are chosen because they represent the conditions under which law can claim the moral authority Fuller described; they are not an exhaustive catalog of goods, but they are the recurring justifications the courts themselves have given, and each can be traced to a commitment the traditions recovered above would recognize as genuinely moral.

A gap is *indefensible* when two conditions hold together. First, the conduct violates a core demand of ethics: impartiality, the even-handed exercise of public power (Rothstein & Teorell, 2008; Mungiu-Pippidi, 2015); fidelity to those whom the actor is bound to serve; or faithfulness to the defining purpose of an institution (Newhouse, 2014; Miller, 2017). Second, no offsetting value of the rule of law is in fact served by permitting it, so that the immunity is an artifact of statutory drift and not a considered protection of notice, of liberty, or of democratic structure.

Between the two halves lies the reconciliation, and it belongs to Fuller. The values of the rule of law that justify part of the gap are not constraints imposed upon ethics from the outside; they are themselves ethical commitments, the procedural morality without which law cannot do justice at all (Fuller, 1964). Seen in that light, much of what presents itself as a contest between law and ethics is in truth a contest *within* ethics, between its procedural and its substantive demands, both of which a decent order is bound to honor. That recognition dissolves the false dilemma and earns the word reconciliation. One caution follows directly from the structure of the test. The indefensible must never be allowed to collapse into the merely distasteful. The test is therefore applied below even where it cuts against the intuitive verdict.

The Case for the Justified Gap

It would be a failure of candor, and the critics of the gap should concede as much, to treat every instance of lawful-but-questionable conduct as a wrong to be corrected by another prohibition. There is a principled case, and not merely a cynical one, for a legal definition of wrongdoing that sits deliberately below the ethical one.

Were the unethical itself the legal standard, the criminal law would expand to the limits of moral disagreement, and the discretion of the prosecutor would become the power to punish the merely distasteful. The narrowing decisions, whatever one thinks of their results, give voice to exactly these concerns: that a vague corruption statute invites arbitrary enforcement, that federalism counsels against nationalizing every local rule on gifts, and that the line between hard politics and crime must be drawn by the legislature, in advance (McDonnell v. United States, 2016; Snyder v. United States, 2024). The deepest form of the position is Hartian. To keep law conceptually distinct from morality is not a license for injustice; it is the very thing that makes the moral criticism of law possible. If whatever is legal were, by definition, ethical, the citizen would lose the ground on which to stand and say that a lawful act is wrong, and to demand that the law be changed (Hart, 1958).

The concession the defenders owe in return is as important as the case itself: to say that conduct is rightly left lawful is not to say that it is right. The space the rule of law protects is a space for freedom and for moral judgment, not a certificate of virtue. A governor who escapes conviction has not thereby behaved honorably, and a corporation that prevails in a tax case has not thereby discharged its obligations to the public. The justified gap is a limit upon punishment. It is not a verdict upon ethics, and the section on reconciliation will show how much may be done within it, short of the criminal law.

The Case Against the Indefensible Gap

The competing position accepts the need for legal precision and denies that a narrow legal definition of corruption is therefore without cost. Its claim is direct: a visible and persistent divergence between legality and ethics corrodes the legitimacy on which lawful government depends.

The scholarship on the quality of government treats impartiality, the even-handed exercise of public power, as the defining virtue of sound institutions, and corruption as its violation (Rothstein & Teorell, 2008; Rothstein, 2011). On that account, conduct that lawfully secures special access or favor is corrupt in the relevant sense even where no statute is broken, because it betrays impartiality. Alina Mungiu-Pippidi frames corruption as a departure from ethical universalism, the principle that the state treats all citizens alike, and shows that durable control of corruption rests on shared norms and not on enforcement alone (Mungiu-Pippidi, 2015). The literature on institutional corruption converges with both: when influence works through lawful channels, as it did in the delegation that preceded the 737 MAX disasters, the injury to public trust, and there to human life, may be greater rather than lesser, precisely because it cannot be prosecuted (Carpenter & Moss, 2014; Lessig, 2013; Newhouse, 2014). The republican tradition, as Pettit frames it, adds a further dimension: citizens who live under institutions that can be captured or bought are dominated, subject to power they cannot control, even if the domination takes a form no statute prohibits (Pettit, 1997).

There is, finally, an expressive cost. When the law declines to condemn what the public regards as corrupt, the decision communicates permission. Each narrowing of the meaning of an official act, or of a bribe, does more than spare a single past offense; it signals to those who come after that the conduct is acceptable, and it shifts the norm downward. The concession the critics owe in return is that some of the gap is the unavoidable price of liberty and of fair notice. The task

is not to abolish the gap but to identify the portion that no value of the rule of law defends, and to meet that portion by means other than the ever-broader criminal statute (Rose-Ackerman & Palifka, 2016).

The Compliance Paradox: Why Lawfulness Is Not Integrity

Between the two positions lies a finding that strengthens the critics' case without abandoning the defenders' commitment to clear rules. The research in behavioral ethics demonstrates that most misconduct is not the work of calculating villains, but of ordinary people who rationalize, who fail to perceive the ethical dimension of their choices, and who act against their own values without ever recognizing that they have done so, a condition its scholars call bounded ethicality (Chugh, Bazerman, & Banaji, 2005; Bazerman & Tenbrunsel, 2011). What is more, the formal compliance system can produce a phenomenon those scholars term ethical fading: by recasting a moral question as a technical one, by asking "Is it allowed?" in place of "Is it right?", compliance can crowd out moral attention rather than reinforce it (Bazerman & Sezer, 2016). O'Neill reaches the same conclusion from a philosophical direction: accountability regimes that rely on formalized structures of verification and audit, rather than on cultivating the conditions of demonstrated trustworthiness, may destroy the very trust they claim to rebuild (O'Neill, 2002; O'Neill, 2014).

This is the same paradox that this author documented in the public procurement context and named the Compliance Paradox: the very structures designed to prevent corruption, the rigid hierarchies, the elaborate protocols, the procedural safeguards, may inadvertently enable it, filtering out low-level opportunism while creating opaque mechanisms that sophisticated actors learn to exploit (Sevillian, 2026). The finding did not emerge from doctrine or from theory. It emerged from years of researching procurement fraud in South Florida, from sitting across from professionals who managed compliance systems and listening to them describe, with evident

frustration, how the protocols meant to stop corruption had become the instruments through which it operated. The rigid bid specifications that were supposed to ensure fairness became the tools by which insiders shaped competitions to favor predetermined winners. The documentation requirements that were supposed to create transparency became the paper trail that gave the appearance of regularity to transactions that were anything but regular. The compliance officer who could certify that every box had been checked became, without intending it, the guarantor of a process whose substance had been hollowed out. What those interviews revealed, and what the subsequent analysis confirmed, was that sophisticated corruption does not break the rules; it colonizes them.

The lesson generalizes well beyond procurement. Yuval Feldman's synthesis sharpens it: because so much harm flows from good people operating in the gray zones of the law rather than from unambiguous lawbreakers, a regime that polices only the unambiguous will miss the greater part of the wrong (Feldman, 2018). Here is the decisive link between the doctrine and the harm. Each judicial narrowing of corruption converts a question that was once both ethical and legal into a question that is merely technical, and the behavioral evidence predicts that the conversion itself will dull the moral perception that once stood guard. The cost of lowering the legal floor is therefore larger than the set of acts it newly permits. It includes the erosion of the conscience that once policed the gap without being told to.

Applying the Test: The Cases Reconsidered

A test earns its keep only when it sorts real cases in the open, including the cases in which it cuts against first impressions. Applied to the documented episodes already before us, the criteria set out above yield the following.

The *Citizens United* line is, on the whole, *justified*, and this is the verdict most likely to provoke, because the doctrine is widely disliked. The strongest version of the objection deserves to be met head-on: that the liberty value at stake is nominal rather than real, because the speech in question is predominantly corporate and institutional rather than individual, and because the access and influence that large expenditures purchase is functionally indistinguishable from the quid pro quo the Court purports to prohibit. The objection has force. But it does not overcome the test. The distinction between a direct exchange and the cultivation of influence, however thin it may appear in practice, is the distinction upon which the separation of powers and fair notice depend; to collapse the two is to hand prosecutors the power to define corruption at the limits of their own judgment, which is precisely the vagueness problem the rule of law exists to prevent. The gap here is principled and not accidental. That does not make the underlying influence benign. It means the proper response to the ethical concern is disclosure, the sunlight of full and timely reporting, rather than a prohibition that would override a recognized right. *Skilling* is a *justified* narrowing as well: it was driven by fair notice, and the underlying fraud at Enron remained independently punishable, so the rule-of-law value was both real and offsetting.

McDonnell is properly *split*, and the split is the very distinction this article presses. The limitation of the official act is justified as a boundary upon criminal liability, for the reasons of notice and structure the Court gave; the governor's acceptance of 175,000 dollars in gifts is indefensible as a matter of ethics, for it offends impartiality at its root. The remedy lies not in federal criminalization but in robust state gift bans and disclosure. *Kelly* leans *indefensible*: the Court itself named the scheme deception, corruption, and abuse of power, and little value of the rule of law is served by leaving it wholly unanswered beyond the technical limit that fraud must target money or property; the remedy is a targeted state statute against the abuse of public office. *Snyder* leans *indefensible* for the same reason: a gratuity for a completed official act offends

impartiality while serving almost no liberty value, and the immunity is an artifact of statutory reading, to be cured by a clear gratuities provision joined to disclosure.

The Apple matter occupies the contested middle, where a real value, the freedom to order one's affairs within the law, collides with conduct that defeats the law's evident purpose; the remedy is legislative, the closing of the loophole through measures such as a global minimum tax, rather than condemnation after the fact. The Boeing delegation is indefensible by design: a lawful structure of dependence captured the regulator, and no value of the rule of law defends the dependence itself, so the remedy is the institutional redesign of oversight, which the post-crash legislation has begun.

The test has now done its sorting work. The verdicts are stated, the criteria are transparent, and the remedies will follow in the section on reconciliation. But before the analysis turns to reconciliation, it must reckon with something the test itself cannot measure: the weight of the harm that falls on real people while the gap between law and ethics remains open.

A Reckoning Owed

The 346 passengers and crew members who died aboard Lion Air Flight 610 and Ethiopian Airlines Flight 302 did not experience a problem of regulatory theory; they experienced the consequence of a lawful structure that placed the certifier and the certified in the same corporate body, and no amount of procedural refinement will speak to their families with the authority of that fact. The citizens of Portage, Indiana, whose tax dollars funded the contracts that generated the gratuity the Court declined to criminalize, did not experience a question of statutory interpretation; they experienced the corrosion of the trust they had placed in the office of mayor. The test proposed above is a tool of analysis. It is not, and must never become, a reason to look away from the human weight of the conduct it classifies. Any reconciliation worthy of the name must begin with the

acknowledgment that the indefensible gap is not merely a doctrinal imperfection. It is a wound in the relationship between the governed and those who govern, and the people who live within it are entitled to more than patience.

Reconciliation: Stewarding the Gap

Reconciliation is not compromise for its own sake. It is the matching of the instrument to the harm. The justified gap calls for restraint; the indefensible gap calls for action; and the two demand different tools. The program that follows is layered, and each layer carries its own caution.

First, the targeted repair of the law, for discrete and indefensible wrongs. Where the courts have narrowed a statute on textual grounds, the constitutional answer is for the legislature to legislate clearly: to define the official act with precision, and to close the gratuities gap that *Snyder* opened, while drafting with the very care for notice and vagueness that the defenders of the gap rightly demand. This honors both halves of the test at once.

Second, institutional redesign, for the systemic gaps that are wrong by their design. Lawful dependence, the revolving door, the captured regulator, the unmanaged conflict of interest, is cured far better by structure than by prosecution: by independent oversight, by genuine separation between the regulator and the regulated, by cooling-off periods, and by enforced recusal. The reforms to aviation certification that followed the 737 MAX are this logic at work (U.S. House Committee on Transportation and Infrastructure, 2020).

Third, restraint where the gap is justified, paired with transparency. Protected expression and lawful tax planning are met not with the criminal law but with sunlight: the disclosure of political spending, of beneficial ownership, of tax arrangements, so that the public may see and judge what the law permits.

Fourth, behavioral design. Institutions should keep the moral dimension of a decision in view, framing the choice as an ethical one and not merely a permitted one, and refusing to let the compliance apparatus license the fading of conscience (Bazerman & Sezer, 2016; Feldman, 2018).

Fifth, character and culture, the oldest remedy and the last line. Because durable integrity rests upon shared expectation and formed character, the work is finally Aristotelian: the deliberate formation of officials and professionals, and the willingness of leaders to name a lawful act as wrong when it is wrong, so that those who act aim above the legal floor rather than at it (Mungiu-Pippidi, 2015; Rothstein, 2011).

Each layer carries a caution, and the discipline of the test is what keeps the program honest. More criminal law is not always better, for the over-broad statute recreates the vagueness and the politicization the defenders fear. Disclosure can decay into ritual; the oversight body can itself be captured; the language of culture can become a substitute for the work of it. Clear law for the discrete and indefensible wrong, institutional design for the systemic dependence, and restraint joined to transparency where liberty and notice genuinely justify the gap: this is the shape of a reconciliation that asks of the law only what the law can give, and asks the rest of ourselves.

Conclusion: The Space Between Validity and Virtue

The lawful-but-wrong is not a defect to be engineered away. It is the permanent shadow of any legal order that, wisely, holds the validity of a rule apart from its virtue. The positivist is right that this separation is what lets us criticize the law; the natural lawyer is right that a widening gap is a standing reproach to it; and Fuller is right that the procedural values which justify part of the gap are themselves moral, so that the apparent contest between law and ethics is, in large measure, a contest within ethics that a decent order can reconcile. Recent doctrine has widened the gap by narrowing corruption toward the bare exchange, and the behavioral evidence warns that the

narrowing dulls the very conscience that once filled the space. The task before us is therefore neither to collapse the law into morality nor to surrender ethics to legality. It is to steward the space between them: to close the indefensible portion of the gap through clear law and sound institutions, and to inhabit the justified portion with the transparency, the civic norm, and the formed character that legality alone can never supply. To say of an act that it is legal should remain the beginning of our moral evaluation of it, and never the end. Justice Brandeis reminded us that sunlight is the best of disinfectants (Brandeis, 1914), and so it may be; but the light must fall upon a conscience that is still awake to see what it reveals.

A Note on Sources and Citation. Citations follow an author-date style; cases and the European judgment are given in legal form. Where a stable public version exists, a URL or DOI has been provided; the remaining entries are books or paywalled articles for which no open address is available, and the legal citations themselves serve as the locator. Statutes named in the text include the Foreign Corrupt Practices Act of 1977, the Ethics in Government Act of 1978, the STOCK Act of 2012, and 18 U.S.C. §§ 201, 666, and 1346. The factual particulars of each case were taken from the decisions and official reports themselves.

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