

# Colloquy

## *Are Extraterritorial Restrictions on Bribery a Viable and Desirable International Policy Goal Under the Global Conditions of the Late Twentieth Century?*<sup>†</sup>

### **Extraterritorial Restriction of Bribery: A Premature Evocation of the Normative Global Village**

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<sup>†</sup> A version of this Article by Professor Salbu and a version of the article by Professor Nichols that follows were originally presented at the Annual Conference of the Academy of Legal Studies in Business, and at the Carol and Lawrence Zicklin Center for Business Ethics Research.

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## I. INTRODUCTION

In 1977, Congress passed the Foreign Corrupt Practices Act (FCPA).<sup>1</sup> Largely in response to protests regarding the legislation as it was originally enacted,<sup>2</sup> Congress amended the FCPA in 1988.<sup>3</sup> The Act is comprised of two different kinds of provisions:<sup>4</sup> accounting provisions<sup>5</sup> and anti-bribery provisions.<sup>6</sup> This Article will focus on the anti-bribery provisions, which apply extraterritorially<sup>7</sup> to a wide variety of actors and entities.<sup>8</sup>

Observers have been critical of both the original version<sup>9</sup> and the amended version<sup>10</sup> of the FCPA. Yet despite concerns regarding the

1. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended in scattered sections of 15 U.S.C. § 78 (1994)).

2. See H. Lowell Brown, *Parent-Subsidiary Liability Under the Foreign Corrupt Practices Act*, 50 BAYLOR L. REV. 1, 30-31 (1998) (noting change contained in the 1988 Amendments that occurred in response to criticism of the 1977 statute); John W. Duncan, Comment, *Modifying the Foreign Corrupt Practices Act: The Search for a Practical Standard*, 4 J. INT'L L. BUS. 203, 203 (1982) (noting critics' early attacks on the FCPA for a variety of reasons); Robert S. Levy, Note, *The Antibribery Provisions of the Foreign Corrupt Practices Act of 1977: Are They Really as Valuable as We Think They Are?*, 10 DEL. J. CORP. L. 71, 79-82 (1985) (noting numerous complaints about the original version of the FCPA during the period immediately following its enactment).

3. Foreign Corrupt Practices Act Amendments of 1988, Pub. L. No. 100-418, §§ 5001-03, 102 Stat. 1107, 1415-25 (codified at 15 U.S.C. §§ 78dd-1 to -2 (1994)).

4. For a good, concise, updated discussion of the two kinds of provisions, see Lynne Baum, *Foreign Corrupt Practices Act*, 35 AM. CRIM. L. REV. 823, 825-35 (1998).

5. See 15 U.S.C. § 78m(b) (1994).

6. See 15 U.S.C. §§ 78dd-1 to -2 (1994).

7. Because the FCPA prohibits certain payments to foreign officials, its application is considered extraterritorial.

8. The anti-bribery provisions of the FCPA apply to issuers of securities, domestic concerns, and the officers, directors, employees, agents or stockholders of either issuers or domestic concerns. See 15 U.S.C. §§ 78dd-1(a), -2(a) (1994). Courts have held that the provisions can be applied to foreign nationals and, indeed, to anyone qualified under the statutory language over whom jurisdiction exists. See, e.g., *Dooley v. United Techs. Corp.*, 803 F. Supp. 428, 439 (D.D.C. 1992).

9. See Mark J. Murphy, *International Bribery: An Example of An Unfair Trade Practice?*, 21 BROOK. J. INT'L L. 385, 386 (1995) ("From its inception, the FCPA has received a great deal of criticism . . . . The 1988 amendments . . . did little to win any additional international support for the U.S. anti-bribery position . . . .").

10. See Henry H. Rossbacher & Tracy W. Young, *The Enemy Within: Excerpts from the Symposium Held At Jesus College Cambridge, September 8-13, 1996*, 15 DICK. J. INT'L L. 509, 524 (1997) ("Despite amendments, the Act still has a variety of problems that prevent it from fully achieving its goals.").

legislation and its purported weaknesses,<sup>11</sup> support for the concept behind the law is clearly growing.<sup>12</sup>

Commentators consistently rally behind efforts to globalize FCPA-style legislation.<sup>13</sup> This galvanization of forces is achieving results, as signatory nations in groups such as the Organization of American States (OAS)<sup>14</sup> and the Organization for Economic Cooperation and Development (OECD)<sup>15</sup> have agreed to follow or roughly imitate the United States's approach.<sup>16</sup> The trend is clear—several dozen countries have recently committed themselves to criminalizing extraterritorial payments of bribes, and writers are supporting the move as healthy progress.<sup>17</sup> Unfortunately, both the states moving toward FCPA-style legislation and the commentators who praise them are entering dangerous territory.

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11. Critics have been concerned with both the specific legislation and the generic philosophy behind the legislation. The specific statute is criticized for its purported vagueness. *See, e.g.*, Daniel Pines, Comment, *Amending the Foreign Corrupt Practices Act to Include a Private Right of Action*, 82 CAL. L. REV. 185, 192 (1994) (suggesting that the statute remains vague despite the 1988 amendments). The philosophy behind the statute is condemned because its extraterritorial reach is considered invasive—"an overreaching and naïve attempt by the U.S. government to impose unrealistic moral standards on global business conduct." Carolyn Hotchkiss, *The Sleeping Dog Stirs: New Signs of Life in Efforts to End Corruption in International Business*, J. PUB. POL'Y & MARKETING, Spring 1998, at 108.

12. *See* Franklin A. Gevurtz, *Using the Antitrust Laws to Combat Overseas Bribery by Foreign Companies: A Step to Even the Odds in International Trade*, 27 VA. J. INT'L L. 211, 215 (1987) ("The FCPA serves pragmatic foreign policy interests of the United States by seeking to ensure that U.S. companies, like Caesar's wife, remain above suspicion."); Murphy, *supra* note 9, at 394-95 ("Instead of considering the repeal of the FCPA due to the failed international efforts, the U.S. position should be bolstered by the serious consideration . . . international forums have granted to the problem of bribery.").

13. *See, e.g.*, HOMER E. MOYER ET AL., FIGHTING FOREIGN CORRUPTION: MULTILATERAL EFFORTS CAN CREATE LEVEL PLAYING FIELD (Washington Legal Found., Critical Legal Issues Working Paper Series No. 75, 1997) (describing and supporting multilateral anti-bribery regulation).

14. In 1996, a specialized conference of the OAS approved the Inter-American Convention Against Corruption, one of the earliest substantial efforts to multilateralize global anti-bribery efforts. *See* Inter-American Convention Against Corruption, Mar. 29, 1996, 35 I.L.M. 724.

15. In late 1997, 29 member states of the OECD became signatories to the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. The signatories have agreed to pass legislation patterned after the FCPA. *See* Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 18, 1997, 37 I.L.M. 1. For general discussion of the Convention, *see* Lucinda A. Low & Michael L. Burton, *Anti-Bribery Pact: Corruption Is Target of Multilateral Efforts*, NAT'L L.J., May 4, 1998, at C5. Already, the nation-by-nation implementation of this commitment is proving troublesome, as business leaders in some countries vehemently object that the multilateral adoption of FCPA-style legislation by OECD members will subject them to a systematic disadvantage doing business in global markets. *See, e.g.*, *Australia Warned Against Moves to Outlaw Business Bribery Overseas*, Agence France-Presse, Mar. 31, 1998, available in LEXIS, News Library, Allnews File (quoting Australian Chamber of Commerce and Industry statement that "[t]he legislation is likely to compromise the ability of Australian commerce and industry to compete in existing markets and emerging foreign markets . . . and against aggressive exporters and investors from non-OECD countries").

16. For a discussion of how these international efforts compare with the FCPA, *see* Lucinda A. Low et al., *The Inter-American Convention Against Corruption: A Comparison with the United States Foreign Corrupt Practices Act*, 38 VA. J. INT'L L. 243 (1998).

17. *See, e.g.*, Michael J. Herschman, *Criminalized Foreign Bribery Will Improve Trade*, NAT'L L.J., Apr. 27, 1998, at A23 (referring to the OECD Convention as a "very real advance").

My previous writing in this area has suggested that, even as amended, the FCPA remains too seriously flawed to be considered prudent legislation.<sup>18</sup> This Article takes the argument a step further and suggests that any form of extraterritorial anti-bribery legislation, even the most perfectly conceived, must be considered imprudent under the global conditions of the late twentieth century. As technology shrinks the world with ever-increasing speed<sup>19</sup> and states enjoy more opportunities to develop value convergence and create unified agendas,<sup>20</sup> this prognosis may change. For now, however, bans on extraterritorial bribery cause more problems than they solve.

The arguments supporting this position are developed around a few central propositions that will comprise most of the remaining pages. Part II contends that the so-called "global village" has yet to develop into a single viable community<sup>21</sup> that can be effectively subjected to a single set of extrinsically imposed rules.<sup>22</sup> Accordingly, otherwise laudable efforts to promote global unity must be more respectful of worldwide cultural diversity than is the FCPA.<sup>23</sup> Part III refines this generic observation regarding global pluralism with specific application to bribery. Part IV examines the importance of motive in assessing the morality of a gratuity and the risk of ethnocentrism in assessing motive across a cultural divide. The Conclusion in Part V summarizes both the underlying arguments and the position that logically arises from them. It suggests that global attitudes about what comprises bribery are so varied that extraterritorial application of anti-corruption laws creates two kinds of perils: a moral peril and a political peril.

The moral peril consists of the dangers of intrusiveness, paternalism, imperialism, and disrespect that arise whenever one state imposes its

18. See Steven R. Salbu, *Bribery in the Global Market: A Critical Analysis of the Foreign Corrupt Practices Act*, 54 WASH. & LEE L. REV. 229, 282-85 (1997).

19. See Steven R. Salbu, *Who Should Govern the Internet?: Monitoring and Supporting a New Frontier*, 11 HARV. J.L. & TECH. 429, 454 (1998).

20. These opportunities should logically increase as technology fosters a virtual kind of proximity. Movements toward value convergence depend on all groups being exposed to other groups' values, norms, and beliefs. Likewise, agendas can approach unification only when all people can engage in an inclusive "global conversation" which requires interaction. See Sean P. Kanuck, *Information Warefare: New Challenges for Public International Law*, 37 HARV. INT'L L.J. 272, 292 (1996) (anticipating the effects of telecommunication linkages, e-commerce, and other communications advances on enhanced "global conversation" and alignment of interests).

21. In the 1980s and 1990s, the concept of community became, and continues to be, an increasingly critical part of discussions relating to business ethics. See Timothy L. Fort, *Goldilocks and Business Ethics: A Paradigm That Fits "Just Right,"* 23 J. CORP. L. 245, 256-59 (1998) (noting the general trend to incorporate notions of community into business ethics literature).

22. See James P. Boggs, *NEPA in the Domain of Federal Indian Policy: Social Knowledge and the Negotiation of Meaning*, 19 B.C. ENVTL. AFF. L. REV. 31, 35 (1991) (noting that "cultural diversity of the world's peoples has never been more apparent").

23. See Terrence Meyerhoff, Note, *Multiculturalism and Language Rights in Canada: Problems and Prospects for Equality and Unity*, 9 AM. U. J. INT'L L. & POL'Y 913, 1011-12 (1994) (discussing the problem of "promoting unity, while reconciling . . . multiculturalism" in environments characterized by diversity).

discretionary values upon another state.<sup>24</sup> The political peril entails the ill will, as well as the potential conflict, that can result from the imposition of alien values.<sup>25</sup> Thus, for both philosophical and pragmatic reasons, the world is not presently ready for legislation like the FCPA, even if the legislation were better constructed than the existing statute.

## II. FOSTERING COMMUNITY IN THE GLOBAL VILLAGE

The case against criminalizing extraterritorial bribery is built on the following logic: When laws are imposed across borders, there should be considerable transnational value consensus. Otherwise, the imposition threatens to deny respect for legitimate regional value variance. Moreover, the state being imposed upon may resent the intrusion as imperialistic or even menacing, resulting in increased potential for subtle or more palpable retaliation.<sup>26</sup>

This Part explains why conditions are not yet ripe for the safe importation of legal authority across international borders in many areas of law, including bribery restrictions. It begins by examining the concept of the global village, observing that the term expresses more of an ideal than an actual achievement of worldwide value consensus. Accordingly, conditions are not yet in place for the FCPA's aggressive style.

This Part also explains in some detail the ways in which value congruence can and cannot legitimately be achieved. The conclusion is that, ordinarily,<sup>27</sup> cultures should be brought to convergence, if at all, by

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24. "Discretionary values" refer to those values that defensibly can vary from one culture to another, or values that occupy the "moral free space" that can be legitimately negotiated under local or regional social contracts. See Thomas Donaldson & Thomas W. Dunfee, *Toward a Unified Conception of Business Ethics: Integrative Social Contracts Theory*, 19 ACAD. MGMT. REV. 252, 260-62 (1994). Discretionary values are contrasted with values associated with fundamental rights and norms, which can legitimately be seen as nonnegotiable.

25. Taken to the extreme, social, cultural, or religious imperialism logically can result in war. For greater elaboration of this proposition, see Steven R. Salbu, *The Foreign Corrupt Practices Act as a Threat to Global Harmony*, 20 MICH. J. INT'L L. (forthcoming Apr. 1999).

At the very least, the resentment engendered by these forms of imperialism can strain international relations, potentially endangering cooperation and free trade. These potential results are a function of the threat of extraterritorially applied laws to diplomatic relations between imposing and imposed-upon nations. For a discussion of this dynamic, see Penny Zagalis, Note, *Hartford Fire Insurance Company v. California: Reassessing the Application of the McCarran-Ferguson Act to Foreign Reinsurers*, 27 CORNELL INT'L L.J. 241, 267 (1994). As one commentator observes, "[p]erceived economic and political 'imperialism,' though much less malevolent than military imperialism, will not be warmly greeted." Alex Y. Seita, *Globalization and the Convergence of Values*, 30 CORNELL INT'L L.J. 429, 432 (1997).

26. See Comment, *NEPA's Role in Protecting the World Environment*, 131 U. PA. L. REV. 353, 370 (1982) (describing "extraterritorial application of U.S. law" as "a sore point with other countries" and as a form of imperialism likely to provoke retaliation); see also Derek G. Barella, Note, *Checking the "Trigger-Happy" Congress: The Extraterritorial Extension of Federal Employment Laws Requires Prudence*, 69 IND. L.J. 889, 913 (1994) (noting, in regard to labor policies, that U.S. overreaching can be viewed as imperialistic and invite retaliation).

27. I say "ordinarily" here in order to leave some latitude for extreme cases in which the severity of an abuse might justify what otherwise would be considered intolerable imperialism. An example would be extraterritorially applied intervention to halt fundamental human rights violations,

persuasion rather than by fiat. This lays the groundwork for Part III, which examines the present state of value pluralism as applied to the specific issues of bribery and corruption.

In the present Part, Section II.A distinguishes between descriptive and normative conceptions of the global village. Section II.B suggests that the normative global village is still in its infancy, and explains why extraterritorial application of laws is generally inadvisable at this stage.

#### A. *Distinguishing Descriptive and Normative Conceptions of the Global Village*

Since Marshall McLuhan first coined the phrase in 1967,<sup>28</sup> the notion of the world as a "global village" has pervaded the vocabulary used to discuss international business, politics, economics, and society.<sup>29</sup> As originally put forth, the term is descriptive rather than normative. McLuhan and Fiore observe that electronic technology reshapes and restructures human patterns of behavior, so that time and space decrease in significance and the world becomes a single community.<sup>30</sup> They are describing the worldwide interdependence that is the inevitable result of what Chon calls "the exponential increase in technological concentration and infiltration."<sup>31</sup> Designating the world a "global village" ascribes to it a new interrelatedness, borne of virtual as well as geographical proximity.<sup>32</sup>

The descriptive reality of global interdependence inevitably leads to discussion of the normative aspects of global interdependence, and indeed, the discussion of the global village has taken a prescriptive turn. The peoples of today's world cannot avoid interaction. This ineluctable social intercourse calls for mutual tolerance and respect, as well as harmonization of values

such as torture.

28. See MARSHALL McLUHAN & QUENTON FIORE, *THE MEDIUM IS THE MESSAGE* 63 (1967); see also MARSHALL McLUHAN & BRUCE R. POWERS, *THE GLOBAL VILLAGE: TRANSFORMATIONS IN WORLD LIFE AND MEDIA IN THE 21ST CENTURY* (1989).

29. See, e.g., Constance Hunt, *Challenges Facing Resource Development: Implications for Lawyers*, 21 *FORDHAM INT'L L.J.* 503, 505 (1997) (examining skills needed by lawyers operating within the global village); Michael H. LeRoy, *Severance of Bargaining Relationships During Permanent Replacement Strikes and Union Decertifications: An Empirical Analysis and Proposal to Amend Section 9(c)(3) of the NLR Act*, 29 *U.C. DAVIS L. REV.* 1019, 1023 (1996) (relating realization of the global village to unions being forced out of American towns); Frederick C. Robbins, *Concluding Remarks*, 4 *HEALTH MATRIX* 119, 121 (1994) (referring to the global village in a discussion of the community's social support role); Charles Smith, *Building Equity or Waiting for Explosions*, 8 *STAN. L. & POL'Y REV.* 61, 67 (1997) (associating an understanding of the importance of ethnic diversity with "cutting edge responses to life in the global village").

30. See McLuhan & Fiore, *supra* note 28, at 8, 16, 63.

31. Margaret Chon, *Postmodern "Progress:" Reconsidering the Copyright and Patent Power*, 43 *DEPAUL L. REV.* 97, 101 (1993).

32. Interactive computer technology brings the peoples of the world virtually closer, while modern transportation advances such as air travel reduce the impact of physical distances. See Keith Aoki, *(Intellectual) Property and Sovereignty: Notes Toward a Cultural Geography of Authorship*, 48 *STAN. L. REV.* 1293, 1347 (1996) (noting effects of technology and a "shrinking globe" in creating a single economic world arena).

throughout the world.<sup>33</sup> As Brown observes, the awareness that we are residents of a global village fosters “an increasing consciousness that what we do or do not do in our own neighborhood can have ripple effects over the entire planet.”<sup>34</sup> Under these conditions, the global village takes on the trappings of an ethical ideal,<sup>35</sup> implemented by groups seeking to unite the world in initiatives to address common problems and causes. In 1970, for example, organizers of Earth Week sought to convene the planet’s inhabitants in what was described as a global “town meeting”<sup>36</sup> to confront worldwide environmental challenges.

The logic behind global collaboration is simply to extend traditional village dynamics to a global scale. In the small, geographically constrained villages that preceded the industrial revolution,<sup>37</sup> the development of a local community supported a system of shared values, norms, and beliefs.<sup>38</sup> This system in turn helped provide social order.<sup>39</sup> As the world is transformed into a single global village, worldwide harmony will likewise be fostered by the development of a larger, more comprehensive version of this same kind of community. Thus, the normative framework for the global village is one in which the peoples of the world recognize the descriptive reality of the term and work together to develop a unified culture. As we shall see in the following Section, the normative conception of the global village remains an ideal rather than a reality, because cultural heterogeneity confounds efforts to address world problems as a single community.

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33. See Robert Brown & Michael Alexander, *Sovereignty in the Modern Age*, 20 CAN.-U.S. L.J. 273, 273 (1994) (“In this global village, with overlapping national claims, we must all make a greater effort to get along with each other and reach difficult and painful accommodations which are necessary to resolve the conflicting claims of different sovereignties.”).

34. Donald A. Brown, *Thinking Globally and Acting Locally: The Emergence of Global Environmental Problems and the Critical Need to Develop Sustainable Programs at State and Local Levels in the United States*, 5 DICK. J. ENVTL. L. & POL’Y. 175, 177 (1996).

35. In part, this ideal suggests that the emerging proximity of previously isolated peoples demands unprecedented levels of global cooperation. Recently, Internet technology has pushed virtual proximity to new extremes, furthering the need for cooperative global efforts. See Henry H. Perritt, Jr., *Is the Environmental Movement a Critical Internet Technology?*, 8 VILL. ENVTL. L.J. 321, 322 (1997) (describing the Internet as “a way of organizing and connecting human activity, which emphasizes decentralization, specialization, and global cooperation”).

36. See Robert F. Blomquist, *The Beauty of Complexity*, 39 HASTINGS L.J. 555, 555 (1988).

37. See Roger K. Lewis, *Americans and the City: A Love-Hate Relationship*, NATION’S CITIES WKLY., Jan. 19, 1998, at 9 (observing the 19th-century U.S. transformation from an agrarian to an industrial society).

38. See MARTIN H. NEUMEYER, SOCIAL PROBLEMS AND THE CHANGING SOCIETY 48–52 (1953) (discussing functions of small communities).

39. See Mark Gould, *Law and Philosophy: Some Consequences for the Law Deriving from the Sociological Reconstruction of Political Theory*, 17 CARDOZO L. REV. 1239, 1280 (1996) (referring to “coherence of a social order grounded in shared values”).

B. *The General Inadvisability of Adopting Extraterritorially Applied Legislation During the Infancy of the Normative Global Village*

McLuhan's vision of a global village pervades the international ethos of the latter part of the twentieth century.<sup>40</sup> As we enter the next millennium, this conceptualization tempts us to heightened efforts to rule the world with a single set of universal laws, regulations, and edicts. In terms of legislation like the FCPA, we are inclined to see extraterritorial application of the rule of law as less invasive and more justified than before.<sup>41</sup> This temptation is based on the notion that one truly unified global community is a present reality that legitimizes the creation and imposition of one standardized rule of law.

To the degree that this notion is false, the movement toward a unified rule of law and extraterritorial application of laws is weakened. While the ideal of a normative global village may be enticing, and while we are likely moving in this direction, the current condition of the world hardly comprises a single community with a single culture of common norms, beliefs, and values.<sup>42</sup> The planet today remains culturally pluralistic, to the extent that even institutions with clearly normative agendas often recognize "the 'legitimate authority' of human cultures and their independence from control by either state or ecclesiastical authority."<sup>43</sup> As of 1998, geography still shapes political, social, and economic reality.<sup>44</sup>

40. McLuhan and the global village are frequently discussed in modern law review articles that address a wide array of topics. See, e.g., Keth A. Dithavong, *Paving the Way for Women on the Information Superhighway: Curbing Sexism Not Freedoms*, 4 AM. U. J. GENDER & L. 455, 466 n.70 (1996) (considering an analogy between McLuhan's global village and the "Information Superhighway"); Stephen Fraser, *The Conflict Between the First Amendment and Copyright Law and Its Impact on the Internet*, 16 CARDOZO ARTS & ENT. L.J. 1, 51 (1998) (describing "the technological reality of what Marshall McLuhan called the Global Village"); Jeffrey W. Stempel, *Two Cheers For Specialization*, 61 BROOK. L. REV. 67, 80 n.44 (1995) (discussing Woody Allen's treatment of Marshall McLuhan, as related to analysis of recruiting judges); David Ehrenfest Steinglass, Note, *Extending Pruneyard: Citizens' Right to Demand Public Access Cable Channels*, 71 N.Y.U. L. REV. 1113, 1127 n.82 (1996) (citing McLuhan in discussion of public access cable television as a "democratic communications medium").

41. Accordingly, many politicians and other commentators today have called for multilateralization of FCPA-style legislation. See, e.g., Ben Barber, *Helms Vows Quick Action on Anti-Bribery Treaty*, WASH. TIMES, June 10, 1998, at A16 (discussing political support of the movement toward multilateralization of anti-bribery laws).

42. Recognition of modern cultural pluralism has been traced to 19th-century historicism, "which . . . undermined the belief in a single set of categories for understanding the world through its demonstration of the ubiquity of historical and cultural diversity." Mark Cammack, *In Search of the Post-Positivist Jury*, 70 IND. L.J. 405, 417 n.68 (1995).

43. Martin Shupack, *The Churches and Human Rights: Catholic and Protestant Human Rights Views As Reflected in Church Statements*, 6 HARV. HUM. RTS. J. 127, 147 (1993) (referring to the Roman Catholic Church's implicit acknowledgement of cultural pluralism in its 1965 publication of *Gaudium et Spes*).

44. See Frank H. Wu, *The Limits of Borders: A Moderate Proposal for Immigration Reform*, 7 STAN. L. & POL'Y REV. 35, 41 (1996) (referring to an article in *The Economist* that answered the title question, "Does it matter where you are?" by concluding that geography is still important economically, but increasingly less so).



This suggests that the ubiquitous transnational application<sup>45</sup> of any one set of laws is dangerous. The peril of extraterritorial application is the risk of inflicting incongruent or discordant values on others in instances where legitimate, nuanced moral differences are supportable.<sup>46</sup> Moreover, in a world that acknowledges cultural pluralism, extraterritorially applied law embracing a single value system is too narrow to achieve wide acceptance.<sup>47</sup> A forced fit between unified, externally imposed law and divergent cultures leads to the moral and political perils observed in Part I.<sup>48</sup>

Of course, there is no such thing as a perfectly heterogeneous or a perfectly homogeneous society. Rather, cultural heterogeneity and homogeneity are conditions of degree. This fact raises the disturbing question of whether transnational cultural pluralism is indistinguishable from domestic cultural pluralism. If increasing diversity in countries like the United States<sup>49</sup> approaches levels of transnational diversity, the supposed moral imperialism of extraterritorially applied legislation may simply be an inevitable artifact of the modern world. Geography could be increasingly irrelevant as a source of cultural variety, so that domestic and extraterritorial laws would face identical pitfalls.

Cultural diversity within countries is a natural by-product of the shrinking globe and an increasingly mobile world population. Migration is facilitated and supported by technological advances, particularly in communications and transportation.<sup>50</sup> Despite this dynamic, it remains possible to defend domestic anti-bribery laws as acceptable while condemning extraterritorially applied anti-bribery laws as unacceptably morally imperialistic. Today's world remains one of separate sovereignties. Although states may one day prove obsolete, they are today's primary global units of analysis.

With sovereignty comes prerogative. The diverse groups that populate states all navigate the straits between maintaining cultural uniqueness and

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45. I refer here to the "ubiquitous" transnational application of a set of laws to confine my discussion to laws which, like the FCPA, apply across the globe, and not simply in nations that agree to its application or sign some form of reciprocal compact. *See also infra* text accompanying note 166 (identifying concerns that would arise even if anti-bribery legislation only prohibited acts that were illegal in the host nation).

46. And indeed, nuanced moral differences are supportable whenever reasonable minds may differ. For detailed support of this assertion, see Steven R. Salbu, *Law and Conformity, Ethics and Conflict: The Trouble with Law-Based Conceptions of Ethics*, 68 *IND. L.J.* 101, 127-31 (1992).

47. *See* A. Peter Mutharika, Essay, *The Role of International Law in the Twenty-First Century: An African Perspective*, 18 *FORDHAM INT'L L.J.* 1706, 1719 (1995) (describing the world as "gradually accepting cultural diversity," and noting that "the Judeo-Christian value system on which modern international law is generally based may be too narrow to support the international law of the future").

48. *See supra* text accompanying notes 24-25.

49. *See, e.g.*, Kunal M. Parker, *Official Imaginations: Globalization, Difference, and State-Sponsored Immigration Discourses*, 76 *OR. L. REV.* 691, 718 (1997) (describing the United States as "a country of immense cultural diversities").

50. *See* Stephen H. Legomsky, *The New Techniques for Managing High-Volume Asylum Systems*, 81 *IOWA L. REV.* 671, 671 (1996) (noting that communications and transportation advancements have enabled recent growth in global migration).

assimilating into civic cultures, as these cultures exist and as they are emerging. This means that the many peoples of a state belong to at least two cultures: the culture of their ethnic or geographic origins—that is, their historic culture—and the culture of their state of choice. Within this context, peoples' voluntary citizenship includes acceptance of the responsibility to participate in the evolving civic culture.

While some role conflict invariably exists between citizens' historic and civic cultures, the domestic imposition of law is ultimately both justified and inevitable. The domestic imposition of law is justified through the social contract,<sup>51</sup> under which the citizens of any state agree that domestic actions will be ruled by their chosen sovereignty, even when those laws conflict with individual values. The domestic imposition of law is inevitable because laws must ultimately be promulgated despite the ineluctable cultural heterogeneity of the people ruled. The existence of law is a given; what is in question is the legitimate source of law operating within a particular state. The domestic law of a sovereignty bears a legitimacy under the social contract that can never be replicated by extraterritorial edict.

### III. PLURALISTIC ATTITUDES ACROSS THE GLOBE IN REGARD TO BRIBERY AND CORRUPTION

This Part provides a sample of the complex range of subtly varying attitudes that exist in regard to bribery and corruption across the globe.<sup>52</sup> Cultural differences in assessing bribery and corruption are relevant to the discussion of global heterogeneity. Accordingly, the following discussion addresses a wide array of differences among cultures in their perceptions regarding corruption. Many of the cases examined in this Part relate to payments<sup>53</sup> made in the course of executing business transactions. In these instances, the FCPA would apply only when a state is one of the transactors—for example, when a government is seeking bids for a project, or when a company in a socialist or semi-socialist country is state-run. In such cases, foreign officials are typically the decision-makers, and therefore

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51. See Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1684 (1988) (noting the relationship between the legitimacy of the government's rule of law and the social contract that supports it).

52. The existing pluralism of attitudes, cultural constructs, and domestic laws creates what one commentator calls "a legal minefield for the general counsel of most global organizations." Mary C. Daly, *The Cultural, Ethical, and Legal Challenges in Lawyering for a Global Organization: The Role of the General Counsel*, 46 EMORY L.J. 1057, 1081 (1997).

53. "Payments" here refers, in the very widest sense, to conferral of anything of value. "Payments" therefore can allude not only to money, but also to gifts, entertainment, and favors. While the FCPA's definition section does not define "payment," the statute's prohibited practices section refines the concept. The section makes it unlawful to use the mails or interstate commerce "in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value" to enumerated parties. 15 U.S.C. § 78dd-1(a) (1994).

the various gifts and gratuities given to them would be covered under the FCPA.<sup>54</sup>

There are subtleties in this area that make it difficult to erect clear, uniform boundaries. The lines between acceptable and unacceptable behavior are drawn differently in different settings.<sup>55</sup> Moreover, in the context of cultural pluralism that continues to pervade the global village,<sup>56</sup> convergence on a single set of acceptable rules is highly implausible.

While the purpose of this Part is to highlight the many ways in which corruption is a cultural construct, it is not necessary to inject ethical relativism into the conversation. Even for those who believe that ethics can or must ultimately transcend cultural distinctions,<sup>57</sup> differences in beliefs or values across cultures create practical external enforcement problems. Stated most simply, even if there is one right answer, those who may have it cannot impose it on those who may lack it without threat of hostility and resentment.<sup>58</sup> Because coercive tactics to enforce even purportedly "right answers" are risky, relativists and universalists alike must confer at least some degree of respect to cultural differences.<sup>59</sup>

The examples that follow are broken into descriptive categories, each discussed in a separate Section. Neither the examples nor the categories are intended to be systematic or exhaustive. There are, undoubtedly, countless other examples, countless other categories, and a variety of classification

54. The FCPA does not prohibit payment of bribes to officers or other decision-makers in private companies, but only to foreign officials, government employees, foreign political parties or candidates, or agents acting for any of these people or groups. See 15 U.S.C. §§ 78dd-1(a), 78dd-2(a) (1994).

55. "Bribery is illegal and unethical here because it contradicts our notion of a free and open market. But does the same apply in the third world, where business (and social life) have very different presuppositions?" ROBERT C. SOLOMON, *THE NEW WORLD OF BUSINESS: ETHICS AND FREE ENTERPRISE IN THE GLOBAL 1990s*, at 65 (1994).

56. See generally *supra* Part II (discussing concept of global village).

57. An obvious example of this class is natural law proponents. For a discussion of natural law proponents' efforts to deduce purportedly objective rules of righteous conduct, see George W. Constable, *Natural Law and Moral Collisions: The Problems of Priorities Among Conflicting Values*, 41 AM. J. JURIS. 203, 209-23 (1996).

58. See, e.g., Judith Berger-Eforo, Note, *Sanctuary for the Whales: Will This Be the Demise of the International Whaling Commission or a Viable Strategy for the Twenty-First Century?*, 8 PACE INT'L L. REV. 439, 467 (1996) (noting that while scientific research overwhelmingly demonstrates the "sentient nature of whales," the Japanese resent the West's imposition of its values concerning whaling).

59. It bears mentioning here that universalism, or the identification of a single set of natural laws that can and should be applied ubiquitously, does not fit the issue of bribery well. Universal moral edicts operate most defensibly when applied to clear-cut cases in which lines can be drawn easily and confidently. We are thus relatively comfortable condemning torture both at home and abroad, based on a lack of moral ambiguity associated with torture. The behavior to be condemned is comparatively easy to identify, and middle-ground cases are hard to imagine. In comparison, we shall see in this Part that an array of practices that could be designated corruption can also be given more innocuous labels. Accordingly, while the statements in this paragraph do not require adoption of a relativist posture, such a stance would be consistent with many of the applications that follow. See THOMAS DONALDSON, *THE ETHICS OF INTERNATIONAL BUSINESS* 81-94 (1989) (identifying a group of "fundamental international rights" that are so basic and noncontroversial as to demand universalized rules rather than culturally defined rules).

schemes that would rely on a different mode of categorization. The following are examples intended to illustrate a simple point—that many areas remain in which different cultures view borderline behaviors in very different ways.

Section III.A provides a general introduction to gift-giving in business contexts. Section III.B examines gift-giving as an expression of gratitude and loyalty. In Section III.C, business-related gift-giving is considered as a form of symbolic expression. Section III.D looks at gift-giving as a form of etiquette. Section III.E examines gift-giving protocols that take on the specific forms of entertainment and hospitality.

#### A. *Gift-Giving: Introduction*

In recent years, the always questionable practice of gift-giving in business contexts has become increasingly discouraged in the United States.<sup>60</sup> Holiday gifts between suppliers and buyers, for example, were once common;<sup>61</sup> today, many companies have adopted policies that either limit or forbid the acceptance of gifts under a variety of circumstances.<sup>62</sup> Never before in our history has the practice of gift-giving come under such stringent scrutiny.

In other countries and cultural contexts, however, gifts that would be presumed illegal or corrupt under American norms may be considered merely a form of common courtesy or a component of expected relational etiquette.<sup>63</sup> Indeed, in some countries, the trend is to move away from, rather than toward, the United States's growing squeamishness about gifts. In these places, gift-giving in business relationships is actually in a growth stage rather than in a state of decline.<sup>64</sup>

Thus, gift-giving in China has been described as “very important in doing business,” and still “very much a part of the competitive terrain.”<sup>65</sup> Likewise, amidst efforts to clean up political campaigning, a former Melanesian lord mayor noted, “There is nothing wrong with [gift-giving].”

60. See, e.g., *Opel Forbids Employees from Taking Christmas Gifts from Suppliers*, AFX NEWS, Nov. 21, 1997, available in LEXIS, News Library, Allnews File (referring to General Motors's strict policy against receiving gifts from suppliers).

61. See Daniel Howes, *Tough Policies Stress Resolve of Carmakers*, DETROIT NEWS, Sept. 7, 1997, at A20 (noting that “pricey gifts, golf course deals, lavish entertainment and big spending [were] long associated with” the automotive industry).

62. See, e.g., Brenda Sapino Jeffries, *Expectations of Outside Counsel Go Beyond Billings*, TEX. LAW., July 22, 1996, at 1 (observing Dell Computer conflict-of-interest policy prohibiting employees from taking gifts from outside lawyers).

63. Cf. Don Oldenburg, *Protocol for Presents: Giving Appropriate Cross-Cultural Gifts*, WASH. POST, Dec. 19, 1991, at C5 (discussing the different cultural taboos and preferences in gift-giving).

64. For example, Chinese hosts of the 1990s expect substantial gifts that they would have considered gauche only a few decades earlier. See LUCIAN W. PYE, CHINESE NEGOTIATING STYLE: COMMERCIAL APPROACHES AND CULTURAL PRINCIPLES 40 n.4 (1992).

65. Kim Yu Wong et al., *The Strategy of an Ancient Warrior: An Inspiration for International Managers*, 6 MULTINATIONAL BUS. REV. 83, 89 (1998).

It is part of our Melanesian culture to exchange gifts when we visit villages, even on campaign.”<sup>66</sup> As we shall see, China and Melanesia are far from alone in continuing to place strong emphasis on a practice that has come under harsh criticism in the United States during the 1980s and 1990s.

Indeed, gift-giving plays a particularly important role in the business relationships of a number of Asian countries.<sup>67</sup> Moreover, distinguishing between appropriate and inappropriate gift-giving behavior requires some delicacy of understanding. According to Chris Pash, CEO of Asia Pulse, “great ceremonial significance is attached to the giving and receiving of gifts” in Asia, such that “it’s extremely important to be familiar with the customs, nuances, and cultural taboos in various countries.”<sup>68</sup> In the remaining Sections, these customs, nuances, and taboos are spelled out more specifically.

### B. *Gift-Giving as an Expression of Gratitude and Loyalty*

In a number of cultures, especially in some Asian countries, gift-giving in business contexts is considered an appropriate demonstration of thankfulness and appreciation.<sup>69</sup> The culture in Indonesia, for example, “strongly favors gift-giving, particularly as a means of expressing gratitude and loyalty to authority figures or to reward service.”<sup>70</sup>

South Korean norms demonstrate the cultural rift that can exist between Asian countries and their Western counterparts in differentiating acceptable protocol and unacceptable bribery. In general terms, Daniel Jun notes that “Korean culture stresses reciprocation as the foundation to interpersonal relationships.”<sup>71</sup> More specifically, embedded in South Korean culture is the concept of *chonji*, a kind of gratitude that can take many forms.<sup>72</sup> For example, *chonji* is expressed by the delivery of material gifts for leniency from teachers, favorable interest rates from bankers, or expedited administrative troubleshooting from government bureaucrats.<sup>73</sup>

One could argue persuasively that *chonji* is a dysfunctional institution. Any social system, including South Korea’s, is likely to improve when

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66. See Patrick Antoine Decloitre, *PAC: New Breed Stands in Poll Amid Disgust at Corruption*, AAP NEWSFEED, Mar. 5, 1998, available in LEXIS, News Library, Allnws File (quoting Alick Noel, former Lord Mayor of Port Vila, capital of the Melanesian country Vanuatu).

67. See, e.g., *infra* text accompanying notes 71–74 (discussing gift-giving in South Korea); see also *infra* text accompanying notes 83–89 (discussing gift-giving in Japan).

68. *How Gift Giving Can Build Stronger Business Relationships With Your Asian Hosts and Partners*, PR NEWSWIRE, Mar. 29, 1998, available in LEXIS, News Library, Allnws File.

69. See Oldenburg, *supra* note 63, at C5 (noting the role of gifts in Japan as tokens of appreciation).

70. Donna K. Woodward, *Foreigners Fathered RI's Graft*, JAKARTA POST, Dec. 17, 1997, at 4.

71. Daniel Y. Jun, Note, *Bribery Among the Korean Elite: Putting an End to a Cultural Ritual and Restoring Honor*, 29 VAND. J. TRANSNAT'L L. 1071, 1084 (1996).

72. See *Agenda for a New Leader*, ASIAWEEK, Mar. 13, 1998, at 14.

73. See *id.*

teachers treat students equally and fairly, without regard to gifts. Likewise, interest rates should be determined by market forces and not as a reflection of an exchange of favors. Government bureaucrats should process requests and provide services evenhandedly, and it should not be necessary to pay for preferential treatment.

Nonetheless, *chonji* has been described as an institution that is "ingrained in much of Korean society."<sup>74</sup> As such, it is better addressed internally and not through extraterritorially applied edict. To enter another country and attack its institutions with a sledgehammer is never prudent, even if strong arguments can be made that the institutions are dysfunctional. The task of improving such institutions is better left to the host country.

### C. *Gift-Giving as Symbolic Expression*

The giving of gifts in business contexts can certainly be innocent of any corrupt taint, at least in terms of the intentions of the donor.<sup>75</sup> Far from seeking to corrupt decision-making processes, gift-giving may include both "exchange rituals," in which a gift-giver chooses to give an item endowed with certain symbolic properties; and "possession rituals," in which the recipient acknowledges these symbolic properties but also personalizes the meaning of the item.<sup>76</sup> In this context, gift-giving supports a social, relationship-building function.

More specifically, in a business context, the giver may be sending a "symbolic message" to the recipient, suggesting that the giver "understands its customers' needs, and is willing to expend the resources to please them."<sup>77</sup> Gift-giving can also be a symbolic expression of loyalty that is essential in some cultures to the maintenance of a social relationship.<sup>78</sup> The symbolic expression of gift-giving can also serve an important social function in the negotiation process. Shell discusses "symbolic, unilateral 'investments'" in the form of gifts or entertainment that can help establish similarity of background and taste, thereby enhancing the potential development of trust.<sup>79</sup>

74. *Id.*

75. For example, gifts that serve a business function for the recipient may be less likely to have a corrupt intent than those that go to the personal benefit of the recipient. Accordingly, De Mente notes that "[f]oreign businessmen with substantial experience in China recommend that gifts be 'business-related,' as opposed to items intended for personal use," because the latter are "more likely to suggest impropriety." BOYE LAFAYETTE DE MENTE, *CHINESE ETIQUETTE AND ETHICS IN BUSINESS* 92 (1989).

76. See Malla Pollack, *Your Image is My Image: When Advertising Dedicates Trademarks to the Public Domain*, 14 CARDOZO L. REV. 1392, 1403, 1404 n.52 (1993) (discussing rituals identified in GRANT McCracken, *CULTURE AND CONSUMPTION: NEW APPROACHES TO THE SYMBOLIC CHARACTER OF CONSUMER GOODS AND ACTIVITIES* 84-85 (1988)).

77. Richard F. Beltramini, *Business Believes in Gift Giving*, in *GIFT GIVING: A RESEARCH ANTHOLOGY* 163, 170 (Cele Otnes & Richard F. Beltramini eds., 1996).

78. See Jun, *supra* note 71, at 1084.

79. G. Richard Shell, *Opportunism and Trust in the Negotiation of Commercial Contracts: Toward a New Cause of Action*, 44 VAND. L. REV. 221, 260 (1991).

If indeed the sole intent is the symbolic conveyance of information, the giver is simply acting strategically, and is without any dishonest or unscrupulous purpose. Of course, gift-giving can also involve mixed motives, and the identification and separation of such motives is a difficult task.<sup>80</sup> This is not to suggest that we should not or must not draw lines. However, the area of symbolic expression exemplifies the importance of cultural context in interpretation. Symbols are inextricably attached to their cultural milieu; symbolic functions of gift-giving protocols simply cannot be identified in a vacuum. Accordingly, the challenge of classification is best left to the internal, domestic forces that best understand cultural context. Extraterritorial tampering creates a recipe for misinterpretation of motives.<sup>81</sup>

#### D. *Gift-Giving as Etiquette*

In some cultures, the giving of gifts is simply the expected protocol for a variety of relationships, both inside and outside the boundaries of business transactions.<sup>82</sup> As Tasker observes, “[g]ift-giving and the exchange of favours are key elements of Japanese culture . . . .”<sup>83</sup> In Japan, failure to tender appropriate<sup>84</sup> summer and year-end business gifts is considered “a terrible breach of etiquette.”<sup>85</sup> These gifts often go beyond the level of nominal tokens. After spending years observing Japanese culture, Rowland noted that gifts of \$300 to \$400 were “not uncommon” at the highest corporate levels in 1985.<sup>86</sup> Especially when adjusted for inflation, such gifts are difficult to classify as mere gestures.

Rowland’s recommendation regarding gift-giving in Japan highlights the difficulty of drawing clear moral lines in the context of another culture. Rowland states that while “[i]t is considered rude to ask for a favor empty-

80. For a more detailed discussion of the importance of mixed motives in the multilateralization debate, see *infra* Section IV.C.

81. The precarious process of interpreting motives in foreign contexts is a central feature of legislation like the FCPA, which prohibits only those payments that can be classified as having a corrupt purpose of which the payer has knowledge or constructive knowledge. For the “corrupt purpose” language of the FCPA, see 15 U.S.C. §§ 78dd-1(a), -2(a), that prohibits “use of the mails or any means or instrumentality of interstate commerce corruptly.” For the “knowledge” language of the FCPA, see 15 U.S.C. §§ 78dd-1(a)(3), 78dd-1(f)(2)(A)(ii), 78dd-2(h)(3)(A)(ii), that includes in the scienter requirement a “firm belief” that unlawful activity is “substantially certain to occur.” For discussion of the forms of constructive knowledge that qualify under the FCPA’s knowledge requirement, see Baum, *supra* note 4, at 830–31.

82. See, e.g., Dawn Bryan, *Beware the Purple Pigskin Clock!*, SALES & MARKETING MGMT., Aug. 1990, at 74 (“Gift giving in Japan is inextricably linked with maintaining good relationships [and] the keeping of *wa* (peace and harmony) . . .”).

83. Peter Tasker, *Crusade Makes a Meal of Corruption Cleanup*, MAIL ON SUNDAY, Apr. 12, 1998, at 11.

84. What constitutes an appropriate gift is a subtly textured issue. For a fairly detailed discussion, see Diana Rowland, *JAPANESE BUSINESS ETIQUETTE: A PRACTICAL GUIDE TO SUCCESS WITH THE JAPANESE* 80–82 (1985).

85. *Id.* at 81.

86. *Id.* at 80.

handed . . . , gifts should not be thought of as bribes.”<sup>87</sup> This set of expectations is fraught with both ambiguity and inconsistency. At least through U.S. cultural lenses, it is hard to distinguish a bribe from a protocol that demands bringing a gift whenever seeking a favor. The Japanese, however, make such a distinction,<sup>88</sup> and Americans must tread lightly and carefully before passing judgment.

None of this is to suggest that bribery and corruption go without notice or comment in Japan. Despite a culture that embraces gift-giving in business environments, Japan has adopted what one commentator calls “a ferocious anti-corruption campaign,”<sup>89</sup> likely spurred at least in part by the country’s late-1990s economic woes. This developing attitude is commendable, and the countries of the world should applaud and support Japan’s efforts to clean up business transactions within its borders. The critical point here is that gifts-as-etiquette play a different and more important role in Japan than in many other countries, and it is therefore crucial to allow reform to develop internally, and not from without.

#### E. *Gift-Giving Protocols in the Forms of Entertainment and Hospitality*

In the preceding Section, we looked briefly at gift-giving as etiquette or protocol. The extension of hospitality in the form of entertainment is a more specific kind of etiquette. Hospitality is extremely difficult to calibrate on a moral scale, even within one culture. When social and cultural nuances associated with norms of socializing are added as an aspect of a gratuity, gift-giving becomes even more culturally textured and complex.<sup>90</sup> Extraterritorial meddling in these situations appears truly foolhardy.

87. *Id.* at 81.

88. See David A. Gantz, *The Foreign Corrupt Practices Act: Professional and Ethical Challenges for Lawyers*, 14 ARIZ. J. INT’L & COMP. L. 97, 108 (1997) (noting the prevalence in Japan of year-end conferrals of relatively valuable gifts). While the distinction between bribes and gifts may be less intuitively acceptable to Americans, a distinction can indeed be made. For example, if all high-level corporate favor-seekers can and do bring gifts that fall within rigidly specified guidelines, then the gifts are both universal and relatively indistinguishable from one another. Under such conditions, no gift-giver gains any unfair advantage over another gift-giver, and the judgment of the favor-giver is unlikely to be clouded or influenced by the gift. The protocol/etiquette rationale behind the gifts becomes more persuasive under this scenario, even within a favor-seeking context. While a U.S. observer may still believe that a system works more efficiently without such gifts, respect for cultural differences could outweigh the observer’s personal and at least partially subjective scruples.

89. Tasker, *supra* note 83, at 11.

90. The conferral of a material gift is relatively static and therefore yields relatively simple social ramifications. The gift is tendered and acknowledged quickly and with limited ceremony. When the gift is one of entertainment, the gift itself entails more protracted social interaction. In this sense, it is more richly relational than the conferral of a material gift, and has the potential to encompass a broader range of relational functions.

The difference goes beyond the temporal, however. The material gift, while it can be highly symbolic and reflect substantial thought intended to convey messages or feelings, lacks the element of caretaking that can embody entertainment. Thus, in many ways, hospitality serves highly complex functions that are potentially more elaborate than, and certainly different from, those served by material gift-giving.



Consider the specific example of dining. Characterizing the hosting of an opulent dinner is a nearly impossible task. From one perspective, lavish entertainment can be seen as indistinguishable from gifts of jewelry, small appliances, etc. Both the meal and the material gifts are items of value, and frequently of considerable value, that can be given without any manifest charge. Given the potential for an unspoken, tacitly understood *quid pro quo*, the dinner and the gift can be equally corrupt,<sup>91</sup> and one might very reasonably develop a rule prohibiting lavish entertainment, or even all entertainment, in business-business or business-government contexts.

On the other hand, a gift of a meal can be socially and culturally distinguished from an arguably more crass gift of goods. In some instances, the two kinds of gifts can be distinguished ethically as well. Socially and culturally, lavish dining can be viewed beyond the generic categories of "etiquette" or "protocol"—it enters the more specific realm of hospitality, a social function that can be more emotionally charged and highly valued than gifts of material goods.<sup>92</sup> In many cultures, feeding another denotes a unique type of caretaking<sup>93</sup> that cannot be replicated by material gifts.<sup>94</sup> Indeed, the characteristic of being "hospitable" is associated by definition with the provision of sustenance.<sup>95</sup>

Feasting can also "serve to link individuals to the wider social fabric through shared understandings of cultural conventions."<sup>96</sup> In the context of transnational business, such a function would seem to benefit all involved, as potential transactors move to achieve a closer, fuller understanding of each other.<sup>97</sup> Arguably, then, the elaborate and expensive meals that are

91. In other words, situations can exist where the motive behind material gift-giving and the motive behind entertainment are absolutely indistinguishable—in each case, evincing a desire to sway the discretionary decision-making of a public official in one's favor.

92. For example, food can convey such emotions as sympathy, concern, gratitude, and love. See PAUL FIELDHOUSE, *FOOD AND NUTRITION: CUSTOMS AND CULTURE* 88 (2d ed. 1995).

93. Feeding, for example, is visceral, in that it meets basic human alimentary needs. Tangential to this is the symbolic imagery of trust that accompanies the provision of a factor of human survival.

94. For example, meal-giving encompasses the values of "[m]utual assistance and sharing." FIELDHOUSE, *supra* note 92, at 78.

95. See WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 553 (1984) (defining "hospitality" as "hospitable treatment, reception, or disposition," and defining "hospitable" as "offering a pleasant or sustaining environment").

96. ROY C. WOOD, *THE SOCIOLOGY OF THE MEAL* 47 (1995).

97. In fact, the sharing of an understanding of cultural conventions is part of the normative global village that is developing throughout the world. See *generally supra* Part II (discussing the concept and development of the global village). Because the normative global village is still in an emergent and developmental stage, one could reasonably suggest that the linkages achieved through feasting support our progression toward a global ideal. Thus in some contexts, elaborate meal-giving can have corrupt motives and effects; in other contexts, it can have precisely the opposite motives and effects. While motives and effects certainly can be distinguished under many circumstances, they are difficult to identify in others, particularly circumstances in which the social context is foreign. Meal-giving, therefore, is both complex and resistant to the facile classifications of FCPA-like legislation. See Lucy Morgan, *A Serious Look at Ethics*, ST. PETERSBURG TIMES, Aug. 12, 1991, at 1B (citing varying opinions regarding the ethical position of hospitality extended toward public officials).

sometimes given in business contexts<sup>98</sup> serve important and irreplaceable relationship-building functions.<sup>99</sup>

Consider the ramifications of this potential differentiation between meal-giving and more generic material gift-giving. Given the potentially heightened cultural value and significance of hospitality, meal-giving occupies an especially wide range of potential moral positions. There will be instances when apparently suspicious meal-giving actually serves important social functions and lacks both corrupt motives<sup>100</sup> and corrupt results.<sup>101</sup> Some hosts will seek and achieve the relational functions of meal-giving, even when the recipient of the meal has some advantage to confer, without either desiring or getting any preferential treatment as a result.<sup>102</sup> In other instances, a quid pro quo may be a tacit expectation when entertainment, especially lavish entertainment, is conferred.<sup>103</sup> Under such complex social conditions, exacerbated as always by unavoidable cultural differences, extraterritorial legal influence and interpretation are potentially dangerous.

#### IV. THE IMPORTANCE OF MOTIVE IN ASSESSING THE MORALITY OF A GRATUITY, AND THE RISK OF ETHNOCENTRISM IN ASSESSING MOTIVE ACROSS A CULTURAL DIVIDE

Part III briefly presented examples in which practices considered objectionable in one cultural context are viewed as innocuous, or as serving important social functions, in another cultural context. This does not mean that no legitimate, universal standards can exist for assessing a particular

98. See Sandra Sugawara, *Japan Inc. Learns to Conduct Business in Broad Daylight*, INT'L HERALD TRIB., Apr. 13, 1998, at Finance 13 (noting restaurant meals costing over \$500 per person have "often seemed a natural extension of Japan's gift-giving culture").

99. This relationship-building function is potentially multi-textured. Food and drink are known social lubricants. They create good will and evoke a visceral trust. They communicate caring in a unique way, and they may create a relaxed and comfortable setting in which business can be negotiated optimally. Under all these conditions, it is nearly impossible to identify a point at which meal-giving and hospitality enter the realm of the corrupt. See Lee May, *Straddling a Culinary Mason-Dixon Line*, ATLANTA J. & CONST., Feb. 28, 1993, at M1 (acknowledging the powerful role of food and drink in the development of relationships).

100. For more detailed discussion of the importance of motive in assessing behavior as corrupt, and the difficulties of determining motive under complex conditions in foreign contexts, see *infra* Part IV.

101. For example, the Japanese are said to view entertaining with suspicion when "no obvious excuse" exists for the activity. See BOYE LAFAYETTE DE MENTE, *HOW TO DO BUSINESS WITH THE JAPANESE* 34-35 (2d ed. 1993). Yet even when the justification is not salient, entertainment may be pro forma etiquette among various parties in other nations. The giving of food may also simply be an expression of friendship. See FIELDHOUSE, *supra* note 92, at 89.

102. This statement is true despite the possibility that gift-giving may confer a largely unavoidable sense of indebtedness on the part of the recipient. Even in the presence of this dynamic, it is possible for the gift-giver to lack ulterior motives and for the gift-receiver to leave the perceived favor imbalance unrectified.

103. See FIELDHOUSE, *supra* note 92, at 89 (observing the dynamic of "[b]alanced reciprocity" in some social contexts, such that "in some commercial concerns smoked hams, bottles of whisky, or wine may be given to valued customers at Christmas time in the expectation that the gift will be reciprocated through continued business orders").

practice across the cultural divide. It does suggest, however, that assessment of practices against universal standards requires a true understanding of the nature of the practices within any given cultural context. Such practices must be viewed through a culture's own lenses rather than through the potentially obscuring lenses of an outside culture. In other words, the trouble with extraterritorially applied rules lies not in the notion of universal standards, but rather in the application of those standards in alien settings.

Some might go even further and suggest that the identification or formulation of universal standards is impossible, given the heterogeneity of value systems throughout the world. I would disagree with this contention, especially given what appears to be a universal disapproval of bribery.<sup>104</sup> The problem is not that some cultures embrace bribery and corruption—indeed, no culture appears to do so. Rather, the difficulty of blanket global rules and assessments rests in more subtle differences in particularized applications of the generic anti-bribery norm, particularly given countervailing social functions of some gratuities in one culture that would be considered unacceptable in another. That is, the world very likely could converge on a set of conceptual standards for theoretically defining corruption. It probably cannot agree on the application of the standards in a wide variety of subtly differentiated cases, as discussed earlier in Part III.

This Part proposes one plausible evaluative standard—the simple standard of motive. Motive is posited here as an example of a potential universal standard, and arguably the most justifiable universal standard. Other standards might also be proposed, either in lieu of or in combination with the standard of motivation. For example, “impact upon and impairment of objectivity of decision-making judgment” could either supplant or supplement the motive standard. Nonetheless, because laws like the FCPA impose criminal sanctions, motive and intent standards are arguably indispensable to justice.<sup>105</sup>

This Part demonstrates the hazards of applying the standard of motive to foreign behaviors that are not correctly understood. Section IV.A explains why motive is a reasonable standard to apply in assessing corruption associated with gratuities. Section IV.B examines, largely by example, how foreign governments' application of the motive standard is subject to substantial risk of error grounded in ethnocentric evaluation and concomitant misunderstanding. Section IV.C investigates how even motive patterns that an assessor understands within the motives' own social and cultural context

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104. See Philip M. Nichols, *Outlawing Transnational Bribery Through the World Trade Organization*, 28 LAW & POL'Y INT'L BUS. 305, 321–22 (1997) (noting the condemnation of corruption among a wide array of religions and philosophies); Veronica Ann DeBerardine, Comment, *Foreign Corrupt Practices: Creating an Exception to the Act of State Doctrine*, 34 AM. U. L. REV. 203, 222 n.123 (noting congressional focus “on a worldwide disdain for corporate bribery”).

105. See Steven R. Salbu, *Developing Rational Punitive Damages Policies: Beyond the Constitution*, 49 FLA. L. REV. 247, 282 (1997) (discussing relationship between the “retributive justice” of a punitive institution and the intent and volition behind the act being punished).

are nonetheless difficult to identify and classify, because of the confounding factors of temporal proximity and degree of explicitness. Section IV.C also discusses a different kind of confounding factor, through which the theoretically pure conception of motivation becomes muddled by the human reality of mixed motives.

#### A. *Motive as a Potential Standard of Evaluation*

The moral status of gift-giving and gift-taking is closely connected to motive.<sup>106</sup> A party's motive may be classically corrupt, as when a gift-giver expects partial treatment or a gift-taker confers partial treatment. In other instances, motives can be untainted or even admirable or noble.<sup>107</sup> In light of the positive roles that gift-giving plays in many cultures,<sup>108</sup> it is reasonable to distinguish between good gift-giving and bad gift-giving based on what the giver and the recipient expect from the exchange.<sup>109</sup> Motive is not only a logical touchstone for the assessment of gift-giving; it is also the standard adopted by the Foreign Corrupt Practices Act, which prohibits only those payments that meet the statute's scienter<sup>110</sup> and "corrupt purpose"<sup>111</sup> requirements. Given the criminal sanctions of the FCPA,<sup>112</sup> motive's emphasis on culpability establishes a more equitable standard than alternative criteria that might be adopted, such as impact or effect.<sup>113</sup>

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106. This connection appears to be acknowledged in many countries. In China, an acceptable gift is distinguished from an unacceptable bribe based on "intentions, purpose, means, and the result." HUANG QUANYU ET AL., A GUIDE TO SUCCESSFUL BUSINESS RELATIONS WITH THE CHINESE 218 (1994). As we shall see in this Part, although motive is a common basis for classifying some gifts as corrupt bribes, this commonality does not overcome obstacles to effective extraterritorial rule. The problem that remains is that determination of motives under particular circumstances requires an interpretation contingent on an understanding of local customs, culture, values, and beliefs.

107. For example, gifts can be given from pure motives of generosity, or noble motives of assistance tendered to another in time of need. Likewise, acceptance of gifts can be innocent or even well-intentioned. One can accept a gift to signal a closeness to the gift-giver, as when acceptance of a gift from a mere acquaintance would be awkward or socially unacceptable.

108. See *supra* Part III.

109. For example, the functions discussed in Part III can also serve as the manifest motives of the parties. Of course, function and motive are technically different. Whereas a function is a role that a gift plays in a society, and can exist in theory apart from the intentions of the participants, a motive reflects the subjective intent of giver and recipient. Despite this difference in definition, function and motive are likely to overlap in many instances. At least some of the functions discussed in Part III, such as expression of gratitude and loyalty, can be motivated by either neutral or admirable intentions. Actors so motivated lack criminal culpability.

110. See 15 U.S.C. § 78dd-1(a)(3) (1994).

111. See 15 U.S.C. §§ 78dd-1(a), -2(a) (1994).

112. These include imprisonment for a maximum of five years and fines of up to \$2,000,000 for domestic concerns or \$100,000 for individuals. See 15 U.S.C. §§ 78dd-1(b), -2(g) (1994).

113. See *supra* note 109.

## B. *The Risk of Ethnocentrism in Evaluating Motivation in Other Cultures*

Unfortunately, understanding and evaluating motives can be difficult, especially across borders and cultures.<sup>114</sup> The common and therefore presumed motivation behind a particular behavior can differ dramatically from one cultural context to another,<sup>115</sup> making it dangerous to render facile assessments of the motives operating in other societies. Anthropologists have long warned us against the hazards of such ethnocentric engagement with foreign cultures.<sup>116</sup> Entering an unfamiliar cultural territory, we are tempted to assess behaviors through our own cultural lenses.<sup>117</sup> Unfortunately, our assessments are often inaccurate when we evaluate activities from the outside, especially when our understanding of the systems and social structures we observe is superficial.<sup>118</sup> The examples that follow demonstrate these concerns.

### 1. *The Activities of Navajo Tribal Leaders*

Motives for taking what some would consider suspect gratuities can seem innocuous, or at least less culpable, when they are fully understood within their native cultural framework. For example, Navajo tribal leaders have recently been caught in a cultural transition, as long-standing traditions of gift-giving and gift-taking are being challenged by Western influences. Two tribal presidents have been ousted over the past ten years for accepting gifts that are classified by one teacher of Navajo culture as “part of what we believe and have been taught by the Holy People.”<sup>119</sup>

One of the presidents was charged with accepting envelopes containing hundred dollar bills from corporations in return for preferential treatment<sup>120</sup>—a practice classically corrupt in its motives and easily labeled as reprehensible. The other president’s alleged infractions are more complex. He accepted contributions to underwrite “Yei-bei-chei” ceremonies to cure

114. This difficulty results, at least in part, from the fact that motive often is interpreted within the framework of local customs. For example, March observes that “[f]or most Japanese, any deviance from customary practice will trigger suspicion about the ‘real’ meaning of [a] gift.” ROBERT M. MARCH, *READING THE JAPANESE MIND* 115 (1996). It would be difficult to understand motives that are associated with niceties in the differentiation of local customs without an intimate, insider’s perspective of the culture.

115. See Leonora Fuxman, *Ethical Dilemmas of Doing Business in Post-Soviet Ukraine*, 16 J. BUS. ETHICS 1273, 1280 (1997) (“The motivation and cultural basis for ethical business behavior are different [in different nations]. . . . An honest Japanese businessman’s motivation may differ from an honest American businessman’s motivation since the corporate cultures are not the same.”).

116. See EVELYN S. KESSLER, *ANTHROPOLOGY: THE HUMANIZING PROCESS* 16–19 (1974).

117. See *id.* at 18. For discussion of the “distorting lenses” that serve to filter facts through a culturally defined “perceptual screen,” see ROGER M. KEESING & FELIX M. KEESING, *NEW PERSPECTIVES IN CULTURAL ANTHROPOLOGY* 21 (1971).

118. See KESSLER, *supra* note 116, at 17–18.

119. Bill Donovan, *Navajo ‘Gift-Giving’ ‘Is All Illegal Now’*, ARIZ. REPUBLIC, Apr. 7, 1998, at B1 (quoting Ruth Roessel).

120. See *id.*

the terminally ill. He also allowed companies that wanted to do business with the tribe to pay his travel expenses, reasoning that acceptance of the payments saved the tribe money.<sup>121</sup> Under recently heightened tribal scrutiny, both presidents were ousted.<sup>122</sup>

The travel costs accepted by the latter president are typical of the kind of payment that resists any facile classification. His avowed motive—to conserve tribal funds—appears on its face a laudable one, at least to the degree that it is the genuine motive. Of course, we also can easily imagine extremes on a continuum at which acceptance of travel compensation could be moderately or highly corrupt. The most defensible situation, for example, might be that in which: (1) the travel is necessary to the business being transacted, rather than discretionary; (2) the travel costs are kept to a reasonable minimum under the circumstances; (3) the time spent during travel is dedicated entirely to the business being transacted; and (4) no more time is spent away than is necessary to transact the business. Conversely, the opposite situation would be among the least defensible and most potentially corrupt. Suspicion of corruption therefore is high when: (1) the business could have been transacted without travel; (2) travel costs are exorbitant and travel conditions are opulent under the circumstances; (3) much time during travel is spent on leisure rather than business-related activities; and (4) more time is spent away than is necessary to transact the business.

Of course, as any business traveler knows, the enormous ground between these extremes of behavior resists easy classification. Business travelers in the real world exercise common sense, and the bounds of propriety in these situations are matters of judgment. When a potential supplier pays legitimate travel expenses, the potential buyer/decision-maker need not avoid all after-hours relaxation and entertainment in order to maintain innocent motives. Although there is obviously a point at which exploitation is clear, the precise cutoff is difficult to ascertain.<sup>123</sup>

The aforementioned tribal president's activities are therefore not easily classified, especially across a cultural divide. As the tribe attempts to navigate the shifting tides of its cultural expectations within a Westernized country, the tribal government is putting together a code of ethics for its elected officials.<sup>124</sup> What is their impetus? Even for a member of the tribe, understanding the nuances of acceptable and unacceptable behavior, including nuances of acceptable and unacceptable motivation, has become

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121. *See id.*

122. *See id.*

123. The difficulties examined here regarding sponsored travel could be interpreted to support a categorical prohibition of such travel under conditions in which conflict of interest could cloud judgment. For example, a company might reasonably decide to absorb the cost of travel for all employees who procure contract work, even though prospective bidders would be more than willing to pay travel expenses. The reasoning here, of course, would be that the cost of employee travel expenses is less than the cost of clouded judgment when employees enter into the gray area of varying sponsored travel perquisites.

124. *See* Donovan, *supra* note 119, at B1.

difficult. For outsiders, a lack of contextual perspective renders this task even more challenging.

## 2. *Fadiman's Example of Post-Transaction Celebration in East Africa*

Another example of error in assessing motives across borders and cultures comes from a case reported by Fadiman in the *Harvard Business Review*.<sup>125</sup> Following a business deal, an East African politely asked Fadiman for money and a radio.<sup>126</sup> Fadiman declined,<sup>127</sup> uncomfortable with a request that departed significantly from his usual custom of celebrating the close of a deal by buying the other party a drink.<sup>128</sup> However, as he became more familiar with the customs of the host country, Fadiman came to believe that he had insulted the East African with unjust suspicions.<sup>129</sup> He learned that the East African's motives were other than he had originally presumed—the money was not to line the East African's own pockets, but rather to provide a celebration in the American's honor; the radio was requested to provide music at the anticipated celebration.<sup>130</sup>

This story is troubling in several ways, each of which reinforces the slippery ground on which we tread when we assess the morality of behaviors in foreign cultures. Most striking here is how easily an outsider can misinterpret the motives behind behavior taking place in another country. While the American assumed the request was motivated by a desire for personal gain, the real motivation was ostensibly the more benign end of celebration.<sup>131</sup>

On a second level, note that the American's "second thought"—i.e., his reassessment of his original reaction to the East African's request—may also be overly simplistic. What is to become of the radio after the celebration? How valuable or rare is this kind of radio in this particular East African country? How many people are being fed at the "celebration," and how elaborate is the entertainment? How much money was the American asked to contribute to the festival? Is the celebration purely a form of post-transactional etiquette or protocol, or did the East African presume the

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125. See Jeffrey A. Fadiman, *A Traveler's Guide to Gifts and Bribes*, HARV. BUS. REV., July-Aug. 1986, at 122.

126. See *id.* at 122 ("Oh, and Bwana, I would like 1,000 shillings as Zawadi, my gift. And, as we are now friends, for Chai, my tea, an eight-band radio, to bring to my home when you visit.").

127. See *id.* at 122-23 ("I'm an American. . . . I don't pay bribes.").

128. See *id.*

129. See *id.* at 123.

130. See *id.*

131. The distinction between personal gain and a celebration is, like virtually all the lines we have seen drawn so far, an artificial one. Participation in any celebration usually entails a kind of personal gain. The East African presumably enjoys and benefits from the celebration, or he would not likely propose it. Yet the element of personal gain here is secondary rather than primary. Nonetheless, like the other examples we have seen of ambiguity in gift-giving, this scenario highlights how difficult it is to understand complex motives and label them accurately with simplistic designators.

perquisites were a quid pro quo, upon which the transaction was implicitly conditioned? These questions highlight the rigidity and imprecision of a "corrupt-versus-benign" classification scheme under the unfamiliar conditions of foreign settings. Indeed, even with the answers to all the above questions, it would be difficult for an American to determine and understand the East African's precise complex of motives.

Consider a final source of concern in regard to Fadiman's scenario. Fadiman originally distinguished between a corrupt request for money (before he knew of its intended celebratory use) and the celebratory drink that he customarily provides at the close of a business deal.<sup>132</sup> Yet how clearly can payments that will line the recipient's pockets be distinguished with drinks that will fill the recipient's stomach? We can label the latter "celebration," and because food and drink are associated with the arguably lofty social functions of hospitality,<sup>133</sup> it may not be entirely unreasonable to make such a distinction here. By the same token, is one who has just received a discretionary benefit from another "hosting a celebration," "rendering thanks," or "returning the favor?" Why he is paying is unclear and difficult to ascertain objectively. The motives, however, are crucial to any determination of the legal and moral status of the gesture. For all these reasons, Fadiman's mini-case highlights the perils of interpreting social behavior, particularly in uncharted foreign terrain.

Of course, these very challenging questions of motive must ultimately be answered if bribery is to be controlled. The question that remains is, Who shall render the judgment calls and assessments? Prosecutors and judges in the country where a payment is rendered have the best chance of accurately classifying the motives at issue.

### C. *Difficulties in the Identification and Classification of Motives*

#### 1. *Temporal Proximity and Degree of Explicitness*

Any facile condemnation of gift-giving is complicated by the fact that some gifts and favors are more difficult to identify and classify as bribes than others, even when the motives and effects of the various gifts and favors are indistinguishable. This variation is related to what one might label "confounding factors"—characteristics that can obscure motivation and thereby hinder its accurate identification. Among the more compelling confounding factors are (1) temporal proximity, and (2) degree of explicitness.

Temporal proximity of a gift and its reciprocation is an important factor that affects ease of classification. If favors are exchanged closely together in time, the quid pro quo connection stands out in comparatively

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132. See Fadiman, *supra* note 125, at 122-23.

133. See *supra* Section III.E.



stark relief. An equally offensive scenario in regard to motives can also exist with a greater span of time separating the two elements of exchange.<sup>134</sup> The two cases may be morally indistinguishable in principle.<sup>135</sup> Nonetheless, corruption with a close temporal proximity of exchange is easier to spot than corruption with a temporally attenuated exchange.<sup>136</sup>

Degree of explicitness in forging a corrupt understanding is another factor that can confound the identification of unethical gifts. A quid pro quo relational expectation can exist in two extreme forms, and in an infinite array of shades between these two forms. One extreme form is created through explicit, detailed, and thorough expression, in which the expected exchange is clearly stated, either in spoken words or in writing. Provided that evidence is available,<sup>137</sup> expressed exchanges are easy for outsiders to identify because the expression tells the assessors what they need to know in regard to motive. A second, far more common form of quid pro quo relational expectations is evinced by little or no clear expression, but exists through some form of tacit understanding.<sup>138</sup> These expectations are more difficult for law enforcers and other observers to identify, simply because objective observers lack the perspective to understand the unstated

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134. This temporal attenuation may exist, for example, when a gift is conferred with a clearly understood expectation that the favor will be returned, but in a manner unstipulated when the gift is given, and at a later but unstipulated time. Such a debt can remain unpaid for years, yet the motivation can be clearly corrupt.

135. For example, when a contract is granted in return for a payment, the transaction is equally corrupt whether the payment is made a day before the contract is granted or five years before the contract is granted. The blame lies in the subversion of fair, untainted bid assessment processes, not in timing. Nonetheless, the connection between the payment and the granting of the contract is easier to identify and to prove in the first case than in the second.

136. The more time that passes between the gift conferral and the return of the favor by the recipient, the harder the corrupt motives become to trace. The difficulty in tracing motive due to temporal attenuation results from several factors. Most obviously, the lapse of time decreases the likelihood that observers will note both the gift and the returned favor and infer corrupt motives from the combination. In addition, the greater the amount of time that passes between gift and return, the more difficult evidentiary problems become, as memories fade, documents disappear, and witnesses move or die.

137. In reality, such high quality evidence is very unlikely to be available. Clear expression of the corrupt nature of an exchange is the exception rather than the rule. As Adler observes, it is very hard to prove that even a lavish bribe was culpable when the transactors cover their tracks. See Tamara Adler, Comment, *Amending the Foreign Corrupt Practices Act of 1977: A Step Toward Clarification and Consolidation*, 73 J. CRIM. L. & CRIMINOLOGY 1740, 1767 (1982). Parties will be reluctant to provide evidence of either illegal or legal-but-unethical behavior, avoiding prosecution in the former instance and harm to reputation in the latter. For this reason, written expression of the terms of these transactions is likely to be extremely rare, and oral expression is likely to be veiled rather than explicit. These tendencies will exacerbate difficulties in understanding the true motives behind exchanges, as parties intentionally confound any future interpretational efforts of outsiders.

138. Tacit understanding can be created in a variety of ways. For example, patterns of past dealings between parties can create unstated but clearly understood expectations. Likewise, strong social and cultural norms of reciprocity can create a potent mutual understanding of indebtedness. See Laura E. Little, *Loyalty, Gratitude, and the Federal Judiciary*, 44 AM. U. L. REV. 699, 716 (1995) (noting the perceived obligation and moral duty of a person receiving a benefit "to reciprocate and demonstrate loyalty and gratitude"). Winks, inflections of voice, and an array of other nonverbal communication mechanisms can also contribute to tacit understandings.

conditions of idiosyncratic, subjectively formulated arrangements between two specific parties.<sup>139</sup> They are also more difficult to prove, because the parties can put forth in court alternative explanations to rebut the unevicenced, damning explanations.<sup>140</sup> Under the high prosecutorial standard of proof in criminal cases, even dubious alternative explanations may pass muster if a reasonable doubt remains in jurors' minds.

Together, then, confounding factors of time and tacitness create various patterns of discernability of motive. Generally, when the terms of an exchange are explicitly spelled out and the two items of exchange are traded simultaneously, any corruption of discretionary decision-making is relatively clear and easily identified. Conversely, when the terms of the exchange are implicit rather than expressly stated, and a substantial gap in time separates the tendering by the two parties, corruption is more difficult to identify.<sup>141</sup> Moreover, the corrupt nature of the motives becomes clouded as the exchange is subsumed within the gray-area patterns of most human interaction.<sup>142</sup>

## 2. *The Human Reality of Mixed Motives*

Consider one other possible confounding factor in the identification of motive—the presence of the mixed motive. In the real world, as opposed to the theoretical world of ideal-type legal constructs, improper motives exist on a continuum. Sometimes a gift-giver is driven exclusively by the dynamic

139. Indeed, the failure of objectivity underlies many of the shortcomings of extraterritorial laws discussed in this Article. As we note here that an outside assessor cannot understand an idiosyncratic agreement, so outside countries and cultures may be unable to understand the intricate relational patterns associated with various suspect practices.

140. For examples of alternative explanations cataloging some potentially benign motives behind the conferral of gifts in various countries, see *supra* Part III.

141. Because we are dealing with two factors, a total of four different combinations exist. The aforementioned are the two extreme combinations. Each of the remaining two would confer a moderate level of discernability. The first is the case in which the two parts of an exchange are temporally close, but the easy discernability that results is hindered by lack of explicitness of terms. The second is the reverse instance, in which the exchange terms are explicit but the transaction is nonetheless difficult to spot because of temporal distance between the conferral of the gift and the reciprocation via returned favor.

142. Four examples along a continuum help to illustrate this point. In Case 1, when a gift is exchanged for an immediate, expressly stipulated favor, the connection is obvious and the corruption of the exchange will stand out. In Case 2, a gift may be given with the understanding that the favor will eventually be returned, although the specifications for the return remain to be stipulated. More difficult to trace as a tainted transaction, this exchange is every bit as corrupt as the first scenario's exchange.

Further difficulty develops as the scenarios become even less formalized. In Case 3, some gifts or concessions that are tendered with no obvious or expressed expectation of a return may nonetheless occupy a place on some subtly implicit tally sheet. In Case 4, favors may be tendered with no intent or even desire to influence later discretionary outcomes. While this case evinces the lowest level of culpability among the four cases posited, even it is potentially troublesome. Because it remains a part of human nature to react favorably to those who have ingratiated themselves to us in various ways, including the provision of past assistance, services, gratuities, etc., even the most innocent of gifts can have the undesirable result of undermining the objectivity of a decision-maker's judgment.

of a quid pro quo. Other times, the more beneficent motives discussed in Part III are combined with moderate, low, or even very low hope for, expectation of, or simply knowledge of the possibility of a return favor. Within this wide range of cognitive possibilities, how much of one's motivation need be tainted for criminal sanctions to be justifiable?

Identifying, classifying, and judging motives in this murky reality of mixed motivations is difficult under any condition. It is even more challenging when the motives must be translated across cultures and underlying legal contexts. Under any circumstance, it requires the weighing of policy considerations that are delicately balanced to achieve what is ultimately a culturally defined set of priorities.

For example, few would deny a natural human predisposition in favor of those who have honored us with gifts in the past;<sup>143</sup> yet despite the potential conflict of interest inherent in this dynamic, a world without favors would be a bleak and selfish world at best. This means that good people with few or no explicitly corrupt motives nonetheless know or have reason to know that their goodwill toward others will likely be repaid over the long run.<sup>144</sup> Accordingly, whenever a businessperson makes a concession, confers a gift, or yields any favor across institutional borders, it is done with the knowledge that, in many instances, the recipient's decisional judgment later may be skewed in the giver's favor.<sup>145</sup> When this happens, the effect is a corrupt effect—a favor acts as an inducement to stray from the ideal of considering only those factors that would optimize the rational, properly oriented exercise of discretion.<sup>146</sup> Indeed, one could argue that because people are or should be aware of common reciprocity norms, all gifts and favors between transactors or potential transactors are inherently corrupt.<sup>147</sup>

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143. Indeed, one former Japanese civil servant observes that the reciprocity norm is ubiquitous among gift-giving practices in Japanese ministries. See Jonathan Watts, *Sleaze Seeps Out of Gift-Wrapping*, *GUARDIAN* (London), Dec. 23, 1996, at 8 (quoting Masao Miyamoto, who notes that gift-giving at ministries "almost always [entails] an ulterior motive," and that "[p]eople give gifts because they want something in return").

144. If the return of good will is an ethical problem associated with gift-giving under conditions of conflict of interest, the size of the gift at issue may not determine the gift's moral status. Even a nominal gift can create goodwill that could then influence a decision-maker later to favor the gift-giver over a non-gift-giver. This may explain in part why, even though some small tokens are commonly viewed as acceptable, companies sometimes recommend that employees decline acceptance of any and all gifts, regardless of size. See David C. Smith, *Pure as the Driven Snow*, *WARD'S AUTO WORLD*, July 1996, at 7.

145. Thus gift-giving in Japan has been cast in terms of the creation of a kind of insurance policy, through the "shadow art of influencing others who are in a position to give later help." CHRISTOPHER ENGHOLM, *WHEN BUSINESS EAST MEETS BUSINESS WEST: THE GUIDE TO PRACTICE AND PROTOCOL IN THE PACIFIC RIM* 233 (1991).

146. A properly oriented exercise of discretion is defined here as discretion aimed solely at weighing the costs and benefits of various options regarding the primary transactional decision at hand, unimpaired by any secondary considerations.

147. Under this reasoning, the law arguably should forbid all forms of gifts, entertainment, and favors in specified settings. Logistical difficulties in classifying various behaviors, the motivation for which may be solely within the knowledge of the giver, may drive this highly pragmatic approach. Since we can't categorize actions in this messy mire of motivations and intentions, let's just forbid all

Mixed motives likewise pervade the popular practice of networking. A thin line separates networking and corruption. In China, for example, practices like gift-giving, entertainment, and sponsorship of dependents' education are at least partially cast in terms of building *guanxi*, a web of interpersonal relations that comprises China's analogue to American networking.<sup>148</sup> To get things done in many cultures, people in business and other organizational settings routinely engage in networking processes that are encouraged and even applauded rather than condemned.<sup>149</sup> These processes include identifying players who are most likely to be able to help achieve desired goals<sup>150</sup> and developing relationships with these people to improve the likelihood that they will cooperate with rather than hinder the networker.<sup>151</sup> The process entails ingratiation. A networker may render a gift or favor today in hopes that he or she will be favored by the recipient tomorrow, when the tables are turned and the recipient is positioned to help the networker. Exchange of favors at some level and in some cultures can be fundamental to functional relationships; indeed, the sense of indebtedness that arises from receipt of a favor is a form of gratitude, which most of us would likely consider more a virtue than a vice.<sup>152</sup>

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gift-giving.

Consider, for example, a potential supplier who gives an extravagant gift to a potential purchaser. Although many suppliers in this position may have ulterior motives, this supplier may not. Although many buyers may be influenced by receipt of the gift, this buyer may not. Even this most suspicious looking scenario might be entirely innocent. Likewise, the most innocuous seeming small gift might be accompanied by corrupt motives in the giver and corrupt influence upon the decision-making processes of the recipient.

All gifts from businesses to public officials, or even between businesses, arguably can be banned under the theory that there is no such thing as an innocuous present. This perspective builds on the "social exchange paradigm" of gift-giving, according to which all gifts operate subject to reciprocity norms. These norms imply that recipients of gifts develop a sense of obligation, predicated on a need to maintain a sense of balance. See Beltrami, *supra* note 77, at 164.

The categorical banning of gift-giving is one of many possible policy solutions that can be adopted to address the problem of corruption. It is a controversial solution, because there are policy considerations, such as the socially beneficial functions of local gift-giving institutions, that argue against a categorical ban. Different people weighing these and other complex policy costs and benefits will arrive at different conclusions and different policy decisions that suit their particular needs and priorities. Under these conditions, an external policy imposition is a usurpation of local political prerogative.

148. See Irene Y.M. Yeung & Rosalie L. Tung, *Achieving Business Success in Confucian Societies: The Importance of Guanxi (Connections)*, ORG. DYNAMICS, Autumn 1996, at 54.

149. See, e.g., Ann Fagan Ginger et al., *Nonprofits Have a New Role in Ensuring Human Rights in the United States*, 30 U.S.F. L. REV. 427, 428 n.5 (describing a United Nations conference's emphasis on the importance of networking in promoting human rights for women).

150. See Catherine Romano, *A Star is Made*, MGMT. REV., Feb. 1995, at 6 (discussing networking in terms of getting "linked to different subject [matter] experts and get[ting fast] answers to . . . questions").

151. See Bengt Johannisson & Mette Monsted, *Contextualizing Entrepreneurial Networking*, 27 INT'L STUD. MGMT. & ORG. 109 (1997) (discussing broadly the benefits of networks, and specifically discussing trust, mutual commitments, and other characteristics that emphasize the importance of getting cooperation from key players).

152. Bourdieu conceptualizes this indebtedness as a form of "symbolic capital" that can be converted into "the more traditional form of economic capital." Richard Terdiman, *Translator's Introduction to Pierre Bourdieu, The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L.J. 805, 812 (1987).

Can the thin line between networking and corruption conscionably be drawn? Can we develop criteria by which to distinguish the former acceptable practice and the latter condemned one? Some might argue that the distinction is arbitrary; others might create an elaborate taxonomy that attempts to distinguish the evil from the innocuous.<sup>153</sup> If the task can be done, it is not done by the FCPA, nor will it be done by the FCPA imitators soon to be adopted under the Convention on Combating Bribery of Foreign Officials in International Business Transactions.<sup>154</sup> What happens when we superimpose cultural differences upon a task that is nearly impossible even without the confounding effect of such differences? In the quagmire of what forms acceptable and unacceptable relationships in various settings, the external imposition of any one set of norms and values is impracticable as well as imprudent.

## V. CONCLUSION

For millennia and then for centuries, the world changed slowly.<sup>155</sup> The industrial revolution brought increasingly rapid and dramatic innovation through technology,<sup>156</sup> and more recent world market conditions have continued to develop and change<sup>157</sup> with unprecedented haste.<sup>158</sup> The current and future speed of change continues and will continue to escalate, most recently with the revolutionary advent of the Internet, a phenomenon that is fundamentally altering the world within its first five years of public access.<sup>159</sup> From a planet comprised of insular, distinct cultures and societies, Earth is being transformed rapidly into a global village.<sup>160</sup>

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153. For example, networking and corruption can be distinguished using the concept of conflict of interest. One can argue persuasively that all gifts are inappropriate when the giver can reasonably foresee a future situation in which the recipient will have the power and authority to provide preferential treatment. Under this reasoning, much of what is currently considered to be acceptable networking would be classified as unethical behavior. This reclassification might more accurately capture the true nature of much networking activity.

154. See *supra* notes 15–17 and accompanying text.

155. See PETER N. STEARNS, *THE INDUSTRIAL REVOLUTION IN WORLD HISTORY* 21 (1993) (suggesting that the rapid innovation of the industrial revolution was a departure from conditions of the preceding period).

156. See JEREMY GREENWOOD, *THE THIRD INDUSTRIAL REVOLUTION: TECHNOLOGY, PRODUCTIVITY, AND INCOME INEQUALITY* 6 (1997) (“The Industrial Revolution, begun in 1760, symbolizes investment-specific technological change. This period witnessed the birth of several technological miracles.”); *id.* at 9 (noting the rapidity of technological change during the industrial revolution).

157. See Barrie Sherman, *The End of Work As We Know It?*, *NEW STATESMAN & SOC’Y*, Oct. 27, 1995, at 27 (discussing changes in current market conditions attributable to a high-technology industrial revolution similar to the original industrial revolution in its transformative impact).

158. See JOZSEF NYILAS, *WORLD ECONOMY AND ITS MAIN DEVELOPMENT TENDENCIES* 9 (1982) (noting the unprecedented modern acceleration of various forms of change).

159. See Frances Cairncross, *A Connected World*, *ECONOMIST*, Sept. 13, 1997, at T3 (describing how the telecommunications network alters “the way people live and work”); Peter Vogel, *Don’t Force The Case*, *TEX. LAW.*, Dec. 16, 1996, at 24 (“The widespread utilization of the Internet for mass communications is changing the world.”).

160. See Nabil Adam et al., *Globalizing Business, Education, Culture Through the Internet*,

Yet despite this almost frightening pace of technologically induced world shrinkage, conceptions of a global village comprised of a single community remain a dream or an ideal.<sup>161</sup> While we can surely expect to see the movement towards homogenization to continue to accelerate at breakneck speed,<sup>162</sup> we are not there yet.<sup>163</sup> Today's world remains diverse and heterogeneous, populated by groups that often have highly individualized cultural identities.<sup>164</sup>

In the preceding Parts, we have examined many ways in which global pluralism undermines efforts to ban bribery extraterritorially. Whatever mechanisms one state may put into its laws to avoid inflicting its values on other states, moral imperialism is an ineluctable reality whenever one sovereign entity seeks to alter or control behavior inside the borders of another. Even if the FCPA were modified to exempt any and all acts that are legal in the host country, rather than only those acts expressly permitted by the written laws of the host country,<sup>165</sup> the process of interpretation under the conditions of extreme cultural complexity examined in Part III is presumptuous and intrusive. What constitutes bribery under Korean law might mean something quite different to a U.S. judge, with his or her cultural context and biases, than it would to a Korean judge operating in a different cultural context. The invasiveness of externally interpreting and assessing host country behaviors can be tempered only by the eventual, and perhaps even imminent, homogenization of cultures worldwide.<sup>166</sup> Until and unless that day arrives, however, efforts to curb corruption by an externally imposed global mandate are not defensible.

Moreover, multilateral efforts, such as the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions,<sup>167</sup> cannot avoid cultural imperialism simply by virtue of their

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COMM. OF THE ACM, Feb. 1997, at 115 (describing the world's transformation into a global village).

161. See Michael Antecol, *Understanding McLuhan: Television and the Creation of the Global Village*, ET CETERA, Winter 1997-1998, at 454 (noting the possibility for creation of a global village which has not yet fully materialized).

162. See *id.* at 455 (noting the electronic technologies that "were seen as catalysts toward an interconnected organismic, and holistic Global Village" are moving to achieve this end as they "radically and permanently alter[] situational definitions and their consequent behaviors with global uniformity as the inevitable result").

163. See Raymond Gozzi, Jr., *Will the Media Create a Global Village?*, ET CETERA, Spring 1996, at 67 (noting that technological networks have not yet transformed the world to a semblance of the "close and meaningful contact of a small village").

164. See Pico Iyer, *Strangers in a Small World*, HARPER'S, Sept. 1994, at 13.

165. See Philip M. Nichols, *Regulating Transnational Bribery in Times of Globalization and Fragmentation*, 24 YALE J. INT'L L. 257, 288 (1999).

166. While such homogenization would facilitate the development of global standards for regulating practices like bribery, the prospect also has a darker side, related to the annihilation of distinct cultures. See Henry J. Steiner, *Ideals and Counter-Ideals in the Struggle Over Autonomy Regimes for Minorities*, 66 NOTRE DAME L. REV. 1539, 1550-51 (1991) (explaining and describing the importance of preserving distinct cultures). Among the costs of cultural homogenization are the loss of diversity and pluralism, as well as the loss of valued norms, beliefs, and traditions for the groups that embrace them.

167. See *supra* note 15.

multilateralism. On one level, even if all the countries of the world were to sign the Convention, their ability to evaluate activities outside their own borders would remain subject to all the limitations discussed in Parts II through IV. With only a few dozen signatories,<sup>168</sup> a pact to adopt extraterritorial legislation bears another, more substantial, flaw. The signatory countries are outlawing extraterritorial bribes throughout the world, and not just in their own countries. While the remainder of the world has not agreed to this intrusion, they will nonetheless be subjected to it.<sup>169</sup>

Of course, the balance between rights to self-determination and the maintenance of world peace, prosperity, and order is complex.<sup>170</sup> Few extremists would suggest that trans-border intervention is wrong under all circumstances, and many would applaud otherwise intrusive efforts that protect, for example, basic human rights in another country.<sup>171</sup> Such efforts can be intellectually grounded in the notion that laws are not merely a reflection or by-product of culture, but can also serve a legitimate "constitutive role in forming culture."<sup>172</sup> Nonetheless, in the absence of compelling grounds and a clearly defined, universally embraced moral mission,<sup>173</sup> substantial deference should be given to rights of sovereignties.

One might argue that extraterritorial legislation such as the FCPA falls within the bounds of respect for sovereignty, since the act typically penalizes a U.S. payer of a bribe and does not govern the foreign taker of the bribe. Under this reasoning, the application of U.S. law outside U.S. borders would be justified by its application to U.S. citizens.

For at least two reasons, concerns about overreaching remain. First, while the FCPA anti-bribery provisions apply only to an issuer of securities registered under U.S. federal law, a "domestic concern," or an "officer, director, employee, or agent of such issuer or any stockholder thereof acting

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168. *See id.*

169. Extraterritorial intervention must be analyzed seriously and recognized as an intrusion upon a state's right to rule within its own borders. Barsh aptly labels "the right to self-determination" as "[t]he most dynamic issue in international law today," suggesting that "all other human rights . . . flow from this one." Russell Barsh, *Indigenous Peoples and the Rights to Self-Determination in International Law*, in *INTERNATIONAL LAW AND ABORIGINAL HUMAN RIGHTS* 68, 69 (Barbara Hocking ed., 1988).

170. For discussion of this issue, see Paul H. Brietzke, *Self-Determination, or Jurisprudential Confusion: Exacerbating Political Conflict*, 14 *WIS. INT'L L.J.* 69, 69-77 (1995).

171. *See* Mark Gibney & R. David Emerick, *The Extraterritorial Application of United States Law and the Protection of Human Rights: Holding Multinational Corporations to Domestic and International Standards*, 10 *TEMP. INT'L & COMP. L.J.* 123, 127 (1996) (advocating the application of U.S. laws extraterritorially to protect human rights in other countries); Gerald L. Neuman, *The Global Dimension of RFRAs*, 14 *CONST. COMMENTARY* 33, 46 (1997) ("How a country treats its own nationals is no longer a matter of exclusive domestic concern, but rather a subject of international cooperation and oversight.").

172. Philip M. Nichols, *The Viability of Transplanted Law: Kazakhstani Reception of a Transplanted Foreign Investment Code*, 18 *U. PA. J. INT'L ECON. L.* 1235, 1271 (1997).

173. Missions to extirpate torture and murder of political victims, for example, may qualify as morally clear and universally embraced missions, or at least as missions distinctively morally clearer than extirpation of bribery, with all the nuances addressed in Part III.

on behalf of" an issuer or a domestic concern,<sup>174</sup> the law's application is not restricted to U.S. citizens. As applied to foreign nationals who are agents of issuers and domestic concerns,<sup>175</sup> the statute's influence is far-reaching.

Charges of moral imperialism do not, however, depend upon the especially impressive scope of the FCPA's application. A more limited statute—for example, one limited to the behavior of American citizens abroad—would still be offensive in its invasiveness. The problem with extraterritorial anti-bribery laws is not only that they may criminalize the acts of foreigners in foreign countries, but that they also attempt to monitor transactions that occur within foreign boundaries, which host countries are likely to want to control themselves. How business is transacted in Germany, and how delicate distinctions are made between acceptable gifts and corrupt bribes in Germany, are best governed by the German government. Even if other states are entitled under international law to monitor these transactions and distinctions, comity and respect for sovereign autonomy suggest that they should do otherwise.

Attempts to improve the world's business climate in the late 1990s and early twenty-first century should be attempts at persuasion rather than coercion. Stated differently, the United States and other sympathetic countries would be wise to avoid trying to force cultural monism throughout the world.<sup>176</sup> If the world is ever to fulfill its promise of becoming a true global village, it is unlikely to be the result of domineering behavior.<sup>177</sup>

What forms of persuasion, then, would be prudent? Our efforts must be directed at convincing other states to develop and enforce<sup>178</sup> their own domestic anti-bribery statutes.<sup>179</sup> All the legitimate reasons for which the world is beginning to converge to fight corruption and bribery form a sound basis for this endeavor.

174. 15 U.S.C. §§ 78dd-1, 78dd-2 (1994).

175. See *Dooley v. United Techs. Corp.*, 803 F. Supp. 428 (D.C. Cir. 1992) (finding British and Saudi Arabian defendants covered by the FCPA).

176. The image of the "ugly American" foisting ideas upon others is an aspect of what Lively and Plass refer to, in a different context, as a "dominant culture's inevitable efforts to force those groups who do not share its mores to conform to its way of thinking, acting and speaking." Donald E. Lively & Stephen Plass, *Equal Protection: The Jurisprudence of Denial and Evasion*, 40 AM. U. L. REV. 1307, 1316 (1991) (quoting *FCC v. Pacifica Found.*, 438 U.S. 726, 777 (1978) (Brennan, J., dissenting)). The perpetuation of this image through application of extraterritorial edicts is both officious and potentially harmful to international relations.

177. Rather, the evolution of a normative global village can and should be a more natural, and therefore less confrontational, process that unfolds as different cultures become exposed to one another's divergent values, and a global conversation begins to take shape. Such exposure is an unavoidable by-product of economic globalization. For discussion of this process, see Seita, *supra* note 25, at 455.

178. In all likelihood, enforcement is more critical than adoption of legislation, as most states purportedly already have some form of domestic prohibition in place. See Lucinda A. Low & Kathryn Cameron Atkinson, *Led By the U.S., the World Wages War on Corruption*, NAT'L L.J., Mar. 3, 1997, at B9. Of course, as nations operate under different legal traditions and conditions of independence, the range of domestic anti-bribery statutes is likely to vary substantially in both form and comprehensiveness.

179. See Salbu, *supra* note 18, at 286.



Some might argue that this is an unrealistic solution, doomed to failure. Professor Nichols suggests that domestic institutional change efforts will be thwarted in countries in transition, where institutions are newly formed, and therefore vulnerable.<sup>180</sup> Among the foremost difficulties are those associated with "self-policing."<sup>181</sup> One might suggest, for example, that corruption is entrenched in some societies, and their corrupt institutions are unfit to battle bribery domestically.

It would be foolish to suggest that this is not a concern. The problems of self-policing, however, are manageable and even surmountable, provided a host state is persuaded to take the problem seriously and employ the kinds of mechanisms that have enabled countries with longer-established institutions to monitor and control behavior internally and without external interference. Leiken identifies a number of these mechanisms, including "[d]eregulation, decentralization, and the simplification of government procedures—fortified by transparent bidding systems, the rotation of offices, and modern information-management systems," as well as "market reforms that dissolve state monopolies and trim the discretionary power of officials," thereby reducing bribe-taking opportunities.<sup>182</sup> While the creation of effective domestic systems will require a concerted effort, that effort is worthwhile in order to avoid the overreaching of extraterritorial rule.

In the end, we must remember that the real difficulty, as demonstrated in Parts III and IV, is not the general notion of anti-bribery legislation, but rather the variance among particularized ideas of what does and does not comprise corrupt, reprehensible behavior.<sup>183</sup> If any worldwide consensus in regard to these specifics is to be approached or achieved, it had best be through the kind of colloquy that convinces rather than outside legal pressures that enforce.<sup>184</sup>

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180. See Nichols, *supra* note 165, at 282.

181. See *id.*

182. Robert S. Leiken, *Controlling the Global Corruption Epidemic*, FOREIGN POL'Y, Dec. 1996, at 55, 68.

183. In other words, while the basic notion of constraining bribery and corruption is quickly developing nearly ubiquitous support, dissension still remains regarding the implementation details. Since these details represent the finer points of distinguishing between acceptable and unacceptable practices, they will be the last vestiges of cross-cultural disparity to fall.

184. For a general discussion regarding the preference for colloquy over coercion under conditions of heterogeneity, see Steven R. Salbu, *True Codes Versus Voluntary Codes of Ethics in International Markets: Towards the Preservation of Colloquy in Emerging Global Communities*, 15 U. PA. J. INT'L BUS. L. 327, 369-71 (1994).

