From Quid Post Quo to Quid Pro Quo: Toward an Evidentiary Standard for 18 U.S.C. § 666 after *Snyder*

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This Comment addresses a question left unanswered by the Supreme Court's recent decision in Snyder v. United States. Snyder *held that the federal funds bribery statute, 18 U.S.C. § 666, covers only bribes, not gratuities. That is, an agreement to exchange payment for an official act by a state or local government official is criminally prohibited (if the official's agency receives a certain amount of federal funding). But § 666 does not prohibit payments made after official acts so long as there was no agreement to conduct a quid pro quo exchange beforehand. Thus, the key issue in cases with this factual posture is whether a quid pro quo agreement occurred. The* Snyder *Court did not suggest any answer for how courts, juries, and attorneys can go about resolving this issue.*

This Comment formulates a response to Snyder*'s unanswered question by turning to antitrust law. Litigation under § 1 of the Sherman Antitrust Act faces the same basic problem as § 666 cases after* Snyder*: determining whether an illegal agreement has occurred when both parties benefit from it and are therefore interested in keeping it hidden. Out of all the areas of law that consider this general issue, antitrust has the best-organized response. It has developed, through case law and scholarly commentary, a set of "plus factors" that explain to litigants, judges, and juries what circumstantial evidence will suffice to prove an illegal agreement in restraint of trade. This Comment's innovation is to convert that framework from antitrust law into the bribery context. After providing relevant background on bribery law, the* Snyder *case, and permissive inference jury instructions, it explains the relevant similarities between antitrust and bribery law. It then develops a set of ten bribery plus factors: four that it directly converts from the antitrust plus factors and six that it draws from federal appellate case law on quid pro quo bribery under § 666. It concludes by offering some recommendations for the application and further refinement of these plus factors in both the jury instruction and appellate review contexts.*

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INTRODUCTION

Bribery of public officials is a classic form of political corruption. Conventional wisdom regards both giving and receiving bribes as immoral, condemning each side of the bribe for harming public trust, efficient government, democracy, and social equality.[1] In the United States, public corruption in general has become

[1] For extended moral, conceptual, and theoretical discussions of bribery, see Stuart P. Green, *What's Wrong with Bribery*, *in* DEFINING CRIMES: ESSAYS ON THE SPECIAL PART OF THE CRIMINAL LAW 143, 151–64 (R.A. Duff & Stuart P. Green eds., 2005); DAVID H. HOFFMAN & JULIET S. SORENSEN, PUBLIC CORRUPTION AND THE LAW: CASES AND MATERIALS 5–6

more prevalent over the past decade; it is also more common in the United States than in many peer Western countries.[2] Bribery, like other forms of corruption, occurs most frequently among state and local public officials.[3] It is an especially vexing criminal matter because both parties involved in a bribe are interested in keeping it hidden—after all, both can be prosecuted. The law most often used to prosecute givers and receivers of bribes is a federal criminal statute that covers state and local officials: 18 U.S.C. § 666.[4]

This statute (1) prohibits state and local officials in jurisdictions that receive federal money from accepting or agreeing to accept payments "intending to be influenced or rewarded in connection with" official acts they take and (2) criminalizes the making or offering of such payments.[5] The Supreme Court recently construed § 666 in *Snyder v. United States*,[6] holding that only "payments made or agreed to *before* an official act in order to influence the official with respect to that future official act" are unlawful under § 666.[7] Prior to *Snyder*, some courts had interpreted § 666 to cover "gratuity" payments made after and because of an official act but without a prior agreement to exchange a payment for the act.[8] Now, however, the Supreme Court has prohibited conviction

(2017). *See generally* JOHN T. NOONAN, JR., BRIBES (1984); Deborah Hellman, *A Theory of Bribery*, 38 CARDOZO L. REV. 1947 (2017); Alex Stein, *Corrupt Intentions: Bribery, Unlawful Gratuity, and Honest-Services Fraud*, 75 LAW & CONTEMP. PROBS. 61 (2012).

2 *See* Cailey Griffin & Amy Mackinnon, *Report: Corruption in U.S. at Worst Levels in Almost a Decade*, FOREIGN POL'Y (Jan. 28, 2021), https://perma.cc/7R7Z-LDE8. The article cites a report from 2020; in the most recent 2024 report, the U.S. score had worsened by 2 points since 2020 on a 100-point scale. *See id.*; *Corruption Perceptions Index*, TRANSPARENCY INT'L (2024), https://www.transparency.org/en/cpi/2024.

3 *See Modest Increase in Official Corruption Convictions in 2023*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE (Jan. 31, 2024) [hereinafter *Modest Increase*], https://perma.cc/MUL4-TQWX. Bribery and corruption occur more often among state and local officials than among federal officials due to the numerical discrepancy between those sets of officials (there are around 20.7 million state and local government employees and only around 2.9 million federal employees), a hallmark of the federal system's decentralization of power. *See id.*; Federal Reserve Bank of St. Louis, *All Employees, Government*, FED. RSRV. ECON. DATA (last updated Sept. 5, 2025), https://perma.cc/ZMQ7-CE4Y (estimating the current number of federal, state, and local employees at 23.6 million); Federal Reserve Bank of St. Louis, *All Employees, Federal*, FED. RSRV. ECON. DATA (last updated Sept. 5, 2025), https://perma.cc/UKV9-K49M (estimating the current number of federal employees at 2.9 million).

4 *Modest Increase*, *supra* note 3.

5 18 U.S.C. § 666(a)–(b).

6 144 S. Ct. 1947 (2024).

7 *Id.* at 1951 (emphasis in original).

8 *See id.* at 1954 (collecting cases).

when the payment is made after the official act without evidence of a prior agreement.[9]

An important question that *Snyder* leaves unanswered relates to the factual circumstances that occurred in *Snyder* itself (and recur rather frequently in other cases[10]), in which there is evidence of a payment to a public official after an official act of the official's government body.[11] Now that *Snyder* has added a quid pro quo requirement to § 666, what additional evidence is necessary for conviction in these circumstances, without direct evidence of an explicit prior agreement? In other words, cases like *Snyder* will likely arise again where prosecutors have proof of a "quid," or payment, and an earlier, related "quo," or official act. But how, after *Snyder*, can the government start from this "quid post quo" (this after that) scenario and then prove by circumstantial evidence that there was a "quid pro quo" (this for that) agreement before the official act? Before *Snyder*, this question would not arise in many circuits; a quid post quo could simply be prosecuted under the gratuity theory of § 666. But after *Snyder* took this theory off the table, the evidentiary threshold for proving a quid pro quo has become a crucial concern across the country for practitioners of public corruption law, as well as for public officials, lobbyists, and otherwise interested citizens. Prosecutors and defense attorneys need to know how to present or defend against evidence of a quid pro quo, judges need to know how to instruct their juries and adjudicate appeals, and government officials and citizens need to know how to comply with federal criminal laws.

To answer how and when a quid post quo becomes a quid pro quo in a post-*Snyder* world, this Comment borrows a framework from antitrust law, which has developed a comprehensive set of indicators to help factfinders infer illegal agreements from circumstantial evidence. Case law on antitrust conspiracy offers a set of "plus factors" that describe the categories of circumstantial evidence from which finders of fact can infer such agreements. The antitrust plus factors are a valuable resource for two reasons:

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9 *Id.* at 1951.

10 *See infra* Part III (discussing cases involving this factual setup).

11 18 U.S.C. § 666(a)(1)(B), (a)(2). This Comment frequently refers in shorthand to the first half of a bribe (or gratuity) as a payment, but the statute defines it as a transfer of "anything of value," so a bribe can be many things other than a cash transfer or check. *Id.* Likewise, this Comment refers to the other half of a bribe as an official act, but the statute defines it more capaciously as "any business, transaction, or series of transactions" of the bribe recipient's organization. *Id.*

they directly address the problem of inferring illegal agreements, and they do so more systematically than any other area of law. This Comment adjusts several of these factors to fit the bribery context. It then devises several independent plus factors, synthesizing the facts and analyses of federal appellate cases on § 666. This Comment ultimately proposes ten bribery plus factors that, when combined with a prior official act and a subsequent payment, should permit a jury to infer a quid pro quo agreement and thus to convict a defendant under § 666. Taken together, this Comment's proposed plus factors add systematic coherence to a body of case law that is currently very fact dependent. This Comment stops short of contending that these factors would require a conviction if present, due to both the factbound nature of the illicit agreement issue and the constitutional restrictions on mandatory jury presumptions in criminal cases.[12] Instead, the plus factors categorize the types of circumstantial evidence that courts should let juries use to infer the existence of a quid pro quo bribe.

The concept of plus factors for bribery agreements has never been proposed, so this Comment addresses some possible reasons for courts' and scholars' failure to consider applying an innovation from antitrust law to criminal bribery. Overcoming several possible objections to its novel approach, this Comment argues that the similarities between antitrust and bribery in the specific context of inferring illicit agreements outweigh those fields' differences and justify importing the plus factors from antitrust law to bribery and thus clarifying this area of law.

Part I of this Comment outlines the background of § 666 and its place in the scheme of federal bribery law before explaining how the Supreme Court narrowed it in *Snyder* and outlining the facts and procedural background of that decision. *Snyder*'s background tees up the question of how to prove bribery by circumstantial evidence. Part I also gives a brief overview of rules on permissible inferences and mandatory presumptions in criminal cases to situate this Comment's recommendation in its constitutional context. Part II brings in the antitrust analogy, explaining the relevant similarities and differences between the two areas of law and developing the first four bribery-specific plus factors. Part III sets out the remaining six plus factors by drawing principles from a set of instructive circuit court decisions that predate *Snyder*, then provides this Comment's final list of bribery plus

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[12] *See infra* Part I.E.

factors to be used for permissible inferences (also referred to as permissive inferences). Part IV concludes the inquiry by suggesting some preliminary principles to guide future prosecutions.

I. LEGAL BACKGROUND

To understand the legal issues this Comment covers, some background on federal bribery law and the constitutional rules governing jury inferences from circumstantial evidence is necessary. This Part introduces the four primary federal bribery statutes. Next, it covers the *Snyder* decision itself. It concludes with an overview of how the Supreme Court has set boundaries on permissible inferences in criminal cases.

A. The Federal Funds Bribery Statute: 18 U.S.C. § 666

Under the federal criminal statute 18 U.S.C. § 666, state and local government employees and officials may not corruptly take payments for their official work. Nor may anyone give such payments. Congress enacted § 666 after some courts interpreted a separate bribery statute, 18 U.S.C. § 201, to apply only to federal officials.[13] Section 666 applies to every "agent" of a state, local, or tribal government, or other organization, that receives more than $10,000 in federal funds "in any one-year period."[14] This jurisdictional requirement relies on the Constitution's Spending Clause and its Necessary and Proper Clause.[15] The theory used to justify the exercise of federal power under the statute is that the United States is entitled to protect the money it spends from being "frittered away in graft or on projects undermined when . . . corrupt public officers are derelict."[16] But the statute is not limited to direct misuse of federal funds; it covers all official actions of every agent of every entity that meets the (practically negligible) $10,000 threshold.[17] This scope means that it can apply to the

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13 *See Snyder*, 144 S. Ct. at 1953.

14 18 U.S.C. § 666(a)(1), (b). As the U.S. Department of Justice interprets the statute, its reference to "organization[s]" covers both public and private recipients of federal funds. *See id.*; U.S. DEP'T OF JUST., JUSTICE MANUAL § 9-46.100 (2020). However, this Comment focuses solely on agents of government entities.

15 *See* Sabri v. United States, 541 U.S. 600, 605 (2004) (citing U.S. CONST. art. I, § 8, cl. 1; U.S. CONST. art. I, § 8, cl. 18).

16 *Id.*

17 *See id.* at 606 ("Liquidity is not a financial term for nothing; money can be drained off here because a federal grant is pouring in there.").

everyday actions of a vast array of state and local officials around the country.[18]

Operationally, § 666 forbids the "agents" to whom it applies from "corruptly solicit[ing] . . . or accept[ing] . . . anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions" of the agent's entity.[19] It also criminalizes the other side of such arrangements, making it unlawful to "corruptly give[ ], offer[ ], or agree[ ] to give anything of value to any person, with intent to influence or reward [an organization's or government's agent], in connection with any business, transaction, or series of transactions" of the agent's entity.[20] One criminal act this language calls to mind is an agreed-upon exchange: the bribe offeror agrees to give the government official "anything of value"; that payment "influence[s]" the government official to agree, in return, to perform "any business, transaction, or series of transactions."[21]

But that is not the only crime the statute's language plausibly suggests. The other is a payment merely to "reward" a public official after an official act without a prior agreement.[22] Such payments are called gratuities, and for decades, several federal appellate courts allowed the government to prosecute the offer or payment of gratuities under § 666.[23] In *Snyder*, however, the Supreme Court declined to read § 666 as those courts had done.[24]

B. The Other Federal Bribery Statutes

To contextualize the reasoning behind the Supreme Court's restriction of 18 U.S.C. § 666, an overview of other bribery-related statutes and similarly restrictive interpretations of them before

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[18] *Cf. Snyder*, 144 S. Ct. at 1958 (using the breadth of activity to which § 666 applies as a reason to interpret it narrowly).

[19] 18 U.S.C. § 666(a)(1)(B). The statute also requires that the business, transaction, or series involve $5,000 or more. *Id.*

[20] *Id.* § 666(a)(2). This provision contains a $5,000 requirement identical to the one for bribe recipients. *Id.* The statute's twin requirements that the government action "involv[e] . . . $5,000 or more" are capacious. *See, e.g.*, United States v. Robinson, 663 F.3d 265, 273–76 (7th Cir. 2011) (describing the breadth of this "subject matter" requirement and holding that the $5,000 can be met by "intangibles," including the decision of law enforcement not to investigate a crime).

[21] 18 U.S.C. § 666(a)(1)(B), (a)(2).

[22] *Id.* § 666(a)(2).

[23] *See* United States v. Abbey, 560 F.3d 513, 520 (6th Cir. 2009); United States v. Zimmermann, 509 F.3d 920, 927 (8th Cir. 2007); United States v. Agostino, 132 F.3d 1183, 1190 (7th Cir. 1997); United States v. Bonito, 57 F.3d 167, 171 (2d Cir. 1995).

[24] *See Snyder*, 144 S. Ct. at 1954.

Snyder is helpful. In addition to § 666, there are three major federal statutes that deal with bribery; courts frequently analyze all four together, and indictments will often charge violations of more than one.[25] The three other statutes are the federal officials bribery statute,[26] the honest services fraud statute,[27] and the Hobbs Act's extortion provision.[28]

1. The federal officials bribery statute.

The federal officials bribery statute, 18 U.S.C. § 201, is more narrowly tailored than § 666, with separate provisions addressing bribery and gratuities. The statute prohibits any federal official or assignee of federal authority from accepting "anything of value . . . in return for[ ] being influenced in the performance of any official act."[29] The statute also prohibits anyone else from offering such an official "anything of value . . . with intent[ ] to influence any official act."[30] Section 201 differs from § 666 because the link between the quid and the quo is "with intent[ ] to influence" (for the bribe giver) and "in return for[ ] being influenced" (for the recipient), as contrasted with the "influence or reward" intent language from § 666.[31] Because it lacks § 666's reference to a reward, this portion of § 201 appears more straightforwardly to cover only bribes.[32]

The Supreme Court in *McDonnell v. United States*[33] provided some useful dicta regarding the standard for proving a quid pro quo.[34] Specifically, the Court held that a quid pro quo agreement "need not be explicit" to obtain a conviction, the means of taking the official act need not be communicated, and "[t]he jury may consider a broad range of pertinent evidence . . . to answer" whether a quid pro quo agreement occurred.[35] That a broad range

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25 *See, e.g.*, *infra* note 71 (discussing *Snyder*'s interpretation of § 666 alongside 18 U.S.C. § 201); *infra* note 189 (noting a judicial construction of § 666 that used case law on the Hobbs Act); United States v. Bryant, 655 F.3d 232, 236, 240–43 (3d Cir. 2011) (assessing the sufficiency of the evidence on § 666 and 18 U.S.C. § 1346 together—and without distinction—when the defendant was charged with violating both statutes).

26 18 U.S.C. § 201.

27 *Id.* § 1346.

28 *Id.* § 1951.

29 *Id.* § 201(b)(2)(A).

30 *Id.* § 201(b)(1)(A).

31 18 U.S.C. § 201(b)(1)(A), (b)(2)(A); *id.* § 666(a)(1)(B), (a)(2).

32 *Cf. Snyder*, 144 S. Ct. at 1954–55 (noting this textual distinction).

33 579 U.S. 550 (2016).

34 *Id.* at 572–73.

35 *Id.*

of evidence suffices to prove a quid pro quo under § 201 supports this Comment's similar contention regarding § 666.[36]

Separately from its bribery provision, § 201 also prohibits gratuities paid to or accepted by federal officials.[37] The statute bars federal officials from soliciting or accepting "anything of value personally for or because of any official act performed or to be performed" by them.[38] And, in parallel language, it forbids anyone else from giving or offering "anything of value" to a federal official "for or because of any official act performed or to be performed" by the official.[39] The separation of this gratuities provision from § 201's bribery provision provided one of the bases for the Supreme Court's holding in *Snyder* that § 666 does not prohibit gratuities,[40] and its language—especially the key linking phrase "for or because of"[41]—can provide a helpful basis for distinguishing bribes from gratuities in future § 666 cases.[42] Section 201's characterization of a gratuity as a reactive response to an official act, and a bribe as a proactive inducement to the act, frame the distinction clearly.

2. The honest services fraud statute.

Another public corruption statute, 18 U.S.C. § 1346, extends the mail[43] and wire fraud statutes[44] to prohibit any "scheme or artifice to deprive another of the intangible right of honest services."[45] To avoid vagueness issues, the Supreme Court limited § 1346 in *Skilling v. United States*[46] to cover only "schemes to defraud involving bribes and kickbacks," the core applications of the statute.[47] Thus, the statute is largely coterminous with the federal

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36 *See infra* Part III.

37 18 U.S.C. § 201(c)(1).

38 *Id.* § 201(c)(1)(B).

39 *Id.* § 201(c)(1)(A).

40 *Snyder*, 144 S. Ct. at 1954–56. Beyond just the separation of bribery and gratuities into two separate offenses, the strikingly disparate statutory maximum punishments in § 201 (fifteen years' imprisonment for bribery but only two years for gratuities) also gave the Court pause. *See id.* at 1956; 18 U.S.C. § 201(b)(4), (c)(3).

41 18 U.S.C. § 201(c)(1)(A)–(B).

42 *Cf.* United States v. Sun-Diamond Growers of Cal., 526 U.S. 398, 404–05 (1999) (discussing in detail the difference between bribery and gratuities in § 201 by focusing on the quid pro quo as the relevant distinction).

43 18 U.S.C. § 1341.

44 *Id.* § 1343.

45 *Id.* § 1346.

46 561 U.S. 358 (2010).

47 *Id.* at 368.

bribery statutes (18 U.S.C. §§ 201 and 666), except that it also covers private sector bribery and kickbacks.[48]

In accordance with the substantial overlap between § 1346 and the rest of federal bribery law, courts often refer to the other bribery statutes when interpreting one of them. For example, *McDonnell* was not actually a case charged under § 201; the only corruption charges were honest services fraud under § 1346 and Hobbs Act extortion under 18 U.S.C. § 1951.[49] The Supreme Court analyzed the case under § 201 because it honored the parties' agreement that its definition of an official act would be exported to the charged statutes.[50] Presumably, then, *McDonnell*'s analysis of proving a quid pro quo also extends across statutes, because the issue of proving a quid pro quo is common to all the statutes, and the Court would not have otherwise accepted the parties' stipulated point of reference.[51]

3. The Hobbs Act's extortion provision.

The final major public corruption statute is different because it does not directly address bribery. The Hobbs Act[52] criminalizes only extortion that "obstructs, delays, or affects [interstate] commerce."[53] The Supreme Court has interpreted the Act's definition of extortion to cover quid pro quo bribery.

The Court construed the Hobbs Act in *McCormick v. United States*[54] in the specific context of campaign contributions.[55] *McCormick* held that conviction under the Hobbs Act for extortion under color of official right required proof of a quid pro quo agreement when campaign contributions were the property obtained by the extortion.[56] In other words, public officials' acceptance of campaign payments violates the Hobbs Act "only if the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act."[57] The Court

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48 *See id.* at 413 n.45. An example of prohibited private sector conduct would be a payment from a manufacturer to a retail employee to give the manufacturer's product preferential store placement unauthorized by the retailer itself.

49 *McDonnell*, 579 U.S. at 562.

50 *Id.* at 562–63, 566–67.

51 *See supra* Part I.B.1; *infra* Part I.B.3.

52 18 U.S.C. § 1951.

53 *Id.* § 1951(a), (b)(3).

54 500 U.S. 257 (1991).

55 *Id.* at 268–69.

56 *Id.* at 274.

57 *Id.* at 273.

did not go into further detail about how such an agreement could be proven or what additional elements might be necessary to obtain a conviction, reserving judgment on whether the government must prove the accused official affirmatively induced the contribution in addition to accepting it.[58] The Court also did not address the scope of the Hobbs Act outside the campaign contribution context.[59]

A case decided only a year later addressed both issues. *Evans v. United States*[60] held that no affirmative act of inducement is required for a Hobbs Act extortion conviction; merely accepting a bribe when in public office suffices.[61] The Court also suggested that a quid pro quo is always required for conviction, reasoning that the Hobbs Act is violated "when the public official receives a payment in return for his agreement to perform specific official acts; fulfillment of the quid pro quo is not an element of the offense."[62] By invoking the quid pro quo, the *Evans* Court implied that it is a necessary element to be proven for Hobbs Act extortion. A concurrence in *Evans* explicitly endorsed this interpretation, and the pattern jury instructions in at least one federal appellate court do the same.[63] *McCormick* and *Evans* demonstrate that Hobbs Act extortion under color of official right is on essentially equal footing with § 666 after *Snyder*, bolstering the importance of the quid pro quo in all of public corruption law. Considering these cases alongside *McDonnell* and *Skilling*, *Snyder* can be understood as the piece that completes the jigsaw puzzle of Supreme Court cases narrowing public corruption statutes to a quid pro quo. But the precedent for *Snyder* does not diminish that

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58 *Id.* at 266 n.5, 274 n.11.

59 *McCormick*, 500 U.S. at 274 n.11.

60 504 U.S. 255 (1992).

61 *Id.* at 268.

62 *Id.* at 267.

63 *See id.* at 272 (Kennedy, J., concurring in part and concurring in the judgment) ("In my view the dissent is correct to conclude that [the majority opinion] requires a quid pro quo as an element of the Government's case in a prosecution under 18 U.S.C. § 1951, and the Court's opinion can be interpreted in a way that is consistent with this rule." (citation omitted)); The Comm. on Fed. Crim. Jury Instructions of the Seventh Circuit, *18 U.S.C. § 1951 Definition of "Color of Official Right"*, *in* THE WILLIAM J. BAUER PATTERN CRIMINAL JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT 788, 788–89 (2023) (citing *McCormick* and *Evans*) ("An extortion conviction 'under color of official right' requires the government to prove a quid pro quo.").

case's significance because it meaningfully changed the controlling interpretation (in much of the country) of what is by far the most used bribery statute.[64]

C. The Supreme Court's Ruling on Gratuities in § 666

In *Snyder v. United States*, the Supreme Court considered whether § 666 prohibits gratuities and not solely bribes agreed to as a quid pro quo before the official act.[65] Based on a careful analysis of the statute's text, history, and structure as well as federalism and due process principles, Justice Brett Kavanaugh's majority opinion concluded that the statute covers only bribes and requires evidence of a quid pro quo.[66] The majority opinion dealt with the statutory term "rewarded"—read as a reference to payments made after an official act—by limiting it to payments that had been agreed to before the official act was taken.[67] No longer would the statute cover gratuities paid as a reward without a prior agreement.[68] Thus, the difference between the statutory terms "influence" and "reward" is simply a temporal one as to when the bribe gets paid out, rather than a substantive distinction turning on the existence of a prior agreement.[69] Animating the opinion was a desire, influenced by federalism concerns, to limit the reach of an expansive statute that covers a vast number of state and local officials.[70]

Another compelling point for the Court was the statute's mens rea (i.e., criminal mental state) standard of "corruptly"—the majority stressed that "corruptly" could only implicate bribery, an act with a higher level of culpability than a gratuity.[71]

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64 *Modest Increase*, *supra* note 3.

65 *Snyder*, 144 S. Ct. at 1954.

66 *Id.*

67 *Id.* at 1959 (quotation marks omitted).

68 *Id.* The majority also described "reward" as intended by Congress to defeat a defendant's claim that he took a payment before the official act but would have done that act anyway. *Id.*

69 *Snyder*, 144 S. Ct. at 1959; *see also* United States v. Macrina, 109 F.4th 1341, 1351–52 (11th Cir. 2024) (using *Snyder*'s reasoning to reject a defendant's argument that § 666 requires proof of a bribe predating the official act).

70 *See Snyder*, 144 S. Ct. at 1959–60 ("The . . . interpretation of § 666 that [includes gratuities] would radically upend gratuities rules and turn § 666 into a vague and unfair trap for 19 million state and local officials. We decline to do so. Section 666 is a vital statute, but its focus is targeted.").

71 *Id.* at 1954–55, 1959 (quotation marks omitted). The majority compared the mens rea requirement in § 666 to that of 18 U.S.C. § 201, which criminalizes bribery of federal officials with proof that the money was paid or accepted "corruptly," but lacks that mens rea requirement (or any explicit mens rea) for its ban on federal gratuities. *Id.* For an

Snyder's limitation of § 666 paralleled the Court's restrictive interpretations of two other public corruption statutes.[72] Namely, *Skilling* limited the honest services fraud statute to two concrete crimes (bribery and kickbacks),[73] and *McCormick* limited the Hobbs Act to quid pro quo agreements;[74] thus, neither statute includes gratuities.

Snyder's principal holding was that only "payments made or agreed to *before* an official act in order to influence the official with respect to that future official act" are unlawful under § 666.[75] As the dissent framed the holding, a "quid pro quo" must be proven.[76] Dicta in a prior case, cited approvingly in *Snyder*, described a "quid pro quo" as an essential element of bribery and defined it as "specific intent to give or receive something of value *in exchange* for an official act."[77]

To understand the context of *Snyder* and its likely effects, a brief detour into the facts and procedural history of the case is necessary. This overview explains by example the outstanding issue after *Snyder*: How can the government prove a quid pro quo agreement when an alleged bribe payment is made *after* an official act?

Mayor James Snyder of Portage, Indiana, controlled portions of his city's public contracting process.[78] Snyder placed his underqualified friend, Randy Reeder, in charge of evaluating bids for city contracts.[79] In December 2012 and January 2013, Reeder steered contracts for the purchase of three garbage trucks to brothers Robert and Stephen Buha, owners of a local truck dealer called Great Lakes Peterbilt (GLPB).[80] He did so by tailoring the bidding criteria to ensure only GLPB could meet them.[81] This bid

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overview of mens rea in the context of bribery and gratuities, see Sarah N. Welling, *Reviving the Federal Crime of Gratuities*, 55 ARIZ. L. REV. 417, 446–57, 447 n.211 (2013).

72 *See supra* Part I.B.2–3.

73 561 U.S. at 368.

74 500 U.S. at 274.

75 *Snyder*, 144 S. Ct. at 1951 (emphasis in original).

76 *Id.* at 1962 (Jackson, J., dissenting).

77 *Sun-Diamond*, 526 U.S. at 404–05 (emphasis in original); *see also Snyder*, 144 S. Ct. at 1955–56 (relying on *Sun-Diamond*'s dichotomy between bribes and gratuities).

78 *See Snyder*, 144 S. Ct. at 1967 (Jackson, J., dissenting). The dissent is a better resource for the facts of *Snyder* than the majority opinion solely because it discusses them in much greater detail.

79 *See* United States v. Snyder, 71 F.4th 555, 573–74 (7th Cir. 2023). Like Justice Ketanji Brown Jackson's dissent, the Seventh Circuit's initial appellate decision is not a controlling statement of the law but offers a useful discussion of *Snyder*'s facts.

80 *See id.* at 562, 574.

81 *Id.* at 574.

rigging cost the city $60,000 over the best alternative proposal.[82] Reeder rigged another bid in favor of the Buhas the next year to buy an additional garbage truck.[83] Snyder had contact with the Buhas, and no other bidders, during the bidding period.[84] The total value of the two contracts was $1.125 million.[85]

Soon after the award of the second contract, Snyder visited the Buhas, told them "I need money," and requested $15,000; they gave him a $13,000 check.[86] Snyder told federal investigators this money was for consulting services but gave three different explanations for the nature of that work to the FBI, Reeder, and another city worker.[87] Employees of GLPB testified that Snyder had done no consulting work at all, and Snyder produced no evidence of completed work; one employee further testified that Robert Buha had told him that the company was paying Snyder for influence.[88]

For this conduct, Snyder was charged with and convicted of violating § 666.[89] The jury convicted him after receiving an instruction stating his guilt depended on, among other elements, whether he "acted corruptly, with the intent to be influenced or rewarded."[90] Based on an interpretation of § 666 that covered both bribes and gratuities, the Seventh Circuit rejected Snyder's legal challenge to his conviction,[91] finding the evidence sufficient to support the jury's verdict of guilt under a gratuity theory of § 666.[92]

The procedural details of the *Snyder* case demonstrate that, even after the Supreme Court's decision, Snyder could be convicted under § 666. The district court originally held that "there was ample evidence permitting a rational jury to find, from the circumstantial evidence, that there was an up-front agreement."[93] Thus, it would have allowed a conviction even under *Snyder*'s interpretation of § 666 that covered only bribes.[94] On appeal, the

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82 *Snyder*, 144 S. Ct. at 1967 (Jackson, J., dissenting).

83 *Snyder*, 71 F.4th at 574.

84 *Id.*; *Snyder*, 144 S. Ct. at 1967 (Jackson, J., dissenting).

85 *Snyder*, 71 F.4th at 573.

86 *Snyder*, 144 S. Ct. at 1967 (Jackson, J., dissenting).

87 *Snyder*, 71 F.4th at 575.

88 *Id.*

89 *Id.* at 565.

90 *Snyder*, 144 S. Ct at 1968 (Jackson, J., dissenting) (quotation marks omitted) (quoting Joint Appendix at 27, *Snyder*, 144 S. Ct. 1947 (No. 23-108)).

91 *Snyder*, 71 F.4th at 578–80.

92 *Id.* at 580–82.

93 *Snyder*, 144 S. Ct. at 1968 n.6 (Jackson, J., dissenting) (quotation marks omitted) (quoting Appendix to the Petition for Writ of Certiorari at 63a, *Snyder*, 144 S. Ct. 1947 (No. 23-108)).

94 *Id.*

Seventh Circuit seemed to approve this alternative theory without elaborating in its ruling on the sufficiency of the evidence.[95] Justice Ketanji Brown Jackson, dissenting in *Snyder*, used the district court's bribery theory to argue that even under the majority's ruling that bribery must be proven, the proven existence of a $13,000 payment and two city contracts that benefitted the payor justified a remand for the circuit court to determine whether that circumstantial evidence was sufficient to uphold Snyder's conviction.[96] The majority disagreed slightly (without elaboration), reversing Snyder's conviction instead of merely vacating it for the circuit court to conduct a harmless error analysis, but it did not rule on the ultimate question of Snyder's guilt or preclude another trial.[97] On remand, the Seventh Circuit granted a new trial over Snyder's motion to dismiss the case. In so ruling, the court contended that "the evidence would support a finding of bribery here, beyond a reasonable doubt."[98] While the government ultimately declined to pursue a retrial,[99] this Comment explores how a bribery conviction could have occurred in that retrial. In other words, this Comment asks how the government could use circumstantial evidence to prove that Snyder, and defendants like him, engaged in an explicit bribery agreement instead of just paying a gratuity.

D. The Unresolved Issue in *Snyder*

Following *Snyder*, an important issue remains outstanding that will be crucial in similar cases. *Snyder* held that a proven gratuity alone cannot establish a violation of § 666 as a matter of law.[100] But could a payment that postdates an official act, combined with other circumstantial evidence, still provide grounds for a bribery conviction? What would that circumstantial evidence have to be? The hypothetical situation—not coincidentally, what happened in *Snyder*—is that a prosecutor has evidence of a quid

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95 *Snyder*, 71 F.4th at 581 ("[A] reasonable jury could conclude that Snyder accepted the check as a bribe or gratuity for steering the contracts to GLPB.").

96 *Snyder*, 144 S. Ct. at 1967–68, 1968 n.6 (Jackson, J., dissenting).

97 *See id.* at 1968 n.6.

98 United States v. Snyder, 2024 WL 4834037, at *2 (7th Cir. Nov. 20, 2024) (pointing to the "timing and size of the payment—and the problems with the attempts by Snyder and the Buhas to explain it").

99 *See* United States v. Snyder, 2025 WL 1610510, at *1 (N.D. Ind. June 6, 2025). The evidence of bribery discussed above may still be relevant to Snyder's case because federal prosecutors stated that they planned to use that evidence in their sentencing arguments for a separate crime of which Snyder was convicted at his original trial. *Id.*

100 *Snyder*, 144 S. Ct. at 1954.

post quo. The question that *Snyder* inspires and that this Comment tackles is what is needed to prove that quid post quo is actually a quid pro quo—an explicit bribery agreement.

Reducing this uncertainty is important for several reasons. As the law stands, federal prosecutors combatting public corruption cannot be certain what evidence they need to obtain a conviction when confronted with cases like *Snyder*. Trial judges cannot know how to instruct their juries in these cases. Appellate courts have minimal guidance in deciding sufficiency of the evidence challenges if a conviction is appealed. And public servants—"the entire army of 19 million state and local officials" the *Snyder* majority invoked[101]—and the Americans with whom they deal now face ambiguity in what conduct could lead them to be convicted of federal crimes. The plus factors this Comment proposes can help mitigate this new ambiguity.[102]

But uncertainty need not—and should not—be eliminated from § 666 altogether. Create too clear a test, and abuses of loopholes or corrupt behavior that toes the line of lawfulness will almost inevitably follow.[103] In the realm of public corruption, this concern is not merely theoretical. Countries with specific anticorruption laws still face persistent corruption, in part because individuals can comply with the letter of the laws but evade their spirit.[104] Additionally, a too-rigid test may condemn conduct that

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[101] *Id.* at 1958.

[102] To understand the nature of this ambiguity, an example may add clarity. Suppose a highway construction contractor gives a county commissioner—and longtime friend—an expensive bottle of wine as a Christmas gift. A few months earlier, the county had awarded a maintenance contract to that contractor's firm. It is not clear, given these facts, whether either party has done anything wrong—much less engaged in a quid pro quo that violates § 666. More information is needed on the nature or existence of any agreement prior to the award of the contract. But current law does not make clear what evidence suffices to demonstrate that such an agreement existed; this Comment aims to ameliorate that ambiguity.

[103] *See, e.g.*, Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1773 (1976) ("The essence of individualist certainty-through-rules is that because it identifies for the bad man the precise limits of toleration for his badness, it authorizes him to hew as close as he can to those limits."); Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 591–93 (1988) (discussing Professor Duncan Kennedy's and other scholars' contributions to the debate between rules and standards in various areas of law).

[104] *See, e.g.*, Aradhana Sharma, *New Brooms and Old: Sweeping Up Corruption in India, One Law at a Time*, 59 CURRENT ANTHROPOLOGY S72, S73 (2018) ("In India and elsewhere, corruption exists not because there are insufficient laws and rules but because of their teeming overabundance. More laws only inflate an already absurd and convoluted maze of state regulations and rules and open new loopholes for subversion."); Abhishek Thommandru, Fazilov Farkhod Maratovich & Niyozova Salomat Saparovna, *Fortifying Uzbekistan's Integrity Landscape: Harnessing India's Tech-Driven Anti-Corruption Strategies*,

a looser, judgment-based standard would find acceptable.[105] Some play in the joints, then, is not only inevitable at this early stage of attempting to craft a standard for § 666—it is also an affirmative good.

E. Basic Criminal Law Principles

Before proceeding to the proposed standard of proof for § 666 after *Snyder*, some attention is required to the concept of a permissive inference and the criminal jury instruction rules that govern it. The Supreme Court has explained that, in criminal cases, "[a] permissive inference suggests to the jury a possible conclusion to be drawn if the [government] proves predicate facts, but does not require the jury to draw that conclusion."[106] That definition came in *Francis v. Franklin*,[107] a case that distinguished permissive inferences of intent in criminal cases from mandatory presumptions of intent.[108]

An earlier case, *County Court v. Allen*,[109] held that the only way a permissive inference can be invalidated is if, "under the facts of the case, there is no rational way the trier could make the connection permitted by the inference."[110] The inference itself need not be obvious; all that is required is that there be a "'rational connection' between the basic facts that the prosecution proved and the ultimate fact presumed, and [that] the latter is 'more likely than not to flow from' the former."[111] The *Allen* Court held that the lower court's instructions at issue constituted a permissive inference. It reached this conclusion because, while they

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7 SUSTAINABLE FUTURES, Apr. 29, 2024, at 1, 3 ("[Uzbekistan's] tax and customs regulations contain loopholes that enable corrupt practices like bribery and smuggling.").

105 *See* Rose, *supra* note 103, at 592.

106 Francis v. Franklin, 471 U.S. 307, 314 (1985).

107 471 U.S. 307 (1985).

108 *See id.* at 314 & n.2. *Francis* defined mandatory presumptions as charges from a judge that "instruct[ ] the jury that it must infer the presumed fact if the State proves certain predicate facts." *Id.* at 314. It held these instructions invalid because they violate the requirement found in the Fourteenth Amendment's Due Process Clause that the government must prove every element of a criminal offense beyond a reasonable doubt. *Id.* That holding—along with the rules on permissive inferences—applies equally against the federal government, which is bound instead by the Fifth Amendment's Due Process Clause. The Fifth and Fourteenth Amendments operate identically in this context. *See* United States v. Cota-Meza, 367 F.3d 1218, 1221–22 (10th Cir. 2004); United States v. Warren, 25 F.3d 890, 897–98 (9th Cir. 1994).

109 442 U.S. 140 (1979).

110 *Id.* at 157.

111 *Id.* at 165 (first quoting Tot v. United States, 319 U.S. 463, 467 (1943); then quoting Leary v. United States, 395 U.S. 6, 36 (1969)).

named one category of evidence (the presence of a loaded firearm in an automobile) that the jury could use to infer the offense of firearm possession, and while they used the term "presumption" to refer to these inferences, they did not demand that conclusion or require that the defendant present evidence in his defense.[112] The Court then upheld the defendants' convictions, finding that the inference of possession was rational given the facts proven at trial.[113]

Federal courts have given similar instructions in more recent years. In 2008, the D.C. Circuit upheld a jury instruction in a gun possession case that permitted—but did not require—the jury to infer possession with the aid of some example scenarios drawn from case law.[114] In the related context of drug crimes, courts have upheld similar permissive inference instructions that describe to jurors the kinds of factors from which they can infer possession.[115]

In the context of § 666 bribery, this Comment argues only that courts should issue permissive inference jury instructions that account for the value of various factors in proving the existence of a quid pro quo agreement. As Parts II and III explain, several categories of circumstantial evidence are rationally associated with bribery, satisfying the *Allen* standard for permissive inferences.[116] To systematize the law and clarify what is sufficient to find quid pro quo bribery agreements, judges should move beyond the present status quo of merely restating the law in their jury instructions. Instead, they should instruct their juries on the inference of agreement they can decide to draw from case-relevant categories of evidence, while making clear that the jury can find the defendant guilty without finding such evidence. Imposing a mandatory presumption would stretch these factual inferences too far, removing an excessive amount of discretion from the jury to consider case-specific facts and running up against constitutional restrictions.[117] Therefore, the instructing court must insist that the jury retains the prerogative to decide

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[112] *Id.* at 160–63 & nn.19–22.

[113] *Id.* at 163–67.

[114] United States v. Bryant, 523 F.3d 349, 356–57 (D.C. Cir. 2008). The *Bryant* decision and the case law it referenced characterized these categories as "plus factors." *Id.*

[115] *See* United States v. Askew, 98 F.4th 116, 120–22 (4th Cir. 2024) (involving possession of a firearm in furtherance of drug trafficking); United States v. Lopez, 880 F.3d 974, 981–82 (8th Cir. 2018) (involving drug possession).

[116] *See Allen*, 442 U.S. at 157, 165.

[117] *See Francis*, 471 U.S. at 314.

the case and can choose to adopt or ignore the permissive inference. Parts II and III give content to this Comment's permissive inference proposal.

II. THE CONCEPT OF PLUS FACTORS

To answer this Comment's central question of how a quid pro quo bribery agreement may be proven from circumstantial evidence, it is essential to look outside of bribery law. This Comment turns to another area of law that shares with § 666 bribery the use of circumstantial evidence to find an illegal agreement between two offending parties: antitrust. Antitrust law is an invaluable resource because it has developed a set of plus factors that impose a far clearer and more comprehensive structure onto permissive inferences of illegal agreement than any bribery case has done.[118] This Part briefly describes antitrust plus factors and how they fit into broader antitrust doctrines. It then explains the relevant similarities between antitrust conspiracy and bribery that justify the use of plus factors in the bribery context, addressing several possible objections. Finally, it adapts four relevant antitrust plus factors to the bribery context, using *Snyder*'s facts to illustrate how courts can employ these factors.

A. Illicit Agreements in Antitrust Law

The Sherman Antitrust Act of 1890,[119] which stands at the heart of U.S. antitrust law, prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations."[120] Section 1 of the Act makes this conduct a felony punishable by a fine of up to $1 million or imprisonment for up to ten years (for individuals) or a fine of up to $100 million (for corporations).[121] The statute has three broad enforcement mechanisms:

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[118] There is one exception to this rule for bribery: the "stream of benefits" theory, discussed below in Part III.F. However, the existence of this theory in case law and scholarly commentary does little to diminish this Comment's central argument that ambiguity reigns in bribery law generally with respect to the quid pro quo, especially because the theory's details are controversial. *See* Terence A. Parker, Note, *Prosecuting Public Corruption After* McDonnell v. United States, 94 NOTRE DAME L. REV. 959, 977–81 (2018) (discussing this theory and its continuing validity despite Supreme Court cases narrowing public corruption statutes).

[119] 15 U.S.C. §§ 1–7.

[120] *Id.* § 1.

[121] *Id.*

criminal prosecutions,[122] private civil actions for a remedy known as treble damages,[123] and civil actions brought by the Department of Justice (DOJ) or the Federal Trade Commission (FTC).[124] Given this vast complex of potential remedial action, the Sherman Act is a statute with teeth. Its substantive reach appears just as vast, although judicial construction narrowed it long ago to encompass only unreasonable or "undue" restraints of trade.[125]

One restraint on trade that is considered particularly pernicious is an antitrust conspiracy or cartel—an agreement among competitors to engage in mutually beneficial, anticompetitive behavior such as price-fixing or output restriction.[126] While agreements among competitors to engage in such conduct violate § 1 of the Sherman Act (by both text and precedent), parallel actions that reach the same outcome without an agreement do not. Even so-called "conscious parallelism" by which all participants in an oligopolistic market (i.e., one dominated by only a few firms) act jointly, understanding their conduct will be mutually beneficial and harmful to consumers, is lawful.[127] Circumstantial evidence of collusive or conspiratorial behavior can suffice to prove a § 1 violation, but "antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case," and "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy."[128] Like § 666 bribery,[129] then, antitrust law faces the

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[122] *Id.*; *see also* U.S. DEP'T OF JUST., *supra* note 14, § 7-2.200 ("While a violation of [the Sherman] Act may be prosecuted as a felony, in general, the Department [of Justice] reserves criminal prosecution under Section 1 for 'per se' unlawful restraints of trade among competitors.").

[123] 15 U.S.C. § 15(a). *See generally* Edward D. Cavanagh, *Detrebling Antitrust Damages: An Idea Whose Time Has Come?*, 61 TUL. L. REV. 777 (1987) (discussing and criticizing the treble damages remedy).

[124] *See* 15 U.S.C. § 4 (authorizing U.S. Attorneys to seek equitable relief against violations of 15 U.S.C. §§ 1–7); Federal Trade Commission Act, 15 U.S.C. § 45(a)(1), (b)–(d) (declaring unlawful "unfair methods of competition" and authorizing the FTC to issue enforceable orders to "cease and desist from using such method[s] of competition"); FTC v. Cement Inst., 333 U.S. 683, 690 (1948) (holding that the FTC has jurisdiction over unfair methods of competition that violate § 1 of the Sherman Act).

[125] Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 59–60 (1911).

[126] *See* William E. Kovacic, Robert C. Marshall, Leslie M. Marx & Halbert L. White, *Plus Factors and Agreement in Antitrust Law*, 110 MICH. L. REV. 393, 398–99 (2011).

[127] Brooke Grp. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 227 (1993); *see also* Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 556–57 (2007) ("Without more, parallel conduct does not suggest [antitrust] conspiracy.").

[128] Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588 (1986).

[129] *See infra* Part III.

problem of how to infer an agreement from evidence of mutually beneficial conduct.

To separate permissible inferences from impermissible ones, antitrust law has developed a set of "plus factors."[130] For example, one commonly invoked plus factor is "[a]ctions contrary to each defendant's self-interest unless pursued as part of a collective plan."[131] If the government or an antitrust plaintiff has evidence tending to show this factor is met, that party can present the factor as evidence of antitrust conspiracy at trial, on appeal, or to defend against motions for dismissal or summary judgment. The plus factors thus serve as a powerful, systematic framework for presenting circumstantial evidence that can prove an illegal agreement.

Created by courts and improved by scholars, the plus factors are much more advanced than anything that bribery law (or any other area of law dealing with illegal agreements) has developed. They are therefore a critical point of reference for exploring how an illegal bribery agreement can be proven.

B. Assessing the Plus Factors' Comparative Utility

Plus factors inspired by antitrust law can only be a legitimate contribution to bribery law if bribery and antitrust conspiracy are similar enough to make a comparative analysis useful. This Section explores the similarities between these two areas of law and explains why the differences do not defeat the utility of plus factors in proving bribery agreements.

1. Similarities between antitrust and bribery law.

The most evident similarity between antitrust conspiracy and § 666 bribery is that both areas of law address the problem of proving agreements by circumstantial evidence. Beyond this, and

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[130] *See, e.g.*, *In re* Musical Instruments & Equip. Antitrust Litig., 798 F.3d 1186, 1194 (9th Cir. 2015) ("This court has distinguished permissible parallel conduct from impermissible conspiracy by looking for certain 'plus factors.'"); *In re* Chocolate Confectionary Antitrust Litig., 801 F.3d 383, 398 (3d Cir. 2015) ("[E]vidence of conscious parallelism cannot alone create a reasonable inference of a conspiracy. To move the ball across the goal line, a plaintiff must also show that certain plus factors are present." (citation omitted)); Louis Kaplow, *On the Meaning of Horizontal Agreements in Competition Law*, 99 CALIF. L. REV. 683, 753–54 (2011) (describing an ABA model jury instruction for § 1 cases as allowing inferences of antitrust conspiracy based on relevant plus factors).

[131] Kovacic et al., *supra* note 126, at 405.

most importantly, both domains of law involve agreements between two parties that are both interested in concealing the existence of their agreement. Because a quid pro quo bribe of a public official and a conspiracy between business competitors in restraint of trade are both illegal,[132] and both are generally entered into by actors sophisticated enough to recognize this illegality,[133] the parties to an agreement will work to hide any proof of it. Thus, direct evidence will be hard to find, and circumstantial evidence crucial. True, civil antitrust cases are distinct in affording plaintiffs and government enforcers recourse to the powerful civil discovery mechanism to obtain the direct evidence they need.[134] But the plus factors—dependent as they are on circumstantial evidence—come in either where that discovery has not yet begun, or when it has failed to produce direct evidence of conspiracy sufficient to obtain the requested relief.[135] Thus, the parties alleging illegal agreement in bribery and antitrust cases are equally reliant on circumstantial evidence when the plus factors become relevant.

Another reason to credit the comparison between antitrust conspiracy and § 666 bribery law is that the distinction between legal and illegal conduct is similar. In antitrust law, "tacit collusion" is permitted, while explicit, agreed-upon price-fixing is unlawful.[136] Similarly, under § 666, a payment made after an official act is a lawful gratuity as long as there was no specific agreement before the official act. After *Snyder*, a tacit understanding appears to be allowed, while an explicit quid pro quo is prohibited.[137]

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[132] *See* 18 U.S.C. § 666; Sherman Act, 15 U.S.C. § 1.

[133] This assumption is reasonable for antitrust because only relatively large businesses will attract government enforcement or the expense of private antitrust litigation; with greater size will generally come a better legal department and more legal training for executives. The assumption is reasonable for bribery given a baseline level of legal knowledge among most government officials and those with the resources to attempt bribery. It is also just fairly obvious that bribery is illegal.

[134] *See, e.g.*, *Twombly*, 550 U.S. at 557–59 (describing the expense associated with antitrust discovery as a reason to increase the burden on plaintiffs at the motion to dismiss stage).

[135] *See Musical Instruments*, 798 F.3d at 1191 & n.2, 1193 & n.5 (applying the plus factors at the motion to dismiss stage due to a lack of direct evidence after the court allowed only limited discovery); Williamson Oil Co. v. Philip Morris USA, 346 F.3d 1287, 1304–05 (11th Cir. 2003) (applying the plus factors at the summary judgment stage because discovery did not return direct evidence); *see also In re* Dealer Mgmt. Sys. Antitrust Litig., 581 F. Supp. 3d 1029, 1060–61 (N.D. Ill. 2022) (citing cases that deemed antitrust plus factor evidence relevant for the jury to consider).

[136] *Brooke Grp.*, 509 U.S. at 227.

[137] *See Snyder*, 144 S. Ct. at 1951; *see also id.* at 1972 (Jackson, J., dissenting) (arguing that the majority has legalized arrangements "that are functionally indistinguishable from taking a bribe").

Thus, the framework that antitrust law uses to distinguish lawful and unlawful conduct should translate over to bribery.

2. Addressing differences between antitrust and bribery law.

Despite these similarities between bribery and antitrust law, no court or commentator has ever sought to bring the antitrust plus factors—or any conceptual equivalent—into bribery law. Two important differences between antitrust and bribery law may help explain the legal profession's reluctance thus far to bring antitrust's plus factors into bribery law. This Comment must address these objections to justify its legal leap.

a) Criminal vs. civil. Antitrust conspiracy and bribery differ in the consequences that typically attend the finding of an illicit agreement. By the letter of the law, individuals convicted of bribery (under § 666) and antitrust conspiracy (under § 1 of the Sherman Act) are both subject to a maximum statutory penalty of ten years in prison.[138] But criminal antitrust cases are rare in practice, and civil enforcement by private or government lawsuits is much more common.[139] Thus, the antitrust plus factors are often used only to overcome a preponderance of the evidence standard, whereas in bribery, they would face the beyond a reasonable doubt burden of proof.

Notwithstanding the difference in burdens of proof, applying standards developed in antitrust to criminal cases can still be reasonable based on how courts treat antitrust defendants in practice. The treble damages remedy for antitrust violations has significant punitive effects that may be comparable to criminal enforcement.[140] And the injunctive remedies that the DOJ or FTC

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[138] 18 U.S.C. § 666(a); Sherman Act, 15 U.S.C. § 1.

[139] *See* Daniel A. Crane, *Criminal Enforcement of Section 2 of the Sherman Act: An Empirical Assessment*, 84 ANTITRUST L.J. 753, 756 (2022) ("[H]istorically, the vast majority of antitrust enforcement has been civil—whether suits by the Justice Department or state attorneys general in equity, private lawsuits for treble damages, or civil enforcement of Section 5 of the Federal Trade Commission Act by the FTC."); *cf.* United States v. U.S. Gypsum Co., 438 U.S. 422, 443–46 (1978) (adding a mens rea element to criminal antitrust offenses: knowledge that anticompetitive effects are likely).

[140] *See* Richard A. Posner, *A Statistical Study of Antitrust Enforcement*, 13 J.L. & ECON. 365, 392 (1970) ("[T]here is another punitive sanction besides the criminal—the penalty component of the treble-damage awards in private antitrust cases—and it would be difficult to disentangle the deterrent effects of each.").

can obtain in civil actions can be hugely disruptive to the businesses on which they are imposed.[141] In accordance with the severity of these sanctions, courts are generally wary of finding antitrust liability too readily; scholars have described judicial behavior that amounts to an apparent raising of evidentiary standards to compensate for the high costs of liability.[142] That the plus factors have a heavy burden to overcome in antitrust law can help justify their salience in another area in which the scales of justice tip in favor of the defendant—the criminal law, with its beyond a reasonable doubt standard of proof.

Moreover, the plus factors are applicable to, and are defined with reference to, criminal antitrust cases. Scholars constructing defenses or typologies of the plus factors refer to their criminal applications to set the stakes of ensuring their accuracy.[143] Criminal cases, albeit none from recent decades, have affirmed that circumstantial evidence is sufficient to convict an antitrust defendant—whether or not they use the plus factors framework.[144]

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[141] *See* Sherman Act, 15 U.S.C. § 4 (describing the open-ended equitable relief the DOJ can seek); Federal Trade Commission Act, 15 U.S.C. § 45 (granting the FTC's broad authority to issue "cease and desist order[s]" against "unfair methods of competition").

[142] *See* Kovacic et al., *supra* note 126, at 404 ("Perceived excesses with private rights of action . . . and the mandatory trebling of damages for victorious plaintiffs . . . have caused the Court to engage in 'equilibration'—the adjustment of one element of the antitrust system (namely, the evidentiary standard) to offset imperfections in other elements." (citing Stephen Calkins, *Summary Judgment, Motions to Dismiss, and Other Examples of Equilibrating Tendencies in the Antitrust System*, 74 GEO. L.J. 1065, 1067 (1986))); *cf.* Herbert Hovenkamp, *Antitrust Error Costs*, 24 U. PA. J. BUS. L. 293, 294–96 (2022) (describing the effect of Judge Frank Easterbrook's "error-cost argument favoring nonenforcement of antitrust law" in shaping judicial doctrine to limit liability in important antitrust decisions). *See generally* Joshua D. Wright & Murat C. Mungan, *The Easterbrook Theorem: An Application to Digital Markets*, 130 YALE L.J.F. 622 (2021) (arguing for a standard higher than preponderance of the evidence in antitrust cases and discussing judicial decisions influenced by Judge Easterbrook's argument to support such a standard).

[143] *See* Kovacic et al., *supra* note 126, at 404–05 (using the applicability of the plus factors to criminal punishment to argue that classifying them by probative value is necessary); *cf.* Christopher R. Leslie, *The Probative Synergy of Plus Factors in Price-Fixing Litigation*, 115 NW. U. L. REV. 1581, 1591 (2021) (using the threat of criminal prosecution to define a plus factor). *But see* William H. Page, *Communication and Concerted Action*, 38 LOY. U. CHI. L.J. 405, 447 n.164 (2007) (arguing that "[e]vidence of a completed verbal agreement through the testimony of immunized conspirators is almost invariably required for a criminal prosecution," but providing two counterexamples).

[144] *See* C-O-Two Fire Equip. Co. v. United States, 197 F.2d 489, 493, 497–98 (9th Cir. 1952) (pointing to the "plus factors" of meetings between competitors and product standardization, among other circumstantial evidence, to uphold a criminal antitrust conviction); United States v. Foley, 598 F.2d 1323, 1331–32 (4th Cir. 1979) (affirming an antitrust conviction based on evidence of a meeting where all participants shared their intentions and preferences); United States v. Champion Int'l Corp., 557 F.2d 1270, 1272–

And there is some reason to believe that guilty pleas may be responsible for criminal cases ending before courts can apply the plus factors.[145]

Finally, the fact that the plus factors, when applied in the bribery context, are nothing more than permissive inferences ought to smooth their transition from antitrust law to criminal bribery law. Like the criminal cases discussed above involving permissive inference jury instructions, the plus factors are perfectly acceptable to criminal law doctrine so long as they are rationally connected to bribery and steer clear of telling the jury what result to reach.[146]

b) The second difference: distinct defenses. The second point of divergence between antitrust and bribery is that antitrust defendants alone have two powerful shields against liability in addition to attacking the merits of cases against them: the rule of reason and the requirement that a plaintiff show antitrust injury. These additional safeguards put the plus factors in a less central role, as one argument among multiple that a plaintiff must prove—if a defendant loses on the plus factors, it may still prevail on these other bases. However, the inapplicability of these defenses to many of the cases in which plus factors would play central a role diminishes this distinction's significance.

The Supreme Court has long interpreted § 1 of the Sherman Act to prohibit only unreasonable restraints of trade.[147] This limitation led courts to develop a "rule of reason analysis" for § 1 claims.[148] The rule of reason involves determining whether a challenged practice or agreement has anticompetitive effects, then balancing those effects against the defendant's procompetitive justifications in a "three-step, burden-shifting framework."[149] The defense that a practice is procompetitive and the requirement

73 (9th Cir. 1977) (affirming an antitrust conviction based on evidence of meetings among the conspirators, their timing, and information shared there).

145 *See, e.g.*, *In re* Citric Acid Litig., 996 F. Supp. 951, 955–59 (N.D. Cal. 1998), *aff'd*, 191 F.3d 1090 (9th Cir. 1999) (finding the allegations against a civil defendant insufficient under the plus factors, despite all its alleged co-conspirators having previously pled guilty to criminal antitrust offenses).

146 *See supra* notes 114–15 and accompanying text.

147 *See Standard Oil Co.*, 221 U.S. at 59–60.

148 Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2151 (2021) (quotation marks omitted) (quoting Texaco Inc. v. Dagher, 547 U.S. 1, 5 (2006)).

149 *Id.* at 2160 (quotation marks omitted) (quoting Ohio v. Am. Express Co., 138 S. Ct. 2274, 2284 (2018)).

that a plaintiff show anticompetitive effects are powerful weapons in an antitrust defendant's arsenal.[150]

An additional antitrust defense comes from the requirement that a civil plaintiff show "antitrust injury."[151] Every private antitrust plaintiff bears the burden of proving that it has suffered "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful."[152] This rule forces the plaintiff to present substantial evidence on the nature of the relationship between its injury, the defendant's actions, and substantive law, and it correspondingly provides defendants an important protection against liability.[153]

The rule of reason and antitrust injury defenses mean that the plus factors in antitrust law can carry a lighter load than they might in the bribery context because even if some of the factors are proven, defendants can defeat liability on another ground. If applied to § 666 bribery law, though, the plus factors would be effectively the whole ball game. Once an agreement is found, liability will almost inevitably attach. There is nothing in § 666 analogous to the anticompetitive harm prerequisite in antitrust law in requiring a special kind of injury; the bribery agreement itself is the entire offense.[154] Likewise, there is of course no procompetitive or prosocial defense to bribery. And § 666 has no subjective standing test beyond the black-and-white jurisdictional hook that the employer of the bribed official must receive an annual $10,000 in federal funds.[155] So the plus factors, if adopted, would be the only difficult issue to analyze in ascertaining a defendant's guilt. The greater importance of the plus factors for

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150 *See* Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 827, 828–29, 831 (2009) (finding that out of 222 rule of reason cases between 1999 and 2009, 215 were decided in favor of the defendant because the plaintiff had not proven anticompetitive effects, and four out of the five cases that balanced procompetitive effects against anticompetitive effects resulted in victories for the defendants).

151 Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977) (emphasis omitted).

152 *Id.*

153 *See* Clare Deffense, Comment, *A Farewell to Arms: The Implementation of a Policy-Based Standing Analysis in Antitrust Treble Damages Action*, 72 CALIF. L. REV. 437, 448–49 (1984) ("[M]ost courts have . . . . incorporated [*Brunswick*'s antitrust injury] rule into standing analysis, [and] they treat the absence of antitrust injury as an absolute bar to a [treble damages] action.").

154 The $5,000 threshold for the value of the official act may perform some screening function, but it is quite straightforwardly met; therefore, it is not nearly as powerful for the defendant as the anticompetitive harm requirement is in antitrust law. *See* 18 U.S.C. § 666(a)(1)(B), (a)(2).

155 *See id.* § 666(b).

bribery convictions may make courts hesitate before adopting them.

Yet the differences between antitrust and bribery law in terms of defenses are not as vast as they may seem. Indeed, there are important scenarios in antitrust law where the plus factors can apply but neither the rule of reason nor antitrust standing are arguments available to defendants. First, courts have carved out an exception to the rule of reason termed the per se standard, which recognizes that "there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use."[156] The core conduct to which per se illegality applies (and the rule of reason therefore does not) is "[h]orizontal price fixing and output limitation[ ]" agreements,[157] which also happen to be the core use cases for the antitrust plus factors.[158] So the rule of reason's anticompetitive effect and procompetitive justification elements cannot be used as defenses in the typical antitrust suit involving plus factors.

Furthermore, the antitrust injury requirement does not cover cases brought by government enforcers from the FTC or DOJ.[159] And the plus factors certainly apply to government-initiated antitrust cases.[160] In these plentiful cases where neither the rule of reason nor antitrust injury defenses can be asserted, the plus factors are just as nakedly dispositive of the defendants' liability in antitrust law as they would be in bribery law. Accordingly, the existence of those defenses in other cases cannot be a sufficient objection to importing plus factors into bribery law.

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156 N. Pac. Ry. v. United States, 356 U.S. 1, 5 (1958).

157 *Alston*, 141 S. Ct. at 2157 (first alteration in original) (quotation marks omitted) (quoting Nat'l Collegiate Athletics Ass'n v. Bd. of Regents, 468 U.S. 85, 100 (1984)).

158 *See* Kovacic et al., *supra* note 126, at 397 (outlining an article describing the plus factors as tailored to cases in which the plaintiff "relies on circumstantial evidence that the defendants conspired to fix prices or restrict output").

159 *See* Eastman Kodak Co. v. Goodyear Tire & Rubber Co., 114 F.3d 1547, 1557 (Fed. Cir. 1997) (noting that only private parties are subject to *Brunswick*), *overruled on other grounds by* Cybor Corp. v. Fas Techs., Inc., 138 F.3d 1448 (Fed. Cir. 1998).

160 *See* E.I. Du Pont de Nemours & Co. v. FTC, 729 F.2d 128, 143 (2d Cir. 1984) (Lumbard, J., concurring in part and dissenting in part) ("FTC power in [the area of conscious parallelism] is already broad and its scope ill-defined, due in part to the expansive list of so-called 'plus factors' devised by the courts for inferring an agreement."); *C-O-Two*, 197 F.2d at 490, 497–98 (using plus factors to affirm a criminal conviction under § 1).

The several key dissimilarities between antitrust law and bribery law can help explain why courts and commentators have heretofore never adopted anything like the plus factors to systematize quid pro quo law. While this hesitance is understandable, the foregoing analysis demonstrates that it is ultimately unjustified. The plus factors play a vital role in helping courts and juries parse circumstantial evidence in antitrust cases and thereby obtain reasonably uniform results. This is a framework for classification that bribery law needs badly to provide fair notice to practitioners and a nationally consistent meaning to its statutes, especially now that *Snyder* has expanded the importance of the quid pro quo under § 666. The framework's importation from antitrust would be entirely legitimate, so long as it is construed only as a permissive inference, given the fields' compatibility in almost every relevant context.

C. What Are the Plus Factors?

Now that the relevance of antitrust's plus factors to bribery law has been explained, the factors themselves must be identified. Various commentators have attempted to categorize the plus factors that permit the inference of an antitrust conspiracy from proven parallel conduct.[161] One of the most helpful of such efforts, on which this Comment principally relies, is a 2011 article titled *Plus Factors and Agreement in Antitrust Law*, written by then–FTC Commissioner and law professor William Kovacic and economists Robert Marshall, Leslie Marx, and Halbert White.[162] The article contains much interesting analysis and two lists of plus factors—the first, of the "chief plus factors" courts conventionally use, and the second, of "super plus factors" derived from the authors' original economic analysis that "lead to a strong inference of explicit collusion."[163] The "chief plus factors" relevant for comparisons to bribery are:

> [1.] Actions contrary to each defendant's self-interest unless pursued as part of a collective plan.
>
> [2.] Phenomena that can be explained rationally only as the result of concerted action.

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161 *See generally, e.g.*, Leslie, *supra* note 143; Page, *supra* note 143.

162 *See generally* Kovacic et al., *supra* note 126.

163 *Id.* at 396–97, 405–06.

> [3.] Evidence that the defendants created the opportunity for regular communication. . . .
>
> [4.] The absence of a plausible, legitimate business rationale for suspicious conduct (such as certain communications with rivals) or the presentation of contrived rationales for certain conduct.[164]

The "super plus factors" are all very narrowly tailored to the antitrust context with limited applicability to bribery, except for one.[165] The fourth listed super plus factor obtains when:

> A firm or subset of firms has knowledge of the details of another firm's [business information] where the latter firm would be competitively disadvantaged by conveying that information unilaterally.[166]

D. Applying the Plus Factors to Bribery

To capitalize on the relevant similarities between bribery and antitrust law and bring antitrust's insights into the quid pro quo context, some adaptation is necessary from the antitrust plus factors to their bribery equivalents. Behavior in the two fields is meaningfully different, and the fact that the antitrust factors are typically used in civil cases is important, so the conversion from antitrust plus factors to criminal bribery plus factors is not one-to-one. Nonetheless, several promising areas of overlap between the plus factors and bribery law readily present themselves and are analyzed below. Like the antitrust plus factors, not all of these are created equal, and they are often most persuasive when combined—as this Comment's analysis explains.[167]

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[164] *Id.* at 405–06 (citing ANDREW I. GAVIL, WILLIAM E. KOVACIC & JONATHAN B. BAKER, ANTITRUST LAW IN PERSPECTIVE 310–11 (2d ed. 2008)). For an example of a court applying the first factor, see *Williamson Oil*, 346 F.3d at 1310–15. For the second, see *Musical Instruments*, 798 F.3d at 1189. For the third, see *Honey Bum, LLC v. Fashion Nova, Inc.*, 63 F.4th 813, 823–24 (9th Cir. 2023). For the fourth, see *Fragale & Sons Beverage Co. v. Dill*, 760 F.2d 469, 474 (3d Cir. 1985).

[165] *See* Kovacic et al., *supra* note 126, at 435–36 (listing seven factors, most of which are tied to economic arguments about market structure).

[166] *Id.* at 435. A court applied this factor in *In re Realpage, Inc., Rental Software Antitrust Litig. (No. II)*, 709 F. Supp. 3d 478, 511–12 (M.D. Tenn. 2023).

[167] *See* Kovacic et al., *supra* note 126, at 416 ("[S]ome individual plus factors do not lead to a strong inference of collusion, but two or more plus factors seen together may lead to a strong inference.").

1. Actions that would be totally irrational without bribery.

The first two chief plus factors—actions normally against self-interest and facts only explicable by concerted action—can be interpreted together as actions whose only rational explanation is coordination because rational self-interest would dictate a manifestly different outcome in the absence of coordination. In the bribery context, this interpretation seems relevant for both potential parties. If the bribe giver would never rationally give the thing of value without getting a return on investment, so to speak, and the return is expected to come only in the form of an official act, a factfinder could rationally infer bribery. This limitation separates bribery from the context of gifts given in the course of friendship, and from the statutory exception for "bona fide . . . compensation . . . in the usual course of business."[168] Likewise, if a public official does an official act without any possible public purpose other than a personal benefit to a private individual and then receives a payment from that person, the best explanation for the act would be that it was done with the expectation of a payoff, establishing circumstantial evidence of bribery. So both a payment whose only rational motivation was an official act, and a prior official act whose only rational motivation was an expected payout, can clear the evidentiary hurdle from a gratuity to a bribe.

To protect the defendant against impermissible inferences of culpability from her refusal to testify,[169] a jury instruction on this plus factor must make clear that the defendant's failure to assert a rational explanation does not provide grounds for inferring there is none. The government will have to affirmatively prove there is no rational explanation for the defendant's action (i.e., there is not even a reasonable doubt that one exists), for example by a process of elimination exercise using expert witnesses knowledgeable in the business or political practices at issue. Additionally, the requirement that the difference between the outcome rationally expected in the absence of bribery and the actual outcome be great protects potential defendants from judges or juries second-guessing their honest policy mistakes or disagreements. Miscalculation would be a complete defense.

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[168] 18 U.S.C. § 666(c).

[169] *See* Griffin v. California, 380 U.S. 609, 613–15 (1965) (holding that the Fifth Amendment prohibits instructing a jury to draw an adverse inference from a criminal defendant's refusal to testify).

To take an example from *Snyder* of total irrationality without bribery, the contract that Snyder ultimately chose cost the city more than $60,000 over the next-best alternative and was selected via bid rigging that prioritized unimportant factors.[170] On the flip side, in *United States v. Bryant*,[171] an individual interested in state legislation offered a state senator a "low-show job," which would never be a reasonable business decision in isolation.[172] It would be quite hard to find a rational explanation for these two decisions other than the expected benefit from a quid pro quo.

2. Communication before the official act.

The third relevant chief plus factor, an opportunity for regular communication, can be imported from antitrust law not through the opportunity for communication (which public officials regularly have with constituents interested in their policy actions) but through the intensity and frequency of it. If a public official and a private party have an unusual level of contact before the official act is taken that benefits the private party, and then a payment flows from the private party to the public official, a reasonable inference that there had been some implicit or explicit agreement of exchange (i.e., a quid pro quo) could be drawn. In *Snyder*, the public official had contact with the alleged bribe givers, and no other bidders, during both rounds of bidding for the city contracts.[173] This opportunity for communication provided the forum in which the bribe was (or could have been) agreed to. Communication, even an unusual amount of it, is innocent in itself and will not normally suffice on its own to prove bribery. But it is a useful plus factor when combined with others.

3. Pretextual explanations for suspicious conduct.

The fourth and final relevant chief plus factor is related both to the first two and to the inference that can be drawn from obstructive or obfuscatory conduct, discussed below.[174] The lack of a

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[170] *Snyder*, 144 S. Ct. at 1967 (Jackson, J., dissenting).

[171] 655 F.3d 232 (3d Cir. 2011). For background on the case, see *infra* Part III.A.

[172] *Bryant*, 655 F.3d at 241–42, 247. A "low-show job" is a position for which the hired employee provides services of markedly lower value than the position's wage or salary. *See id.* at 243, 247 & n.20.

[173] United States v. Snyder, 71 F.4th 555, 574 (7th Cir. 2023); *Snyder*, 144 S. Ct. at 1967 (Jackson, J., dissenting).

[174] *See infra* Part III.A.

rational explanation for suspicious conduct, such as communication between the alleged parties to the quid pro quo bribery, can suggest that the conduct was nefarious; attempts to conceal the conduct would only strengthen that conclusion. In *Snyder*, the mayor's apparently pretextual (because unsubstantiated) defense to allegations that he had taken a bribe was that he had obtained a consulting job with the alleged bribe givers.[175] This explanation hurts him doubly because, in addition to being unsatisfactory, it demonstrates his awareness of the wrongfulness of his conduct such that he believed the explanation was necessary.

4. Awareness of the other party's relevant private information.

This super plus factor can be applied to the bribery context in both directions. That is, evidence that one party is aware of some nonpublic information held by the other, and relating to the desired official act, could be indicative of communication between the parties about information necessary for the quid pro quo exchange. For example, in *Snyder*, the mayor and his friend tailored the bid specifications for a city contract to specific criteria they knew only one firm could meet—the one that ultimately paid the mayor $13,000.[176] How would Snyder know that the firm could meet these criteria? Almost certainly through the communications that the evidence shows had occurred.[177] The plus factor here lets us infer that the contracts were the subject of these conversations, elevating the likelihood that a quid pro quo had been discussed and agreed to. As with the second plus factor, more must usually be proven to establish guilt beyond a reasonable doubt. But both factors would merit a permissive inference jury instruction when combined with enough other factors (in this Comment's list or from other sources) that tend to support an inference of agreement.

III. GUIDANCE FROM CASE LAW

To finalize this Comment's list of plus factors, this Part introduces six more categories of circumstantial evidence that permit

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[175] *Snyder*, 71 F.4th at 575; *see also* United States v. Snyder, 2024 WL 4834037, at *2 (7th Cir. Nov. 20, 2024) (using this reason to justify retrial).

[176] *Snyder*, 71 F.4th at 574.

[177] *Id.*; *Snyder*, 144 S. Ct. at 1967 (Jackson, J., dissenting).

a factfinder to infer the existence of a quid pro quo bribe. To illustrate these factors, this Part relies on the facts of *Snyder* and the facts (and some analysis) from several pre-*Snyder* appellate decisions that discuss the evidentiary threshold for finding a quid pro quo under § 666. These cases involved quid pro quo bribery because they came about either in cases that required bribery to be proven under § 666 for various reasons or in cases in which the existence of a quid pro quo bribe, as opposed to a gratuity, was a relevant issue due to an indictment or a sentencing rule. The cases' holdings and facts therefore bear directly on this Comment's central issue of finding a standard of proof to get from a quid post quo to a quid pro quo. This Part proposes six plus factors, using categorical reasoning to distill the principles underlying these cases and going well beyond the cases' limited, factbound analyses.

The plus factors this Part draws from the case law are (1) obstructive conduct by either party, (2) an admission by one party of an improper relationship with the other, (3) a close temporal association between the official act and the bribe, (4) evidence that one or both parties to the bribe were aware of what the other wanted, (5) the specificity with which the official act benefitted the bribe giver, and (6) a repeated pattern of official acts going in one direction and payments going in the other.

A. Obstructive Conduct

One compelling piece of evidence that a bribe has occurred is that parties have lied about a transaction or otherwise tried to conceal its existence. Such obstruction is strongly indicative of guilt, as several cases indicate.

For example, in *United States v. Jennings*,[178] Baltimore government employee Charles Morris managed a special contracting program to renovate vacant housing units.[179] Larry Jennings, a local businessman, met with Morris and was subsequently added to the list of approved contractors.[180] Jennings made five cash payments to Morris over the course of several months.[181] The cash for two of Jennings's payments to Morris came from checks made out to subcontractors and cashed at a liquor store by Jennings's associate, allowing Jennings to conceal the checks' true purpose.[182]

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[178] 160 F.3d 1006 (4th Cir. 1998).
[179] *Id.* at 1010.
[180] *Id.* at 1011.
[181] *Id.*
[182] *Id.* at 1011–12.

The court held that, when combined with other circumstantial evidence, this "underhanded method to generate . . . cash" while attempting to obscure its source permitted a jury to find Jennings guilty of quid pro quo bribery.[183] Such concealment would, therefore, also be an appropriate subject for a permissive inference instruction.

United States v. Siegelman[184] also covered conduct aimed at concealing the existence of a bribe, this time by omission rather than commission. *Siegelman* involved the prosecution of Don Siegelman, the former governor of Alabama, and Richard Scrushy, the former CEO of a hospital group.[185] The two were accused of engaging in a corrupt arrangement in which Siegelman appointed Scrushy to a state review board charged with limiting redundancy in healthcare services in exchange for a $500,000 bribe paid through two separate campaign donations.[186] After the campaign's fundraising director raised an issue about the size of the second donation, Siegelman's associate deposited the check without telling the director.[187] Despite laws requiring their disclosure, the campaign only made the donations public after media scrutiny two years later.[188] While the court did not specifically analyze these facts as circumstantial evidence of a bribe, it held that all the evidence in the case together (none of which was direct) "was sufficient to permit a reasonable juror to find [ ] a quid pro quo"—even under *McCormick*'s demanding standard for campaign contributions.[189] The court emphasized that a quid pro quo agreement need not be express; as done here, it "may be 'implied from [the official's] words and actions.'"[190]

A third case, *Bryant*, also involved a cover-up. The bribe alleged in that case was a "low-show job" at a state medical college provided by the dean of that college, Michael Gallagher, to New

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[183] *Jennings*, 160 F.3d at 1018. The court assumed but did not decide that § 666 covered only bribes and not gratuities. *Id.* This Part discusses some of the other pieces of evidence supporting Jennings's conviction, as it does for the other cases it covers. The presence of multiple plus factors is an important indicator of guilt, especially for those that tend to be insufficient on their own. *See supra* note 167 and accompanying text.

[184] 640 F.3d 1159 (11th Cir. 2011).

[185] *Id.* at 1164.

[186] *Id.* at 1165–67.

[187] *Id.* at 1167.

[188] *Id.* at 1167–68.

[189] *Siegelman*, 640 F.3d at 1172. The court imported the *McCormick* requirement of an explicit quid pro quo into § 666 from its original Hobbs Act context. *Id.* at 1170.

[190] *Id.* at 1172 (alteration in original) (quoting *Evans*, 504 U.S. at 274 (Kennedy, J., concurring in part and in the judgment)).

Jersey state senator Wayne Bryant in exchange for funding for the school.[191] Both were convicted for this scheme.[192] The value of the job included a $35,000 salary, credit toward Bryant's state pension eligibility, and a $5,000 bonus.[193] The interview process for Bryant was a "sham," and he was told he would do only one-third of the work for which he would be paid.[194] To obscure this conduct, Gallagher created a false calendar to make it appear that Bryant had done work meriting his pay; Gallagher also lied to higher-ups at his university about Bryant's involvement in securing funding.[195] The court held that mens rea under § 666—an intent to exchange bribes for official acts—could be inferred against Gallagher based on the "indirect proof of [his] intent" that his false statements and obfuscatory acts provided.[196]

The fourth case illustrating damning acts of concealment is *Snyder* itself. Snyder gave three different explanations to as many inquirers for the nature of the $13,000 payment he received from Great Lakes Peterbilt.[197] The Seventh Circuit on remand cited "the problems with the attempts by Snyder . . . to explain" this payment as evidence of his guilt under *Snyder*'s quid pro quo test, justifying its decision to allow a new trial.[198]

These four cases demonstrate how courts can use defendants' concealment of various aspects of an alleged bribery agreement to find that such an agreement existed and that the defendant acted with a corrupt mental state.

B. Improper Relationship

Proof of some sort of improper relationship between the alleged parties to a bribe tends, and could suffice, to prove a quid pro quo when it is associated with the payment and the official act, even in the absence of an explicit agreement. Such evidence

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191 *Bryant*, 655 F.3d at 237 (quotation marks omitted).

192 *Id.*

193 *Id.* at 237, 241–42.

194 *Id.* at 241–42. The fact that Bryant performed some legitimate services did not bar a conviction because the primary motivation of the putative compensation for that work was to obtain favorable official action. *See id.* at 243 (citing United States v. Urciuoli, 613 F.3d 11, 14 (1st Cir. 2010)).

195 *Bryant*, 655 F.3d at 243.

196 *Id.* at 242–43. Proof of a quid pro quo was required in *Bryant* because bribery was the offense the § 666 indictment described. *See id.* at 236, 240–41.

197 United States v. Snyder, 71 F.4th 555, 575 (7th Cir. 2023).

198 United States v. Snyder, 2024 WL 4834037, at *2 (7th Cir. Nov. 20, 2024).

demonstrates the nature of the quid pro quo and can increase a factfinder's confidence in its existence.

United States v. Griffin[199] illustrates this principle. Bob Griffin, while serving as Missouri's Speaker of the House, had recommended to business leaders that they hire Cathryn Simmons as a lobbyist.[200] Later, Simmons gave Griffin two $5,000 checks.[201] Per a plea agreement, Griffin admitted he made the recommendation with the "understanding that Simmons would pay him for his efforts."[202] Griffin was sentenced for having engaged in bribery; the sentence range for bribery under the U.S. Sentencing Guidelines was heavier than for accepting a gratuity.[203] Griffin appealed his sentence and argued he should have only been punished for a gratuity.[204] Rejecting this argument, the Eighth Circuit held that the defendant's confession of an "understanding" (that the future payment was directly related to the official act) was enough to impose a bribery sentence.[205] Thus, despite the fact that an understanding can be interpreted as a mere implicit agreement, the court apparently found that the confession to an understanding was grounds for inferring a relationship between Griffin and Simmons that encompassed an explicit quid pro quo.

Another type of improper relationship occurred in *Jennings*, the Baltimore housing contracts case. When delivering two of the payments, Jennings told Morris (the city official) that he (Jennings) wouldn't "have made it" without Morris's help and that "if it wasn't for you, I don't know what I would have done."[206] After a subcontractor complained to Morris, Jennings told that subcontractor that the "people downtown report right back to [me]. . . . I have that under control. So, your complaints are . . . worthless."[207] Morris did not act on those complaints.[208] The Fourth Circuit mentioned only the statements of indebtedness

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199 154 F.3d 762 (8th Cir. 1998).

200 *Id.* at 763.

201 *Id.*

202 *Id.* at 764.

203 *Griffin*, 154 F.3d at 763 & n.3. The court sentenced Griffin to forty-eight months in prison, within the Sentencing Guidelines range of forty-six to fifty-seven months for his conduct. Had Griffin been sentenced for a gratuity, his Guidelines range would have been between thirty-three and forty-one months. *Id.*

204 *Id.* at 763.

205 *Id.* at 763–64.

206 *Jennings*, 160 F.3d at 1011.

207 *Id.* at 1012.

208 *Id.* (alterations in original).

when summarizing the circumstantial evidence permitting conviction, but it would be reasonable to assume Jennings's claims that he controlled Morris's political power also contributed to the case's outcome.[209]

C. Close Temporal Association

A third category of circumstantial evidence of a quid pro quo is temporal proximity between the official act (or acts) and the bribe payment (or payments). This proximity suggests that the bribe was tied to the official act as part of a single economic exchange, exhibiting a level of coordination that increases the likelihood that an agreement predated the official act.

Jennings showcases a prime example of such temporal proximity. Jennings made five cash payments to Morris;[210] each was shortly after Jennings was either approved or paid for his construction work.[211] Three of the five payments came less than a day after the government issued a specific disbursement or approval—each payment seemingly related one-to-one with a favorable government action.[212] The Fourth Circuit found this evidence compelling: in ruling that the evidence sufficed to show a quid pro quo, it noted that "[t]he timing of each charged payment from Jennings to Morris closely corresponded to a payment from [the city] to [Jennings's company] and to Morris's approval of new jobs for Jennings's companies."[213]

A similar temporal association between a payment and official act was present in *Bryant*.[214] Senator Bryant "received a $5,000 bonus from [Gallagher's college] after the 2003–2004 budget passed with the $2.325 million carve-out" for the college.[215] This timing was the final piece of evidence that the Third Circuit listed before concluding that the evidence was sufficient to convict Bryant and Gallagher for quid pro quo bribery.[216] *Bryant* therefore demonstrates, like *Jennings* did, the probative value of multiple plus factors in combination.[217]

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209 *See id.* at 1018.
210 *Id.* at 1011.
211 *Jennings*, 160 F.3d at 1011.
212 *Id.*
213 *Id.* at 1018.
214 655 F.3d at 242.
215 *Id.*
216 *Id.*
217 *See supra* notes 167, 183, and accompanying text.

D. Awareness of the Counterparty's Interests

If a party to an alleged bribe knew, prior to the occurrence of an official act, of the other party's desire to conduct a quid pro quo exchange, this is good circumstantial evidence that the exchange did in fact occur. In classic criminal law terms, such awareness is evidence of means, motive, and opportunity to engage in quid pro quo bribery. The communication channel by which one party learned of the other's wishes is the means of committing bribery; the personal benefit from the quid pro quo is the motive, and opportunity is present because at least one party was amenable to the exchange before the official act.

Siegelman illustrates the value of this type of evidence through testimony from Nick Bailey, a close associate of Alabama governor Don Siegelman.[218] According to Bailey, Siegelman was aware before taking his official action that hospital executive Richard Scrushy wanted a state board appointment to enable his hospital's growth and that Scrushy wanted to exchange a campaign contribution for that appointment.[219] Siegelman subsequently made the appointment, and Scrushy offered the campaign contribution.[220] This was one of several pieces of evidence that the Eleventh Circuit used to affirm (without much analysis) Siegelman's and Scrushy's convictions for § 666 bribery.[221]

E. Specific Benefit to the Bribe Giver from the Official Act

A fifth type of evidence supporting the inference of a quid pro quo is that the official act provides a specific, direct benefit to the alleged bribe giver, rather than simply favoring many similarly situated people. Specificity provides a special motive to engage in a quid pro quo because there are no other potential bribe givers on whom to free ride. It also renders the payment to the official after the act highly suspect because direct benefits have then traveled in both directions between the bribe giver and the official. This factor is not enough, of course, to permit conviction on its own—specific benefits pass honestly from public to private hands every day. But it can help focus a jury's inquiry on a specific form of official act that has the greatest potential for abuse, and

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[218] 640 F.3d at 1166.

[219] *Id.*

[220] *Id.* at 1166–67.

[221] *See id.* at 1172.

it can warrant a permissive inference instruction when combined with related factors that are more probative.

Such specificity was present in every case discussed in this Part. In *Griffin*, the official act was a job recommendation for the bribe giver alone.[222] In *Jennings*, the official act was a series of public contracts paid out to the bribe giver.[223] In *Siegelman*, the official act was a political appointment given to the bribe giver alone (and later transferred to his business associate).[224] In *Bryant*, the official act was a budget line item that singled out the bribe giver's institution.[225] And in *Snyder*, the official act was a city contract that only the bribe giver's company received.[226] This factor went unmentioned in the analyses of the courts considering these cases, but it is a noteworthy indicator that can raise suspicions as compared to other official act types.[227]

F. Pattern of Bribes and Official Acts

A final category of evidence from which a factfinder can infer quid pro bribery is a pattern of acts by the public official benefitting the alleged bribe giver and payments flowing in the opposite direction—the so-called "stream of benefits."[228] After a certain point, the payments can no longer be construed as thank-yous for the preceding official act (gratuities) but are rather down payments on the subsequent official act (bribes).

In *Jennings*, five different payments to the Baltimore official followed five contracts issued by that official to the bribe payer.[229] The Fourth Circuit held that "[a] reasonable juror could have found that Jennings intended the . . . payments to be either arranged-in-advance rewards in return for Morris's official acts on behalf of Jennings's companies or paid-in-advance bribes for Morris's future acts on behalf of the companies, or both."[230] These payments were also useful in proving the temporal proximity plus factor; the two factors are often associated, and a long string of

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[222] 154 F.3d at 763.

[223] 160 F.3d at 1011.

[224] 640 F.3d at 1164–65.

[225] 655 F.3d at 237.

[226] 71 F.4th at 574.

[227] *Cf. McDonnell*, 579 U.S. at 570 (requiring proof of an official act that is "focused and concrete" and "relatively circumscribed" to convict for § 201 bribery).

[228] *See Bryant*, 655 F.3d at 241 (quotation marks omitted); *see also supra* note 118.

[229] 160 F.3d at 1011.

[230] *Id.* at 1017.

payments made in close proximity to official acts is powerful evidence of a bribery agreement.

The Third Circuit decided *Bryant* using similar reasoning. There, the court used the "stream of benefits" theory of a quid pro quo exchange.[231] In this rare case in which a categorical principle of evidentiary sufficiency appears in the case law, the court endorsed the inference of an "agreement, even if implicit" from the presence of a job and its benefits flowing to Bryant and funding increases flowing to Gallagher's college.[232] Put differently, the fact that Bryant (or Siegelman) kept getting benefits and Gallagher (or Scrushy) kept getting official acts was evidence that there was an agreement to exchange them; multiple successive gratuities without a sense that the payments were influencing the official acts would have been implausible.

G. Consolidating the Plus Factors

The cases discussed in this Part confirm that bribery in the form of a quid pro quo agreement can be proven by circumstantial evidence and that courts will analyze such evidence for sufficiency,[233] making the plus factors relevant. Prosecutors need not present direct proof of, for example, a written agreement to engage in bribery to satisfy the corrupt intent prong of § 666 and the associated quid pro quo element described in *Snyder*.[234] The six plus factors from the case law add to the four that Part II already drew from antitrust law to complete this Comment's novel framework for inferring the existence a quid pro quo bribery agreement by circumstantial (rather than direct) evidence. A list of the two sets of plus factors is presented below.

Plus Factors Derived from Antitrust

1. Payments and official acts that, assuming rational self-interest by both parties, can only be explained by a prior agreement.
2. Communications between the parties before the official act(s) or payment(s) began.
3. Suspicious conduct, such as communications between the parties, that is only pretextually explained.

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[231] *Bryant*, 655 F.3d at 241.

[232] *Id.*

[233] *See, e.g.*, *Siegelman*, 640 F.3d at 1171; *Jennings*, 160 F.3d at 1014.

[234] *See* 144 S. Ct. at 1951; 18 U.S.C. § 666(a)(1)(B), (a)(2).

4. Awareness by one party to the alleged bribe of nonpublic information held by the other that relates to the alleged quid pro quo.

Plus Factors Native to Bribery

5. Acts that obscure the nature or existence of payments, official acts, or the fact of an exchange.
6. Admission by a party to the alleged bribe of an improper relationship with the counterparty that relates to the alleged quid pro quo.
7. Temporal proximity between the bribe(s) and official act(s).
8. One or both parties knew the other wanted a quid pro quo exchange.
9. The official act furnished a direct and personal benefit to the alleged bribe giver (not merely a beneficial general policy action).
10. A pattern of both acts by a public official that benefit the alleged bribe giver and payments from that individual to the public official.

IV. INITIAL RECOMMENDATIONS

Before concluding, this Comment briefly considers how courts can, and practically should, apply the plus factors. There will be ample opportunities to apply these factors in the future—federal funds bribery is a relatively common crime, § 666 is a commonly used statute, and direct evidence is often unavailable.[235] So the issue this Comment confronts and the proposal it offers are far from (merely) academic.

The concept of plus factors can survive the doctrinal transition from antitrust to criminal bribery law if appropriately construed as mere permissive inferences and with respectful deference to the presumption of innocence and the government's permanent burden of persuasion.[236] When confronted with such cases, juries and (in bench trials) judges must ultimately be responsible for deciding, by considering all the evidence in any

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[235] *See supra* notes 3–4 and accompanying text.

[236] *See Allen*, 442 U.S. at 157–65.

given case brought under § 666, whether an illegal bribery agreement has occurred. But they could certainly use some help in doing so.

The framework of plus factors may not comprehensively answer the question of what evidence suffices to prove a quid pro quo bribery agreement in every circumstance, but it provides far more clarity than is present under current articulations of the law. It can also help appellate courts assess appeals based on the sufficiency of the evidence, enabling them to impose more regularity on the law and establish the outer boundaries of what can prove a quid pro quo while policing the permissive inference language to protect the jury's ultimate factfinding authority. And the residual uncertainty need not be fully eradicated, because a standard for this area of law has benefits that a brightline rule would lack.[237]

If judges use this Comment's proposed plus factors when crafting trial instructions or hearing appeals in bribery cases involving circumstantial evidence of a quid pro quo, they would do well to keep a few principles in mind. First, not all the plus factors will be relevant in every case. The factors can be triggered by the presentation of certain evidence, and only then should they be added to permissive inference jury instructions or considered on appeal. In addition, jury instructions must leave room for inferences outside the list of plus factors; this can help the case law advance, expanding the list of plus factors beyond this Comment's initial effort.

Second, it is appropriate to emphasize the permissive nature of the plus factors. They provide great value in helping to structure a jury's or judge's evaluation of the evidence, but they cannot fully supplant it. Other factors not mentioned here may well be determinative in one case, while some of the factors may be present in another case but remain insufficient to prove a defendant's guilt.

Third and finally, not all plus factors are created equal. While it is beyond the scope of this Comment to comprehensively assess the plus factors' relative probative value,[238] the discussion above provides some indications of which plus factors may require additional corroboration.[239]

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[237] *See supra* notes 103–05 and accompanying text.

[238] *Cf.* Kovacic et al., *supra* note 126, at 413–16 (drawing on a large body of literature about antitrust plus factors to rank some of them by probative value).

[239] *See supra* Parts II.D.2, II.D.4, III.E.

All told, breaking down the barriers between antitrust and bribery law to import the plus factors offers a valuable answer to this Comment's question of what evidence suffices to prove a § 666 quid pro quo after *Snyder*. Instead of an open-ended jury deliberation without a reference point for what suggests an illegal agreement, the plus factors enable jurors to access the accumulated wisdom of bribery case law and related antitrust inquiries, helping to frame their decision without mandating any outcome or weighting of evidence. They also provide guideposts for prosecutors and defense attorneys to structure their arguments, and a doctrine for appellate judges to rely on when reviewing jury verdicts. More concretely, the plus factor analyses in Parts II and III show how, notwithstanding the outcome of *Snyder*, a jury could have convicted Mayor Snyder himself of committing § 666 bribery given the accumulation of circumstantial evidence against him.

CONCLUSION

The *Snyder* decision narrowed the scope of 18 U.S.C. § 666 and has destabilized this federal anti-corruption law in a way that matters for state and local public officials, prosecutors, and judges. A quid pro quo is now a required element of proof in cases in which the payment postdates the related official act, but the Supreme Court has not explained how a quid pro quo may be proven. Thus, an analysis of what evidence suffices, in addition to gratuities, to convict the alleged giver or taker of a quid pro quo bribe under § 666 will be useful for all parties affected by the current uncertainty.

Two principal sources provide a basis for this analysis. First, antitrust law contains a well-developed literature of plus factors that deal with the comparable issue of what circumstantial evidence suffices to prove a conspiracy between competitors in restraint of trade. Second, judicial decisions construing 18 U.S.C. § 666 contain facts and some limited analysis that suggest how circumstantial evidence may be used to obtain a conviction. This Comment breaks fresh legal ground by adapting antitrust's factors to the bribery context; it then adds some additional factors unique to bribery from the case law. In doing so, this Comment contributes an important measure of clarity to the evidentiary issue of proving a quid pro quo under § 666, where no such clarity currently exists. This Comment ultimately contends that there are ten plus factors courts can and should use in jury instructions to permit an inference of quid pro quo bribery when a payment

postdates an official act. It leaves open a path for courts and future commentators to refine the doctrine by adding, editing, or removing plus factors and adjusting their application.

In practice, courts will be tasked with making law regarding bribery and evidentiary sufficiency, and prosecutors and defense attorneys will be responsible for the arguments they make to shape this law. The aspiration of this Comment is to help both sides of this contest—and its judicial referees—by taking a significant step toward systematizing § 666 bribery law.