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PERSPECTIVES

Transnational Bribery: The Big Questions

*Steven R. Salbu**

I. INTRODUCTION

During the past few years, I have written extensively on the subject of transnational bribery. My articles have examined several aspects of this serious problem,¹ including the Foreign Corrupt Practices Act (“FCPA”),² re-

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¹ Bribery is a serious problem for a variety of reasons. In discussing corruption in Africa, Deputy Assistant Secretary of State Whitney W. Schneidman summarizes the problem succinctly:

Corruption in Africa is of particular concern because it undermines the emerging political and economic institutions in these countries and threatens the ongoing political and economic reforms in the region. It corrodes democratic institutions, weakens the rule of law, and undermines the confidence of people in democracy. Corruption, as illustrated by the illicit trade of national resources, is also theft from a nation. It robs citizens in Africa of their future and has a debilitating impact on their quality of life. As a consequence, poorly managed resources, embezzlement, and corruption result in fewer funds allocated to government programs in education, healthcare, housing, physical infrastructure (such as, wa-

cent multilateral global conventions to fight bribery,³ and the comparative costs and benefits of legislative versus systemic or institutional forms of change.⁴ This body of work also has addressed some of the problems that can accompany aggressive legal remedies, such as potential cultural imperialism⁵ and global discord.⁶

This examination has been rewarding, and it has spurred a rich exchange with a number of very talented scholars, as the late 1990s has seen a renewed interest in legal research on the subjects of bribery and corruption.⁷

ter and sanitary systems, roads) and other social services.

Prepared Testimony of Whitney W. Schneidman, Deputy Assistant Secretary of State, Bureau of African Affairs, U.S. Department of State Before the Senate Foreign Relations Committee African Affairs Subcommittee, Sept. 21, 2000, available at LEXIS, News Library, Allnws File.

² See Steven R. Salbu, *Bribery in the Global Market: A Critical Analysis of the Foreign Corrupt Practices Act*, 54 WASH. & LEE L. REV. 229 (1997).

³ See Steven R. Salbu, *Extraterritorial Restriction of Bribery: A Premature Evocation of the Normative Global Village*, 24 YALE J. INT'L L. 223 (1999) [hereinafter Salbu, *Premature Evocation*]; Steven R. Salbu, *The Foreign Corrupt Practices Act as a Threat to Global Harmony*, 20 MICH. J. INT'L L. 419 (1999) [hereinafter Salbu, *Threat to Global Harmony*].

⁴ See Steven R. Salbu, *Battling Global Corruption in the New Millennium*, 31 LAW & POL'Y INT'L BUS. 47 (1999) [hereinafter Salbu, *Battling Global Corruption*]; Steven R. Salbu, *A Delicate Balance: Legislation, Institutional Change, and Transnational Bribery*, 33 CORNELL INT'L L.J. 657 (2000) [hereinafter Salbu, *Delicate Balance*]; Steven R. Salbu, *Information Technology in the War against Corruption: The Next Frontier of Institutional Reform*, 38 HARV. J. ON LEGIS. 67 (2001) [hereinafter Salbu, *Information Technology*].

⁵ See Salbu, *Premature Evocation*, supra note 3.

⁶ See Salbu, *Threat to Global Harmony*, supra note 3.

⁷ Most notably, Professor Phil Nichols of the University of Pennsylvania has generated and participated in an exciting exchange of ideas regarding transnational bribery. See Philip M. Nichols, *Regulating Transnational Bribery in Times of Globalization and Fragmentation*, 24 YALE J. INT'L L. 257 (1999) [hereinafter Nichols, *Regulating Transnational Bribery*]; Philip M. Nichols, *Are Extraterritorial Restrictions on Bribery a Viable and Desirable International Policy Goal Under the Global Conditions of the Late Twentieth Century? Increasing Global Security by Controlling International Bribery*, 20 MICH. J. INT'L L. 451 (1999) [hereinafter Nichols, *Increasing Global Security*]. This present Perspective is likewise part of a dialogue with Tom Dunfee and David Hess, also of the University of Pennsylvania. See Thomas W. Dunfee & David Hess, *Getting from Salbu to the "Tipping Point": The Role of Corporate Action Within a Portfolio of Anti-Corruption Strategies*, 21 NW. J. INT'L L. & BUS. 471 (2001). A more general exchange of ideas was held at Cornell Law School in April of 2000, which recently culminated in a collection of articles in a special symposium issue of the *Cornell Journal of International Law*. For a sample of articles by this group of leading contemporary scholars in this field, see Kathleen A. Lacey & Barbara Crutchfield George, *Expansion of SEC Authority into Internal Corporate Governance: The Accounting Provisions of the Foreign Corrupt Practices Act (A Twentieth Anniversary Review)*, 7 J. TRANSNAT'L L. & POL'Y 119 (1998); Duane Windsor & Kathleen A. Getz, *Regional Market Integration and the Development of Global Norms for Enterprise Conduct*, 38 BUS. & SOC. 415 (1999); Beverley Earle, *The United States' Foreign Corrupt Practices Act and the OECD Anti-Bribery Recommendation: When Moral Suasion Won't Work, Try the Money Argument*, 14 DICK. J. INT'L L. 207 (1996); Mark B. Bader & Bill Shaw, *Amendment of the Foreign Corrupt Practices Act*, 15 N.Y.U. J. INT'L L. & POL. 627 (1983).

Yet detailed legal scholarship, like all highly specialized academic work, can leave us eager for more of the big picture. This Perspective reflects my own desire to take a step back from the issues I have addressed to date, and ask a basic question that may help frame some legal scholarship on bribery and corruption in the future: what are the big questions that we should be addressing in regard to these challenges as we enter the 21st century?

The term “big questions” could refer to a variety of things—for example, it could refer to macro-level issues,⁸ or it could refer to those issues least exhaustively addressed to date, or it could refer to those issues that are most pressing because they will have the greatest impact in the war against corruption, or the greatest effect on the social ills that accompany corruption, or both. The only characterization of “big questions” that I’d like to avoid is the macro-level characterization.

Some of the questions that I pose in the following pages are macro-level questions. For example, there are questions of broad public policy, such as whether non-governmental organizations (“NGOs”) should supplant governments in the fight against bribery. Likewise, there are questions of broad philosophical scope, such as whether the payment of bribes ever can be ethically justified. Yet I do not limit myself to macro-level questions. The Perspective also addresses focused questions regarding very particular, narrow policy decisions, such as the “routine government action” exemption under the FCPA.

The questions to be addressed are not all “big” in the sense of having a broad, macro-level scope. I call the questions “big” more in the spirit of addressing some important issues—issues likely to have an impact on the challenges the world faces in the 21st century. They are also questions that merit greater attention in the future, and part of my goal is to identify them as deserving serious regard by scholars studying corruption. Finally, my unavoidably subjective identification of this Perspective’s questions as the “big” ones cannot help but reflect my own inherent interest in them—in short, they are questions that I personally find compelling and engaging.

What are these questions? Section II asks, can it be ethical to pay a bribe, and if so, should our laws recognize this? Section III asks whether the FCPA’s notion of “routine government actions” creates a viable standard for distinguishing acceptable and unacceptable payments. Section IV queries whether corporate principles can have a meaningful impact in the battle against global corruption. Section V asks whether NGOs should supplant government action in fighting global corruption.

⁸ The term “macro-level” issues is my own invention in regard to the topics discussed in this Perspective. The term refers to broad questions that concern basic or fundamental aspects of bribery, be they economic aspects, philosophical aspects, social aspects, etc. The opposing term, “micro-level” issues, encompasses highly focused, particularized questions in regard to specific practices or policy solutions.

One final note before jumping in—the purpose of this Perspective is not to provide definitive answers to these questions. While I make observations and judgments, the questions are intentionally left unresolved, as they should be. Easy answers rarely exist for big questions, and these are no exception. The goal here is to spark discussion and debate among scholars and other commentators in their future work.

II. CAN IT BE ETHICAL TO PAY A BRIBE, AND IF SO, SHOULD OUR LAWS RECOGNIZE THIS?

Few commentators today seriously question or criticize the war against the institutions⁹ of bribery and corruption.¹⁰ One would be hard-pressed to find a law review article written since the passage of the FCPA in 1977 that is anything but highly critical of corruption and its effect on many aspects of the global economy.¹¹ More recently, the finance literature has begun to recognize the serious costs of bribery in global markets. A well-publicized study¹² by two prominent economists suggests that corruption can deter foreign direct investment.¹³

A number of corrupt behaviors that are broadly banned by law¹⁴ cannot be ethically justified under any circumstances. It is difficult to imagine a situation where a public official is justified in demanding a bribe, or where a businessperson is justified in offering one that has not been requested or demanded. When a businessperson does offer an unrequested, undemanded

⁹ I emphasize the *institutions* here, in contrast to the *practice* of bribery and corruption. One point of this discussion is to suggest that, even if the institution is clearly and unambiguously wrong, the practice of bribery under very limited circumstances can be morally ambiguous, and arguably morally preferable, in a system where the admittedly bad institution of bribery is entrenched.

¹⁰ See Balakrishnan Rajagopal, *Corruption, Legitimacy, and Human Rights: The Dialectic of the Relationship*, 14 CONN. J. INT'L L. 495, 496 (1999) (casting anti-corruption discourse as “re-legitimizing particular conceptions of development, rule of law, democracy and human rights that are elitist, statist and Eurocentric”).

¹¹ See, e.g., articles cited *supra* note 7 (all agreeing that bribery is a serious problem that needs to be carefully addressed).

¹² See, e.g., Alan Beattie, *Investors See Corruption as a Barrier*, FIN. TIMES, Oct. 17, 2000, at 12.

¹³ See Beata K. Smarzynska & Shang-Jin Wei, Abstract, *Corruption and Composition of Foreign Direct Investment: Firm Level Evidence*, NBER Working Paper Series, Working Paper 7969, available at <http://www.nber.org/papers/w7969> (last visited Nov. 24, 2000) (“Empirical tests of the hypothesis on a firm-level data set show that corruption reduces inward FDI and shifts the ownership structure towards joint ventures. Technologically more advanced firms are found to be less likely to engage in joint ventures”).

¹⁴ See Scott P. Boylan, Essay, *International Security in the Post-Cold War Era: Can International Law Truly Effect Global Political and Economic Stability? Organized Crime and Corruption in Russia: Implications for U.S. and International Law*, 19 FORDHAM INT'L L.J. 1999, 2021 (1996) (“[V]irtually every nation prohibits bribery of domestic government officials”).

bribe, it is likewise hard to imagine how acceptance of that offered bribe can be ethically justified.

Consider, however, another class of behavior: the payment by a businessperson of a bribe that is requested or demanded by a public official. Ordinarily, the payment of such a bribe is no more justifiable than any of the other types of bribes mentioned in the preceding paragraph. The exceptional cases are, however, more easily imagined in this category than in the others. Consider the following example.

A developing nation is in the throes of civil war. The nation is suffering from a politically motivated famine—i.e., donations of food are available, but in order to impose pressure on dissidents, entrenched authorities are withholding delivery of food donations and people are starving. A number of public officials have suggested to corporate benefactors that their donations will get past the blockade if a big enough bribe is paid. In essence, although the authorities have not approved food distribution, select individual officials are corrupt enough to defy the edict surreptitiously if the personal emolument is high enough.

Is it unethical for a corporate decision-maker to pay the bribe? This is not an easy question. Ethicists would likely disagree, and their disagreement would reflect two equally tenable perspectives. I put forth two conflicting arguments, each of which is plausible under well-regarded tenets of business ethics. These two arguments reflect, respectively, deontological and teleological viewpoints, which are commonly recognized as two basic models of ethical decision-making.¹⁵ Note that while the following are not the only deontological and teleological responses to the preceding hypothetical, they are both rational applications of these two models, and each answer would be supportable under the tenets of its respective model.

A. Deontological Approach.

Deontological ethical decision-making is based on the recognition of duties, such as those derived from application of Immanuel Kant's categorical imperative.¹⁶ A Kantian duty is created by virtue of our ability to say that the duty should apply in all instances.¹⁷ A categorical imperative

¹⁵ Virtually every textbook in business ethics has a section that discusses these two approaches to ethical decision-making in business. See, e.g., JOHN W. DIENHART & JORDAN CURNUTT, *CONTEMPORARY ETHICAL ISSUES: BUSINESS ETHICS* 11-15 (1998).

¹⁶ For relevant primary writings, see IMMANUEL KANT, *FOUNDATIONS OF THE METAPHYSICS OF MORALS* (Lewis White Beck trans. 1959). For a brief general discussion of Kant's categorical imperative, see O.C. FERRELL & JOHN FRAEDRICH, *BUSINESS ETHICS: ETHICAL DECISION MAKING AND CASES* 57-59 (3d ed. 1997).

¹⁷ Specifically, the categorical imperative states, "Act as if the maxim of thy action were to become by thy will a universal law of nature." See FERRELL & FRAEDRICH, *supra* note 16, at 57.

against bribery is certainly supportable.¹⁸ The proposition that no one should ever offer a bribe can be supported, and the proposition that no one should ever accept a bribe likewise can be supported.¹⁹

If a deontological model creates a duty neither to pay nor to accept bribes, the duty applies under all circumstances, regardless of the consequences of its exercise.²⁰ Paying and taking bribes is simply wrong, and any plausible positive ends, such as the feeding of starving people, cannot justify means that are inherently wrong. This approach is a highly principled one, and it suggests that what is fundamentally right or fundamentally wrong cannot be altered situationally, simply to accommodate particular scenarios.²¹ The fact that some readers may be left feeling uncomfortable with this deontological solution to the hypothetical at hand reflects the difficulty of living ethically in an imperfect world. Yet it also may reflect the belief of some that deontological approaches to ethics can be overly rigid. These readers might be more likely to apply the teleological approach discussed in the next Subsection, and their method of solving a tough ethical challenge would be reasonable.

¹⁸ Donaldson and Dunfee create a framework from which a Kantian certainly could reach this conclusion. They contend that bribery violates hypernorms of “necessary social efficiency.” See Thomas W. Dunfee & Thomas Donaldson, Book Review Dialogue, *Tightening the Ties that Bind—Defending a Contractarian Approach to Business Ethics*, 37 AM. BUS. L.J. 579, 581 (2000) (“We chose bribery to demonstrate important dimensions of ISCT including the emphasis on defining relevant communities, correctly assigning norms to those communities, and particularly to demonstrate the application of the hypernorm of necessary social efficiency. We believe the issue of bribery is not only of great importance because of its pernicious impact on global trade and its significant contribution to human misery, but also because the corruption issues facing global firms are indeed complex and difficult. We need to understand the ‘paradox of corruption’ whereby bribery is ‘universally disapproved’ and ‘universally prevalent’”). For the original work upon which this Book Review Dialogue excerpt focuses, see generally THOMAS DONALDSON & THOMAS W. DUNFEE, *TIES THAT BIND: A SOCIAL CONTRACTS APPROACH TO BUSINESS ETHICS* (1999).

This is not to suggest that Donaldson and Dunfee’s model of integrative social contract theory is the equivalent of Kant’s categorical imperative. Although the two approaches certainly can be consistent, they are not the same. Donaldson and Dunfee’s treatment of bribery is, however, consistent with and suggestive of a Kantian approach, and could be used to support the suggestion of a categorical imperative against bribery.

¹⁹ Nichols appears to do so, at least implicitly. See Nichols, *Regulating Transnational Bribery*, *supra* note 7, at 301-03 (building on Donaldson and Dunfee’s work to support a broad prohibition of corrupt practices).

²⁰ See SIR DAVID ROSS, *KANT’S ETHICAL THEORY: A COMMENTARY ON THE GRUNDLEGENDE ZUR METAPHYSIK DER SITTEN* 44 (1954) (“Kant holds that to make our perception of the rightness of an act depend on its tendency to promote a certain end would deprive the imperative of duty of its absolute, categorical character; it would become a hypothetical imperative, ‘Do this if you desire that’”).

²¹ See PATRICK Æ HUTCHINGS, *KANT ON ABSOLUTE VALUE: A CRITICAL EXAMINATION OF CERTAIN KEY NOTIONS IN KANT’S GROUNDWORK OF THE METAPHYSICS OF MORALS AND OF HIS ONTOLOGY OF PERSONAL VALUE* 266 (1972) (quoting Kant regarding the importance of exercise of will irrespective of ends).

B. Teleological Approach.

Teleological models of ethics suggest that right and wrong can be determined by looking at the consequences of various competing options.²² For this reason, they are “consequentialist” modes of ethics.²³ Under them, “the morality of obeying the law is determined by the comparative consequences of obedience and disobedience.”²⁴

Most frequently associated with John Stuart Mill²⁵ and Jeremy Bentham,²⁶ teleological decision-making distinguishes the “right” choice as that which yields the maximum net social utility, or the most pleasure for the greatest number of people.²⁷

The teleological model also goes by the label “utilitarianism,” a word that is revealing in its etymology. The root “utility” is something every student of introductory economics knows well.²⁸ Economic, rational people are considered self-seeking, personal utility maximizers.²⁹ A utility in economics denotes the weight an individual places on various goals or ends, in the form of personal satisfaction.³⁰ We each have our own set of personal utility preferences,³¹ and these direct the ways in which we act rationally to try to optimize our personal satisfaction.³² As Patten observes, “[w]e com-

²² See TOM L. BEAUCHAMP & NORMAN E. BOWIE, *ETHICAL THEORY AND BUSINESS* 21 (2d ed. 1983) (noting that teleological theories assess moral worth of actions and practices solely by virtue of their consequences).

²³ See DAMIAN GRACE & STEPHEN COHEN, *BUSINESS ETHICS: AUSTRALIAN PROBLEMS AND CASES* 21 (1995) (defining consequentialism as “a moral outlook which evaluates. . . behaviour according to the consequences of that behaviour,” and discussing ethical decision-making models that appraise conduct by “judging how well that conduct produces the relevant consequences”).

²⁴ Kent Greenawalt, *Promise, Benefit, and Need: Ties That Bind Us to the Law*, 18 GA. L. REV. 727, 745 (1984).

²⁵ See generally JOHN STUART MILL, *UTILITARIANISM* (1863).

²⁶ See generally JEREMY BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* (1789).

²⁷ See Jeremy Bentham, *On the Principle of Utility*, in LOUIS P. POJMAN, *THE MORAL LIFE* 227, 227-32 (2000) (putting forth the net social utility maximization conception of ethics, and describing in some detail how net social utility is to be measured).

²⁸ For discussion in a classic economics textbook, see generally WILLIAM J. BAUMOL & ALAN S. BLINDER, *ECONOMICS: PRINCIPLES AND POLICY* 357 (3d ed. 1985) (“Economists have constructed a simple theory of consumer choice based on the hypothesis that each consumer spends his or her income in the way that yields the greatest amount of satisfaction, or utility”).

²⁹ See C.E. FERGUSON & JUANITA M. KREPS, *PRINCIPLES OF ECONOMICS* 86 (2d ed. 1965) (referring to the “fundamental thesis” that consumers spend dollars on those goods that they believe will give them the most satisfaction).

³⁰ See *id.* at 86 (“The utility of a good lies in its capacity to satisfy a human want”).

³¹ See *id.* (observing the subjectivity of satisfaction, such that individual consumers determine their own utility preferences).

³² See *id.*

pare groups [of options] . . . choosing that group from which we can get the greatest sum of pleasure."³³

Utilitarianism in ethics is analogous. If satisfaction or net happiness over misery is a good thing for the economic actor, it is also a desirable goal for the ethical actor. What changes is simply the unit of analysis. As an ideal type, economic actors are self-seeking and therefore strive to maximize their own personal utilities;³⁴ as a distinct ideal type, ethical actors recognize the legitimate claims of stakeholders other than themselves.³⁵ These claims can trump decision-maker self-interest; therefore, ethical actors must shift the unit of analysis to "all" rather than simply "self."³⁶ Instead of acting to maximize net personal utility, the utilitarian ethical actor seeks to maximize net social utility.³⁷ Hence, we have Bentham's edict to strive to achieve "the greatest good for the greatest number," in a sort of social cost-benefit analysis.³⁸

There are two varieties of utilitarian analysis—act utilitarianism and rule utilitarianism. The distinction is important here, because the plausible moral justification for bribe-paying in the hypothetical under discussion is based on act utilitarianism rather than rule utilitarianism. Under act utilitarianism, the social cost-benefit analysis is done individually and separately for every act that is considered.³⁹ The decision-maker selects the option that maximizes net social utility in the particular situation at hand.⁴⁰

Under rule utilitarianism, the decision-maker focuses not on the one particular act or precise situation at issue, but rather on the entire relevant class of acts.⁴¹ She asks, "What rule, applied over all like cases, will yield

³³ Simon Nelson Patten, *The Theory of Dynamic Economics*, in *ESSAYS IN ECONOMIC THEORY*, BY SIMON NELSON PATTEN 33 (Rexford Guy Tugwell ed., 1924).

³⁴ See Paul B. Stephan, *Rationality and Corruption in the Post-Socialist World*, 14 *CONN. J. INT'L L.* 533, 538 (1999) (describing rational actors, a classic concept in economics, as self-serving).

³⁵ See JOHN STUART MILL'S UTILITARIANISM: TEXT AND CRITICISM 45 (James M. Smith & Ernest Sosa eds., 1969) ("The utilitarian morality does recognize in human beings the power of sacrificing their own greatest good for the good of others").

³⁶ See *id.* at 40 (incorporating the good of other people as well as ourselves into utilitarianism's "greatest happiness principle").

³⁷ See *id.*

³⁸ See FERRELL & FRAEDRICH, *supra* note 16, at 54 tbl. 3-1.

³⁹ In other words, act utilitarianism evaluates net social utility on a case-by-case basis. See Michael Rosenfeld, *Contract and Justice: The Relation Between Classical Contract Law and Social Contract Theory*, 70 *IOWA L. REV.* 769, 889 (1985) (referring to act utilitarianism as "case-by-case consideration").

⁴⁰ See J.L. MACKIE, *ETHICS: INVENTING RIGHT AND WRONG* 125 (1977) ("[T]he right act is that which will produce the most happiness, not just for the agent himself[,] but for all who are in any way affected [by his act].").

⁴¹ See Stephanie Loomis-Price, *Decision-Making in the Law: What Constitutes a Good Decision -- The Outcome Or the Reasoning Behind It?*, 12 *GEO. J. LEGAL ETHICS* 623, 631 (1999) (observing that the rule utilitarian adherent asks what would happen "if everyone

the greatest net social utility?"⁴² That rule is the one she chooses as ethical. Even if an alternative rule would yield the greatest net benefit in the particular situation under consideration, the decision-maker selects the option that would yield the greatest net benefit over *all* cases.⁴³ Thus, an element of principled decision-making is injected into teleology, and situational variance is averted.

As applied to the bribery hypothetical in this Section, act utilitarian analysis can easily recommend payment of a substantial bribe as the right thing to do.⁴⁴ Even conceding that bribery is a dysfunctional and harmful institution,⁴⁵ and conceding that payment of bribes usually is wrong, the consequentialist easily can determine that payment of *this particular* bribe will yield far more good than harm. The benefit is obvious: potentially thousands will be spared from starvation. There are costs as well. Any one instance of bribe paying may support the institution, which admittedly is a very harmful one. The questions under act utilitarianism are (1) How much does this one payment bolster the institution of bribery; (2) How much incremental bribery in the future is enabled by supporting the institution?; (3) How much harm is attributable to this incremental bribery?; and (4) Is the resulting harm greater or less than the immediate harm averted by paying the bribe and saving thousands of people from starvation?

Because we are dealing with a hypothetical situation, we don't have real facts that allow us to engage in a true act utilitarian analysis. Yet we need not do an actual analysis of this situation for the purpose at hand. Rather, we simply must be able to posit a plausible scenario under which the benefits of making a particular payment outweigh the costs.

Such a scenario is certainly imaginable. First, note that the entire chain of four questions listed above depends on finding, in response to Question 1, that the payment being considered does indeed bolster the institution of bribery. If the payment doesn't bolster the institution, the remaining three questions simply are not triggered. The negative ripple effects of one in-

chose to act in a particular manner when faced with this same choice," and creates a rule accordingly).

⁴² See Julie Peters Zamacona, *Evidence and Ethics: Letting the Client Rest in Peace: Attorney-Client Privilege Survives the Death of the Client*, Swidler & Berlin v. United States, 118 S. Ct. 2081 (1998), 21 U. ARK. LITTLE ROCK L. REV. 277, 285 (1999) ("Rule-utilitarianism calls for a one-time balancing, resulting in a firm rule to be applied in all like situations").

⁴³ See Loomis-Price, *supra* note 41, at 631 (noting that rule utilitarianism is not concerned with the consequences of a particular choice).

⁴⁴ But see Thomas W. Dunfee et al., *Social Contracts and Marketing Ethics*, 63 J. MARKETING 14 (1999) (rejecting validity of applying act utilitarian analysis to bribery, suggesting that accurate comparison of broader social costs to specific benefits of a single act is a daunting challenge).

⁴⁵ See Dunfee & Donaldson, *supra* note 18, at 581 (describing bribery as having a "pernicious impact on global trade" and making a "significant contribution to human misery").

stance of bribery are both speculative and uncertain, and a single, idiosyncratic, furtive instance of bribe-paying may actually yield no incremental future harm.⁴⁶ If this be the case, and if thousands of lives could be saved by paying the bribe, the decision-maker applying act utilitarianism would pay the bribe to save the lives. From a teleological standpoint, payment of a bribe under certain conditions may be considered the right thing to do.

Tax kickbacks in Italy are another interesting example that sheds light on the question at hand: whether it ever can be acceptable to pay a bribe. Kelly describes the Italian system: "The Italian federal corporate tax system has an official, legal tax structure and tax rates just as the U.S. system does. However, all similarity between the two systems ends there."⁴⁷ Under the Italian system, tax officials expect original filed tax returns of corporate taxpayers to understate profits by 30 to 70 percent.⁴⁸ After returns are filed, tax officials issue taxpayers invitations to discuss, creating a system under which taxpayers' representatives negotiate the amount that ultimately will be collected.⁴⁹ These representatives, called *commercialistas*, pay Italian revenue agents *bustarella*, which Kelly classifies as a "substantial cash payment" that "usually determines whether the final settlement is closer to the corporation's original tax return or to the fiscal authority's original negotiating position."⁵⁰ Under the U.S. Foreign Corrupt Practices Act, if an Italian *commercialista* is acting as the agent of a U.S. taxpayer, the taxpayer can be liable for any *bustarella* that the *commercialista* tenders to tax officials.⁵¹

⁴⁶ The furtiveness of the payment would constrain its publicity. If it is truly furtive and no one but the payer and taker know about it, then the bribe does not serve as a legitimating example, attracting others toward emulation. If the payment induces no incremental future bribery, its negative effects on the institution of bribery under act utilitarian analysis may be negligible compared to the saving of lives. Again, it is important to remember that this analysis does not justify either the demand of the bribe or the taking of the bribe by the public official. Under act utilitarian reasoning, the paying of a bribe would be justified only after it has been requested by the official holding the power to distribute the food to dying people.

⁴⁷ Arthur L. Kelly, *Italian Tax Mores*, in CASE STUDIES IN BUSINESS, SOCIETY, AND ETHICS 272, 272 (Thomas L. Beauchamp ed., 4th ed. 1998).

⁴⁸ See *id.*

⁴⁹ See *id.*

⁵⁰ *Id.* at 272-73.

⁵¹ For the source of liability for acts of agents under the FCPA, see *infra* notes 53-55. A conceivable way to avert liability—and it is not very plausible—is to argue that the payments are for "routine government actions." The argument is not highly persuasive because *bustarella* as described by Kelly is used to purchase a financial gain via the reduction of taxes, rather than simply to get access to universal services like water, utilities, or mail delivery. For further discussion, see *infra* text accompanying notes 62-65.

How so? Under the FCPA, a corporation can be held liable if it knows that its agent⁵² is paying a bribe,⁵³ including a “firm belief” that the bribe is “substantially certain to occur.”⁵⁴ More specifically, the law provides that “knowledge is established if a person is aware of a high probability” of an illegal act occurring, “unless the person actually believes” that it is not.⁵⁵ Given that the payment of *bustarella* by *commercialistas* is the norm in Italy, awareness of high probability would not be a difficult standard to meet. A U.S. manager who hires a *commercialista* does so at his or her own peril, under the FCPA’s present treatment of the principal-foreign agent relationship.

I have discussed this case with business students for ten years. It raises a number of very interesting issues. Most pertinent to this Section, (1) nearly all students believe a system to be unethical if it allocates ultimate tax liability, and therefore proportionate tax burdens, on the basis of the size of a kickback to a public official; and (2) nearly all students believe that it is ethical for a U.S. manager to hire a *commercialista* to pay the kickback, or at least that it would be ethical if the manager could be assured that the payment didn’t violate any laws. This schism reflects an interesting bifurcation of ethical attribution. Those students who support both statements (1) and (2) above imply a belief that it can be morally defensible to tender a bribe in a corrupt system over which one has no control, and in which bribery has been institutionalized. The reasoning of those who adopt this position is summarized in the following paragraphs.

First, let us concede that the Italian system of taxation is at very least sub-optimal for several reasons: it perpetuates bribery, an institution widely considered to be harmful in many ways.⁵⁶ The Italian tax system also warps the relative burdens borne by individual taxpayers. The fairest, most consistent system will allocate tax burdens impartially, according to accepted legal standards. The payment of *bustarella* injects an element of corrupt

⁵² Agency issues in real cases are complicated, as principals are likely to deny either complicity or knowledge, and agents are likely to try to deflect responsibility by asserting such complicity or knowledge. The messiness is exacerbated when more than one country is involved in fact finding, and issues of extradition of witnesses arise. For one example of this kind of situation, see Andres Oppenheimer, *IBM Executives Deny Home Office Knew of Bribes in Argentina Bureau*, MIAMI HERALD, Oct. 1, 2000, available in LEXIS, News Library, Allnews File.

⁵³ 15 U.S.C. § 78dd-1(a)(3)(1999).

⁵⁴ 15 U.S.C. §§ 78dd-1(f)(2)(A)(ii), 78dd-2(h)(3)(A)(ii)(1999).

⁵⁵ 15 U.S.C. § 78dd-2(h)(3)(B)(1999).

⁵⁶ See Brian C. Harms, *Holding Public Officials Accountable in the International Realm: A New Multi-Layered Strategy to Combat Corruption*, 33 CORNELL INT’L L.J. 159, 209 n.63 (2000) (citing comment of Barbara Ettore that bribery is considered destructive to economies); Jong Bum Kim, *Korean Implementation of the OECD Bribery Convention: Implications for Global Efforts to Fight Corruption*, 17 UCLA PAC. BASIN L.J. 245, 260 (1999) (observing that bribery undermines economic development and distorts competitive conditions).

subjectivity, such that a taxpayer can reduce his or her overall costs if a marginal contribution to the kickback is exceeded by a greater marginal reduction in ultimate tax liability according to the tax official's final determination. Finally, the system encourages and virtually mandates dishonesty, as masses of taxpayers learn how to play the system, knowing that they initially must seriously underreport their earnings if they are to bear a reasonable tax liability at the end of the Italian process.

It is one thing to say that the Italian tax-collection system is sub-optimal, ethically or otherwise; it is another thing to say that it is unethical to participate in that system. Clearly, there are systems that are so objectionable that one ultimately declines to participate, based on moral grounds, political-economic grounds, or both. The system of apartheid in South Africa in the latter part of the twentieth century is an example of one such system.⁵⁷ Yet even withdrawal from the South African economy was controversial, as one can argue that active engagement in a system creates avenues for change that one loses through a trade embargo.⁵⁸

Now compare the Italian tax system. Is *bustarella* a form of bribery? Yes. Is it illegal under the FCPA? Whether any activity is illegal under the FCPA is frequently a tough question, because the FCPA is vague in so many ways. As Seglun recently observed,

Bribes are tricky. Well, not the bribes themselves. Deciding what constitutes a bribe and then whether you should pay one to do business in a foreign country [T]he Foreign Corrupt Practices Act . . . leaves . . . ambiguity [I]f the law does not provide clear guidance, how can anyone decide how to behave?⁵⁹

This ambiguity is exacerbated by a dynamic identified by Greanias and Windsor—the fact that payments considered commonplace and acceptable in one culture may be considered corrupt in another.⁶⁰

The FCPA's ambiguity, combined with its criminal sanctions,⁶¹ is likely to have a chilling effect on borderline behaviors. In the instance of *bustarella*, the chilling effect may be significant, considering that tax liabil-

⁵⁷ See *Greenbacks*, *ECONOMIST*, Aug. 3, 1991, at 73, 73-74 (discussing how "investors' revulsion at South African apartheid helped to bring that system down," as well as the economic boycotts and "shunning" that formed anti-apartheid policies around the world).

⁵⁸ Likewise, commentators in the early 1990s began to recommend the dismantling of vestigial sanctions as South Africa showed signs of moving away from apartheid. As one writer observed, removal of sanctions, combined with incentives for U.S. investment, could facilitate the fostering of democracy and freedom. See J. Daniel O'Flaherty, *Holding Together South Africa*, *FOREIGN AFF.*, Sept./Oct. 1993, at 126, 135. Engagement thus enables countries to share and encourage the adoption of institutions they consider desirable.

⁵⁹ Jeffrey L. Seglun, *When Bribery is Lost in Translation*, *N.Y. TIMES*, Oct. 15, 2000, at B8.

⁶⁰ See GEORGE C. GREANIAS & DUANE WINDSOR, *THE FOREIGN CORRUPT PRACTICES ACT* 129 (1982).

⁶¹ 15 U.S.C. § 78dd-2(g)(1999).

ity reductions do not fit convincingly into the vague category of “routine government actions.”⁶² Of course, the government action here—conferral of tax liability reductions—could be considered routine in the sense that it is commonplace in Italy. It is less likely to be considered routine by analogy to the examples enumerated in the FCPA, such as mail delivery or provision of phone service.⁶³ The statute’s catch-all provision permitting payment for “actions of a similar nature” to those enumerated does not specify the criteria for similarity.⁶⁴ Accordingly, it would be very risky to assume that payments for a reduction of the tax burden, however common and widely accepted, would be classified by the U.S. government as analogous to payments for basic utilities.⁶⁵ Accordingly, a prudent U.S. manager operating in Italy should probably assume that the payment of *bustarella* could trigger FCPA liability.

If the FCPA did not prohibit *bustarella* under U.S. law, would a U.S. businessperson be justified in paying it? Most students who study this case say yes. The initial underreporting of tax liability might seem dishonest under U.S. conceptions of honesty, but it may be honest under Italian conceptions of honesty. If the system accepts the fact that all reports are deflated by a commonly accepted discount factor, then arguably, the report is not dishonest; rather, the language and rules for reporting are simply different. The protocol is to discount, and the reported figures simply incorporate this protocol by virtue of common usage and understanding.

But what about the concern of more immediate relevance to this paper? How can the payment of the bribe be justified, if the payer believes the system to be fundamentally flawed? Again, consider an act utilitarian analysis. The social costs of making the payment include diversion of funds from the tax base to tax collectors’ pockets, the unfair relative allocation of tax burdens among taxpayers, and the support of what is at best a sub-optimal institution. The benefits include profits to shareholders that result from participation in the Italian market, the potential opportunity to effect changes in Italian policy by active engagement in the economy and the society, the provision of business to the Italian people, and respect for an alternative system that does not violate basic human rights. If the social benefits outweigh the social costs, participation in the system could be justified under act utilitarianism, even in the face of ethical objections to the system itself.

⁶² 15 U.S.C. § 78dd-1(f)(3)(1999).

⁶³ See *id.*

⁶⁴ See *id.*

⁶⁵ The risk of falling on the wrong side of the FCPA is significant. Penalties for violation include fines potentially in the millions of dollars, as well as imprisonment. See 15 U.S.C. §78dd-2(g) (1999).

C. Should Our Laws Acknowledge This Ambiguity?

The intersection between law and ethics is certainly imperfect, potentially by both design and accident. By design, it is possible to enact an ethically objectionable law with the goal of establishing a countervailing order, for example. Nonetheless, as a rule, we should prefer that there be harmony between what is legally required and what is ethically right.

The schism identified in the preceding two Subsections suggests that the law sometimes may require individual actors to act or refrain from acting in ways they determine to be wrong, in good faith and using legitimate ethical analysis. Should the laws seeking to control corruption exempt good-faith behaviors that can be morally justified under a reasonable, well-accepted mode of analysis?

There certainly is precedent for the position that law should exempt good-faith or well-meaning behavior. Homicide is one good example. It is hard to imagine a deontological edict more compelling than "Thou shalt not kill."⁶⁶ When I ask students in my business ethics classes to identify the most basic moral responsibilities of all human beings, respect for human life and the moral law against killing other human beings is always among the first mentioned. Not surprisingly, students consider the duty not to take a human life as a higher-order, more fundamental duty than the duty not to pay or take bribes. In the Judeo-Christian tradition, the tablets Moses brought down from the Mount contained a commandment against homicide, but not one against bribery.⁶⁷

This is not to understate the harm that corruption yields. Indeed, corruption can easily lead to loss of human life, as when purchased inspection approvals allow bridges to collapse, for example.⁶⁸ Rather, the point here is that the law provides good-faith exceptions to even the most basic deontological imperative not to kill. If one kills in defense of self or defense of others, homicide may be deemed justifiable,⁶⁹ and the perpetrator may go

⁶⁶ *Exodus* 20:13.

⁶⁷ *See id.*

⁶⁸ *See* Judge Stanley Sporkin, *The Worldwide Banning of Schmiergeld: A Look at the Foreign Corrupt Practices Act on its Twentieth Birthday*, 18 *Nw. J. INT'L L. & Bus.* 269, 280 (1998) ("What society would want to construct a major bridge, tunnel or public building where the best company for the job was excluded because it would not bribe a government official to procure the contract? When that bridge collapses because of faulty work, who is going to answer that a bribe paying shoddy contractor was hired because he gave Schmiergeld?").

⁶⁹ The notion of justifiable homicide is ancient. For discussion dating back to Cicero, see Grant M. Dawson, *Defining Substantive Crimes Within the Subject Matter Jurisdiction of the International Criminal Court: What Is the Crime of Aggression?*, 19 *N.Y.L. SCH. J. INT'L & COMP. L.* 413, 427 n. 66 (2000) ("...Cicero was explaining that all persons have an inherent right of self-defense or, at least, the right to be charged with justifiable homicide rather than murder.").

free.⁷⁰ This legal concept of justifiable homicide receives broad popular support.⁷¹ If homicide can be considered legally justifiable, perhaps there should be instances in which payment of a bribe should be legally justifiable, too.

The hypotheticals in this Section are two examples of cases in which the payment of a bribe could be made in good faith, and under a tenable ethical analysis. They certainly are not the only examples. Suppose Parent is visiting a hostile country, and her child is abducted. Corrupt public officials demand a payment for the release of the child. This kind of transaction can certainly be cast as corrupt, and it would not fall under the heading of a "routine government action" under any reasonable analysis.⁷² Yet the parent making such a payment would do so in good faith, and it would be difficult to condemn him.

The law could easily exempt "good-faith" payments that are nonetheless made for corrupt purposes, and it is hard to think of a reason against such a provision. A good-faith exemption would not undermine the spirit of anti-bribery laws⁷³ since most bribes are made in bad faith. It would, however, recognize that the personal ethical issue of bribe payment is not always clear-cut.

III. DOES THE FCPA'S NOTION OF "ROUTINE GOVERNMENT ACTIONS" CREATE A VIABLE STANDARD FOR DISTINGUISHING ACCEPTABLE AND UNACCEPTABLE PAYMENTS?

Under the present version of the Foreign Corrupt Practices Act ("FCPA"), payments made for the "routine government actions" of foreign officials are permitted.⁷⁴ This standard is meant to exempt what are commonly known as "grease payments."

The "routine government actions" language replaces a provision in the original version of the statute that allowed payments to foreign officials whose duties were "ministerial" or "clerical."⁷⁵ This alteration certainly

⁷⁰ See Sharan K. Suri, *A Matter of Principle and Consistency: Understanding the Battered Woman and Cultural Defenses*, 17 MICH. J. GENDER & LAW 107, 111 n.20 (2000) (observing that justifications like self-defense are grounds for acquittal).

⁷¹ See Tziporah Kasachkoff, *Killing in Self-Defense: An Unquestionable or Problematic Defense?*, 17 LAW & PHIL. 509, 509 (1998) ("Although most people believe that the deliberate and intentional killing of another person is generally morally wrong, many also believe that killing another person is sometimes morally justified and sometimes even called for").

⁷² I elaborate on this conclusory statement later in the paper, in a Section specifically addressing issues relating to the exemption for "routine government actions." See *infra* Section III.

⁷³ This comment assumes that anti-bribery laws are to any degree effective. The presumption is debatable, but if laws do have some impact on corruption, the impact would not be harmed by a good-faith exemption.

⁷⁴ 15 U.S.C. § 78dd-2(h)(4)(A)(1999).

⁷⁵ See 15 U.S.C. § 78dd-2(d)(2) (1982).

makes sense, given the spirit of the exemption of grease payments under a criminal law. If certain kinds of payments-for-service are considered innocuous, then the services for which they are tendered are a better indicator of a payer's culpability than the job descriptions of the *recipients* of the payments. A foreign official whose job is essentially clerical may nonetheless have some powers that would enable him or her to take seriously corrupt payments. By focusing on the specific reciprocal services rendered instead of the jobs of the recipients, the law can more accurately assess the culpability and the social effects of a particular payment.

Did the change from "ministerial" and "clerical" duties to "routine government actions" give us a workable exemption from liability for grease payments? As we shall see, there are several reasons to be skeptical. To begin the analysis, it helps to look at the specific statutory language that purportedly circumscribes the exemption for routine government actions.

The statute defines and briefly discusses the term "routine government action":

(3) (A) The term "routine governmental action" means only an action which is ordinarily and commonly performed by a foreign official in—

(i) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country;

(ii) processing governmental papers, such as visas and work orders;

(iii) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country;

(iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or

(v) actions of a similar nature.

(B) The term "routine governmental action" does not include any decision by a foreign official whether, or on what terms, to award new business to or to continue business with a particular party, or any action taken by a foreign official involved in the decision making process to encourage a decision to award new business to or continue business with a particular party.⁷⁶

The routine government actions exception appears to make the FCPA more palatable than it would be without such a provision. It certainly makes allowances for reasonable and relatively harmless payments. The FCPA's definition of a routine government action does identify a few clear-cut cases of activities that would be exempt from prosecution. If one needs to pay a bribe that everyone else pays in a particular country to have one's water hooked up, the statute is unambiguous, and the party making the

⁷⁶ 15 U.S.C. §§ 78dd-1(f)(3)(1999).

payment can feel secure that she won't be prosecuted.⁷⁷ Likewise, businesspersons abroad who need reliable mail delivery needn't worry that a small grease payment could lead to incarceration.⁷⁸ This is certainly a good thing.

The statute is far less helpful in the cases that are likely to be the most compelling ones—those in which the ethical dilemmas for executives and other businesspersons are more demanding and challenging. Arguably, these areas in which the need for guidance is the strongest are also those in which the statute is most deficient. Statutory reticence is exacerbated by judicial reticence—to date, no court decisions interpret the “routine government actions” exception.⁷⁹ In light of this dearth of illumination, either statutory or judicial, this discussion addresses some of the reasons why the routine government actions exemption is flawed.

Here's the most serious problem: some payments that are ethically justifiable, or even desirable, may be illegal or ambiguous under the statutory language. In Section II, I introduced a hypothetical in which an entrenched government was blocking food deliveries during a civil war, and in which certain officials were proposing to facilitate delivery, *sub rosa*, provided they were paid personal kickbacks.⁸⁰ I also identified ethical analysis under which payment of a bribe could be determined the right thing to do. Yet under the language of the FCPA, the payment may be actionable. As we shall see, the word “routine” is highly ambiguous, and payment in this hypothetical isn't routine under the most plausible interpretations of that word.

One possible interpretation of “routine” is that it applies to frequent actions. Assume that the official in the hypothetical is not taking a bribe that is commonly accepted in his country. To the contrary, given the goals of the entrenched government to thwart the civil war by “starving out” the communities of dissidents, it's likely that the acceptance of bribes to allow food to pass the blockade is both dangerous and uncommon.

Another way to interpret “routine” is to mean “ordinary” or “commonplace.” The list of goals for which routine payments can be made suggests that this might be close to the intended meaning. The processing of government papers, the provision of police protection and mail services, the provision of phone service and utilities, and the scheduling of inspections are all enumerated in the statute,⁸¹ and are all ordinary, commonplace government activities. The statute also includes “loading and unloading cargo, or protecting perishable products or commodities from deterioration.”⁸²

⁷⁷ See *supra* note 76 and accompanying text.

⁷⁸ See *id.*

⁷⁹ See Gary Eisenberg, *Foreign Corrupt Practices Act*, 37 AM. CRIM. L. REV. 595, 605 (2000).

⁸⁰ See *supra* Section I.

⁸¹ See *supra* note 76 and accompanying text.

⁸² 15 U.S.C. § 78dd-1(f)(3)(A)(iv)(1999).

These are also ordinary, commonplace activities, and they are likewise the closest analogues to the situation in the hypothetical: payment to pass a blockade. But are passage beyond a blockade and unloading cargo close enough to assure decision-makers that the former will be protected from prosecution?

Analogies are important here because of the layout of the statute. In addition to the enumerated routine government actions, the statute permits payments for "actions of a similar nature." This catch-all category requires decision-makers contemplating the statute to think in terms of analogues. On one hand, passage beyond a blockade and the unloading of cargo are similar, in that both pertain to facilitation of the process of deliverance of goods. If we think in these terms, and if we accept commonness and ordinariness as the qualities of a "routine" government action, we may be tempted to consider the payment permissible under the FCPA.

Before we get too comfortable with that assessment, consider yet another way of interpreting the phrase "routine government action." "Routine" could incorporate an element of acceptance or legitimacy. These certainly would be appealing qualities to attribute to the word "routine," given the general goal of distinguishing between legally permissible and legally impermissible payments. If this is the case, then the lawful, commonly accepted unloading of cargo is routine, whereas the passage of a government blockade in contravention of extant government edict is not.

The observations in this Section all lead to the same conclusion: It's hard to imagine a less helpful phrase than the catch-all "actions of a similar nature." Similarity and dissimilarity can be assessed on the basis of different criteria. The statute doesn't even suggest the criterion for assessing similarity—is it similarity of behavior? Similarity of ends? Similarity of frequency? Similarity of commonality and ordinariness? Similarity of social or legal acceptance in the community? Moreover, similarity and dissimilarity are obviously relative terms—terms that can be affected by context, including cultural context. In truth, if a government action is not specifically enumerated as exempt, the catch-all provides little help to a prospective payer.

One final thought bears consideration. So far, this Section has addressed the idea that some payments not clearly permitted under the "routine government action" exception may in fact be desirable. Some suggest the opposite problem: that payment for routine government actions exempted under the FCPA is a bad thing. These commentators suggest that grease payments are not harmless. According to McCary, "[a]lthough greasing payments are considered to be acceptable in certain foreign locales, the international community has recently expressed a consensus that

such payments constitute bribery.”⁸³ If the logistical and moral distinctions between corruption and grease become sufficiently blurred in international communities, the perceived legitimacy of the grease payment exemption may well decline. In this event, global acceptance of extraterritorial bribery legislation could become more questionable than it already is.⁸⁴

IV. CAN CORPORATE PRINCIPLES EFFECTIVELY BATTLE CORRUPTION?

Government programs to halt corruption have had limited success.⁸⁵ Moreover, extraterritorial government edicts can engender resentment and hostility.⁸⁶ Exercise of authority across borders can evoke perceptions of cultural imperialism and aggression, and therefore is potentially more troublesome than domestic exercise of authority.⁸⁷

As large, centralized, highly bureaucratized entities, governments are prone to other limitations. Perhaps most importantly, it is unlikely that such enormous, impersonal institutions can effect significant changes in the values, beliefs, and mores of the individuals who ultimately must determine whether bribery will flourish or dwindle. As Fort and Noone have noted, size affects the ability of institutions to develop and foster community values.⁸⁸

⁸³ M. McCary, *Bridging Ethical Borders: International Legal Ethics with an Islamic Perspective*, 35 TEX. INT'L L.J. 289, 314 (2000).

⁸⁴ For one article critical of the present global anti-bribery environment, see Balakrishnan Rajagopal, *Corruption, Legitimacy, and Human Rights: The Dialectic of the Relationship*, 14 CONN. J. INT'L L. 495, 496 (1999) (referring to the current anti-corruption discourse as “re-legitimizing particular conceptions of development, rule of law, democracy and human rights that are elitist, statist and Eurocentric”). For an article acknowledging the existence of criticism of some current anti-corruption policies, see Barbara Crutchfield George et al., *On the Threshold of the Adoption of Global Antibribery Legislation: A Critical Analysis of Current Domestic and International Efforts Toward the Reduction of Business Corruption*, 32 VAND. J. TRANSNAT'L L. 1, 19 (1999) (noting some who criticize U.S. promotion of the FCPA abroad, and who contend that the U.S. is morally imperialistic).

⁸⁵ See Mary Jane Sheffert, *The Foreign Corrupt Practices Act and the Omnibus Trade and Competitiveness Act of 1988: Did They Change Corporate Behavior?*, 14 J. PUB. POL'Y & MKTG. 290, 294-300 (1995) (observing that many companies have done nothing to respond to the Foreign Corrupt Practices Act); Transparency International, *1999 Bribe Payers Index, 1999 Corruption Perceptions Index*, available at <http://www.transparency.de/documents/cpi/index.html> (last visited Feb. 27, 2000) (revealing that after nearly 25 years under the FCPA, the U.S. ranks an unimpressive 9 out of 19 on the dimension of corporate “propensity to bribe senior officials”).

⁸⁶ See V. Rock Grundman, *The New Imperialism: The Extraterritorial Application of United States Law*, 14 INT'L LAW. 257, 257 (1980) (suggesting that others resent the exportation of United States law).

⁸⁷ See *supra* notes 5-6.

⁸⁸ See Timothy L. Fort & James J. Noone, *Challenges to Corporate Governance: Banded Contracts, Mediating Institutions, and Corporate Governance: A Naturalist Analysis of Contractual Theories of the Firm*, 62 LAW & CONTEMP. PROBS. 163, 196 (1999) (“[It] is not just

These limitations of government suggest that we may need to consider shifting our purview in the war against global corruption. One of the critical questions in this regard is whether corporations have a greater potential than is generally recognized for creating sustainable reforms in the area of transnational bribery. More specifically, do corporations have the ability to effect meaningful changes in values, where nations will fail? Fort's work on mediating institutions⁸⁹ suggests that the answer to this question may be yes. He notes,

Mediating institutions are relatively small communities which socialize individuals. They stand between the individual and the large megastructures of society, such as the nation-state or the multinational corporation. Because of their small size, mediating institutions allow individuals to see and experience the consequences of their actions. Accordingly, those consequences teach moral norms because they socialize individuals to see that their self-interest is connected with the welfare of others.⁹⁰

Smaller corporations certainly fit Fort's description of mediating institutions capable of effecting modifications in value systems. Of course, corporations of all sizes are not immune from potential charges of moral imperialism, but they are less susceptible to such charges than governments. Government is the classic imperial entity. Literal "empires" such as the historic British Empire are built by governments, not by companies. Moreover, governments by their nature create laws, which by definition are coercive. In contrast, corporate codes, rules, and guidelines are applied far less expansively, because corporate communities have much smaller populations than government constituencies. Moreover, the potential imperialist weight of government is supported by criminal laws, which carry the serious and therefore highly coercive threat of incarceration. While corporate codes can have a powerful effect, their influence is largely limited by less compelling sanctions—internal controls and penalties. One can be demoted, fined, or dismissed for violating a corporate code; one can't be imprisoned for such violation in absence of an overlapping, governmentally sanctioned law. These inherent differences in size and coercive power render corporate efforts less threatening than their governmental counterparts, when the efforts affect actions that take place across international borders.

any community that fosters the desire to be ethical, but a small one—a mediating institution. In such a mediating institution, contracts are not based on consent alone, but have a socialized content—a banded contract").

⁸⁹ See, e.g., Timothy L. Fort, *The Corporation as Mediating Institution: An Efficacious Synthesis of Stakeholder Theory and Corporate Constituency Statutes*, 73 NOTRE DAME L. REV. 173 (1997); Timothy L. Fort, *Business as Mediating Institution*, 6 BUS. ETHICS Q. 149 (1996).

⁹⁰ See Timothy L. Fort, *The First Man and the Company Man: The Common Good, Transcendence, and Mediating Institutions*, 36 AM. BUS. L.J. 391, 395 (1999) (citations omitted).

The potential of mediating institutions in this area raises two important questions: (1) Can corporate codes, guidelines, or principles be desirable tools for curbing international bribery; and (2) If the answer to the first question is yes, how effective will extant approaches be in achieving this end?

A. Can Corporate Codes, Guidelines, or Principles be Desirable Tools for Curbing International Bribery?

In earlier writings, I have suggested that we need to be careful in developing and implementing corporate codes.⁹¹ This work distinguishes “codes of law” from “codes of ethics.”⁹² Where there is widely held consensus regarding right and wrong, legalistic codes (broadly classified as “codes of law”) can be an effective means of policing behavior.⁹³ However, in regard to legitimately controversial ethical situations—scenarios in which reasonable minds can and do differ—codes are less defensible for two reasons. They coerce people to behave in ways that may go against their personal beliefs, and they belittle the idea of ethics by suggesting that ethics are to be pre-cut by the corporate tailor in complex situations, and then worn off the rack by mindless employees.⁹⁴

These generalizations apply to codes regarding bribery, just as they would apply to generic ethical codes, or to codes focused on meeting other particular ethical challenges. If principles are supported by virtually universal consensus, they have the potential to become effective organizational laws. If they attempt to manipulate behavior in areas where legitimate controversy exists, they are likely to be dysfunctional or even counterproductive, undermining the legitimate exercise of personal ethical judgment.

In one sense, bribery and corruption are subject to a universal consensus; in another sense, they are not. The consensus exists on the broader level. Even in nations where abuses are rampant or supported by a benefiting power elite, the institution of bribery is not approved by the population at large.⁹⁵ As Nichols notes, “the concept of bribery is universally condemned.”⁹⁶ This conceptual condemnation of bribery is a logical extension

⁹¹ See *infra* notes 92-94.

⁹² See Steven R. Salbu, *Law and Conformity, Ethics and Conflict: The Trouble with Law-Based Conceptions of Ethics*, 68 *IND. L.J.* 101, 103-07 (1992).

⁹³ See *id.* at 104-05.

⁹⁴ 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 (1994).

⁹⁵ See Mark J. Murphy, *International Bribery: An Example of an Unfair Trade Practice?*, 21 *BROOKLYN J. INT'L L.* 385, 392 (1995) (“[B]ribery is generally not condoned—at least once it is publicly revealed”).

⁹⁶ See Nichols, *Increasing Global Security*, *supra* note 7, at 476.

of a more general honesty norm.⁹⁷ At a more particularized level, however, “the precise boundaries of what constitutes a bribe may differ.”⁹⁸ The consensus regarding bribery is conceptual; the differences across cultures exist when the concept is translated and applied to specific behaviors.

Under these conditions, corporate principles condemning bribery are most likely to succeed if they are *conceptually* snug, yet still leave breathing room for cultural differences at the stage of *application*. This is a difficult razor’s edge to navigate, because it demands two qualities that tend to be at odds—it asks a code to be both tight and loose at the same time. If corporate principles are to be effective while respecting legitimate cultural differences, just such a subtle balance is required. The following Subsection assesses two contemporary efforts to create corporate codes, guidelines, or principles.

B. How Effective Will Extant Approaches be at Stemming Bribery Through Codes, Guidelines, or Principles?

This Subsection looks at two contemporary efforts to create codes, guidelines or principles that can be applied by mediating institutions to fight corruption at the organizational level—International Chamber of Commerce Corporate Practices Criteria, and Hess and Dunfee’s C² Principles.

1. *International Chamber of Commerce Corporate Practices Criteria.*

Formal codes and principles are not the only offerings available to help guide corporate behavior. Less formal recommendations and guidelines also exist, purporting to help companies navigate the legal and ethical shoals of bribery and corruption.

Consider the sometimes subtle distinction between gifts and bribes, a distinction that can be especially complex in transnational contexts, where important differences may exist in etiquette, values, and norms.⁹⁹ A recent International Chamber of Commerce (“ICC”) Corporate Practices Manual reports three criteria that one company uses to differentiate between bribes and good-faith gifts:

- a. Bribes are made in secret, while gifts are made openly as gestures of good-will or affection.
- b. Bribes are often made through intermediaries, while gifts are usually made directly.

⁹⁷ For discussion of anti-bribery norms as they relate to honesty norms, see Claire Moore Dickerson, *Political Corruption: Free-Flowing Opportunism*, 14 CONN. J. INT’L L. 393, 394-96 (1999).

⁹⁸ See Nichols, *Increasing Global Security*, *supra* note 7, at 467 n.96.

⁹⁹ See Salbu, *Premature Evocation*, *supra* note 3.

c. Bribes create obligations on the part of recipients, while gifts come with no such conditions.¹⁰⁰

As well-intentioned as such guidelines are, their usefulness is questionable, and they could do more harm than good. First, they are generalizations concerning correlation, rather than principled guidelines for making legitimate distinctions. As such, they probably aren't the worst correlational stereotypes—it makes sense that bribes are disproportionately furtive, and that they often are laundered, and tracks often are hidden, by the circuitous use of intermediaries. But like all stereotypes, these are likely to evoke plenty of errors as well. Bribes can be paid without secrecy; legitimate payments can be paid furtively for legitimate reasons, such as the avoidance of publicity in order to keep strategies confidential.

Some of the generalizations don't make sense—for example, the statement that gifts generally are not given through intermediaries. On what basis is this stereotype put forward? Indeed, instances where the FCPA is most likely to be evoked are also those where intermediaries are most likely to be needed or used for legitimate gift-giving. If a U.S. company does business in China, high-level executives located in the U.S. are very likely to send gifts through intermediaries, be they friends or acquaintances who are otherwise doing business in China, or local contacts who are on site and also have expertise regarding appropriate and suitable gifts. Use of intermediaries may have to do with illicit motives; it also may reflect nothing more culpable than the practical necessity of using others to tender legitimate gifts halfway around the world.

Finally, the idea that bribes create recipient obligations, while gifts do not, is overly simplistic. It ignores the fact that reciprocity norms are strong even in regard to legitimate gift-giving.¹⁰¹ Consider the couple that is planning a dinner party and decides to invite the Joneses, stating, "We owe them." While there are no strong express notions of reciprocal obligation attached to dinner parties, there are strong implicit notions of reciprocity. These kinds of expectations hardly trigger concerns about corruption. This is murky territory at its cloudiest. The idea that items of value can be neatly categorized into obligation-triggering and non obligation-triggering categories is overly simplistic.

¹⁰⁰ See Frank Reynolds, *Export ABCs: Autumn Required Reading*, J. COM., Sept. 11, 2000, at Special Report 3 WP, available at <http://www.joc.com> (last visited Feb. 10, 2000) (reporting that the International Chamber of Commerce Corporate Practice's Manual offers these three suggestions as "practical suggestions for companies wishing to develop anti-bribery policies").

¹⁰¹ Consider gift-giving in Japanese business contexts. Like any gift-giving situation, it can be blatantly corrupt. However, gift-giving also can be a legitimate display of Japanese etiquette and protocol. Nonetheless, even under the most benign conditions, one commentator notes that gift-giving in Japanese business contexts "almost always" evokes reciprocity expectations. See Jonathan Watts, *Sleaze Seeps Out of Gift-Wrapping*, GUARDIAN (London), Dec. 23, 1996, at 8 (citing comments of Masao Miyamoto).

For these reasons, the kinds of corporate guidelines that are likely to work best are carefully considered, principled guidelines. Generalizations, tips, and hints are likely to be more risky and less helpful. Grounded in frequently inaccurate stereotypes, they will create error. That error will be greater or lesser according to the degree that the underlying stereotypes are unreliable.

2. *Hess and Dunfee's C² Principles.*

Hess and Dunfee have provided another model for the corporate reform approach,¹⁰² one that is more formal than that discussed in the ICC Corporate Practices Manual. Hess and Dunfee's approach is patterned after the Sullivan Principles that many companies adopted in response to apartheid in South Africa,¹⁰³ and the McBride Principles that applied to conduct of operations in troubled Northern Ireland.¹⁰⁴ The authors cite precedent for the application of corporate principles in other areas of social responsibility as well—the CERES Principles, or Valdez Principles, applied to environmental issues;¹⁰⁵ the Slepak principles, applied to human rights issues in the Soviet Union;¹⁰⁶ and the Miller Principles, applied to doing business in the People's Republic of China and Tibet.¹⁰⁷

Hess and Dunfee's principles for bribery and corruption are called the "C² Principles" ("Principles"), an acronym for "combating corruption."¹⁰⁸ The philosophy of the C² Principles is to "require firms to implement procedures to prevent the payment of bribes and to publicly disclose their progress and efforts towards these ends."¹⁰⁹ Specifically, a corporation that endorses the C² Principles makes the following pledges:

1. To disclose publicly and make widely known its endorsement of the C² Principles.
2. To establish a clearly articulated written policy against the payment of bribes and "kickbacks" by the firm's employees.
3. To implement the policy with due care and take appropriate disciplinary action against any employee discovered to have made payments in violation of the policy.

¹⁰² David Hess & Thomas W. Dunfee, *Fighting Corruption: A Principled Approach: The C² Principles (Combating Corruption)*, 33 CORNELL INT'L L.J. 593 (2000).

¹⁰³ For discussion of the Sullivan Principles, see Alexandra Bernasek & Richard C. Porter, *Private Pressure for Social Change in South Africa: The Impact of the Sullivan Principles*, 55 REV. SOC. ECON. 172 (1997).

¹⁰⁴ For discussion of the McBride Principles, see Kevin A. Burke, *Fair Employment in Northern Ireland: The Role of Affirmative Action*, 28 COLUM. J.L. & SOC. PROBS. 1 (1994).

¹⁰⁵ Hess and Dunfee, *supra* note 102, at 626 & n.141.

¹⁰⁶ *Id.* at 626 & n.142.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 615.

¹⁰⁹ *Id.* at 594.

4. To provide training for employees to carry out the policy, and to provide continuing support, such as help lines, to assist employees to act in compliance with the firm's policy.

5. To record all transactions fully and fairly, in accordance with clearly stated record keeping procedures and accounting controls, and conduct internal audits to assure no improper payments are made.

6. To report annually on the firm's bribery and corruption policy along with a description of the firm's experience implementing and enforcing the policy.

7. To have the annual report in principle audited either by an independent financial auditor or by an independent social auditor, or both.

8. To require all agents of the firm to affirm that they have neither made nor will make any improper payments in any business venture or contract to which the firm is a party.

9. To require all suppliers of the firm to affirm that they have neither made nor will make any improper payments in any business venture or contract to which the firm is a party.

10. To establish a monitoring and auditing system to detect any improper payments made by the firm's employees and agents.

11. To report publicly any solicitations for payments (or report privately to a monitoring organization or a social auditor).

12. To establish a system to allow any employee or agent of the firm to report any improper payment without fear of retribution for their disclosures.¹¹⁰

The C² Principles contain provisions that attack corruption in two distinct ways: by prohibiting corrupt behaviors¹¹¹ and by ensuring appropriate monitoring, record-keeping, and reporting functions that encourage transparency.¹¹² In this sense, the Principles resemble the Foreign Corrupt Practices Act's dual-tiered approach.¹¹³

The discussion in this Subsection focuses on the prohibition of corrupt behavior contained primarily in Principle 2, rather than on the monitoring, record-keeping, and reporting provisions. It bears noting at this point, however, that the latter provisions are highly detailed and specific. This is appropriate for audit-related provisions, because the audit and control processes of a company are essentially legalistic rather than ethical in nature. While they certainly *support* ethical behavior, in and of themselves they are administrative. As such, they benefit from detail that reflects serious thought on optimization of administrative functions. The audit-related provisions provide more rather than less guidance to employees who are

¹¹⁰ *Id.* at 626.

¹¹¹ See Principle 2, text accompanying *supra* note 110.

¹¹² See Principles 5-12, text accompanying *supra* note 110.

¹¹³ The FCPA contains both anti-bribery provisions and record-keeping provisions. For the anti-bribery provisions, see 15 U.S.C. §§ 78dd-1, 78dd-2, 78dd-3 (1999). For the record keeping provisions, see 15 U.S.C. § 78m(b) (1994).

implementing a system of administrative controls. This specificity should add to the effectiveness of the audit system and consistency of its operations. Since the audit system supports ethical behavior and is not in itself an ethics provision, high specification doesn't run the risk of taking responsible decision-making authority from corporate actors facing difficult ethical questions under conditions of subtle cultural heterogeneity.

The anti-corruption provisions in the Principles are very different from the audit-related provisions, in that they are broad, and are not closely focused on highly specified behaviors. The C² anti-corruption Principles avoid the main shortcoming of the ICC Corporate Practices—the reliance on stereotypes to provide guidance to decision-makers. This difference may be related to a broader difference in the two efforts—whereas the ICC approach seems to aim for extreme simplicity, and therefore ease of application, the C² anticorruption Principles are more open-textured and theoretical. If the ICC approach were less prone to errors in stereotyping, it would have a strong advantage over the C² anti-corruption Principles in providing relatively clear, easily applied guidance. Unfortunately, while the goal of easy answers is attractive, it may be untenable because easy answers do not exist for difficult questions.

The C² anti-corruption Principles appear neither to seek nor to provide simplistic guidance. Rather, the primary strength of the C² anti-corruption Principles is their grounding in theory rather than in easy behavioral answers or suggestions. This quality makes them inherently more difficult to apply than the ICC tips, in that a decision-maker must engage in more elaborate thought processes and assessments. For example, Principle 2 doesn't define a "bribe" or "kickback," and Principle 8 doesn't define an "improper payment." The decision-maker is left to distinguish legitimate consideration or gifts from corrupt offerings, in the context of local or regional differences in protocol and custom. This process can and likely will incorporate assessments that take cultural heterogeneity into account.¹¹⁴

What are the main advantages to this approach? By virtue of their lack of specificity, the anti-corruption Principles leave breathing room for decision-makers to exercise responsible ethical judgment. In the process, the Principles avoid blind adherence to overly specific requirements that would allow no consideration of the local definitional and implementation differences noted in the immediately preceding paragraphs. In contrast, the Principles are tighter and more highly specified where they ought to be—in the more legalistic, administrative audit provisions.

¹¹⁴ Recall that there appears to be a universal conceptual condemnation of bribery, but less universal agreement on what specifically comprises a bribe at the margins. *See supra* notes 96, 98, and accompanying text. It is important to emphasize here that the C² Principles' open texture leaves room for exercise of decision-maker discretion at the definitional and implementation stages only. They do not permit a decision-maker whose employer has adopted the Principles to decide that bribery is acceptable in a particular culture.

The result is a set of model requirements through which corporations can achieve some real results. The Principles set a clear and unambiguous tone. If they expect the Principles to work, corporate leaders must adopt them seriously and in good faith, and not simply as window dressing. If leaders effectively communicate the seriousness of their commitment, no lower-level worker need experience corporate ambiguity on the issue of bribery. The company that seriously adopts the Principles and puts its weight behind them sends decision-makers clear signals in bidding for business: the company will not condone the payment of bribes, and workers will not be penalized for loss of business attributable to refusing to violate the principles.

Perhaps most importantly, the tightly designed audit provisions provide transparency and meaningful controls, while the loosely designed prohibitions allow human decision-makers to exercise their best judgment in ways that respect cultural heterogeneity and legitimate, subtle differences in defining corruption. For this reason, the Principles can avert the risk of imperialism inherent in extraterritorial legislative approaches, such as the present efforts to spread FCPA-style statutes across the globe.

V. SHOULD NON-GOVERNMENTAL ORGANIZATIONS SUPPLANT GOVERNMENT ACTION IN THE WAR AGAINST GLOBAL CORRUPTION?

In past articles, I have questioned the wisdom of globalizing the U.S. approach to fighting corruption. My specific concerns about the FCPA have focused on its ineffectiveness and inefficiency,¹¹⁵ as well as possible cultural imperialism¹¹⁶ and global discord.¹¹⁷ All of these articles have suggested that we look for alternative solutions to the recent “paradigm shift”¹¹⁸ toward FCPA multilateralization—a shift most notable in the form of accords like the Organization for Economic Cooperation and Development (“OECD”) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions,¹¹⁹ and the Organization of American States (“OAS”) Inter-American Convention Against Corruption.¹²⁰ While commentators tend to applaud these conventions as reflec-

¹¹⁵ See generally Salbu, *Delicate Balance*, *supra* note 4; Salbu, *Information Technology*, *supra* note 4.

¹¹⁶ See generally Salbu, *Premature Evocation*, *supra* note 3.

¹¹⁷ See generally Salbu, *Threat to Global Harmony*, *supra* note 3.

¹¹⁸ See Nii Lante Wallace-Bruce, *Corruption and Competitiveness in Global Business—The Dawn of a New Era*, 24 MELB. U. L. REV. 349, 362-66 (2000).

¹¹⁹ Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, 37 I.L.M. 1, available at <http://www.oecd.org/daf/noc/orrup/20nov1e.htm> (last visited Nov. 25, 2000).

¹²⁰ Inter-American Convention Against Corruption, Mar. 29, 1996, 35 I.L.M. 724, available at <http://www.oas.org> (last visited Nov. 25, 2000).

tions of a growing global accord in the war against corruption,¹²¹ others challenge this depiction.¹²² They portray a reluctant resignation on the part of some signatory nations that may have been hectored and politically maneuvered into compliance.¹²³ To the extent that participation is coerced, we have reason to wonder if implementing legislation, not to mention enforcement of implementing legislation, will ever be realized.

In other earlier articles, I have suggested that reform of social institutions that undergird corruption is a more promising approach than multilateral extraterritorial legislation.¹²⁴ While there are many such institutional foundations of corruption that we can attack, my research has focused on a few particular ones, such as poverty and underpayment of public officials¹²⁵ and the global digital divide.¹²⁶

These previous writings have not addressed a very important question: should non-governmental organizations ("NGOs") supplant governmental organizations in the international battle against corruption? In other words, should incipient multilateral extraterritorial laws, mimicking the U.S. Foreign Corrupt Practices Act, be replaced by NGO initiatives?

The NGOs that most typically come up in discussions about global corruption are Transparency International ("TI"),¹²⁷ the International Monetary

¹²¹ See, e.g., Alejandro Posadas, *Combating Corruption Under International Law*, 10 DUKE J. COMP. & INT'L L. 345, 410 (2000) ("Notwithstanding . . . concerns, the OECD Convention is a relevant step in the development of the treatment of bribery under international law. Leaving aside for the moment its substantive developments and the questions raised about its implementation and enforcement, this Article submits that its contribution to the development of a common language and definitions in this field is highly relevant in itself. In addition, the OECD Convention may grow in membership and eventually become the model upon which is built a more comprehensive and balanced regime").

¹²² See, e.g., Brian Michael Jenkins, Commentary, *Oil Greases the Way for Corruption*, L.A. TIMES, Oct. 31, 2000, at B9, available at <http://www.latimes.com> (last visited Feb. 10, 2001).

¹²³ See *id.* ("The Organization of Economic Cooperation and Development's convention against bribery in 1999 globalized the Foreign Corrupt Practices Act and represented a victory for the proponents of ethical business practices. The agreement, however, does not reflect consensus. Many factors persuaded governments to go along. Principles played a role, but domestic politics drove decisions. For European and Asian governments, the reasons for supporting the convention varied. In addition to being persuaded that it was a good thing to do, they faced hectoring by the Americans and more gentle but effective persuasion by the International Chamber of Commerce and World Economic Forum").

¹²⁴ See Salbu, *Battling Global Corruption*, *supra* note 4; Salbu, *Information Technology*, *supra* note 4.

¹²⁵ See generally Salbu, *Battling Global Corruption*, *supra* note 4.

¹²⁶ See generally Salbu, *Information Technology*, *supra* note 4.

¹²⁷ See, e.g., *A Guide to Graft*, ECONOMIST, Oct. 30, 1999, at 86 (discussing Transparency International in regard to the escalating global war against corruption, and suggesting the group's influence by observing that no country can ignore it).

Fund ("IMF"),¹²⁸ the World Bank,¹²⁹ and the United Nations.¹³⁰ Among these, Transparency International is the organization most specifically focused on the problem of transnational corruption. For the other organizations, corruption is one of many concerns. This may explain why TI really plays the leading role among NGOs in this arena. In addition, TI has not been plagued by the degree of criticism that has recently dogged the IMF and the World Bank.¹³¹

The idea that an NGO like Transparency International could supplant rather than supplement governmental action is certainly novel. TI's literature consistently supports contemporary multilateralization of FCPA-style legislation,¹³² and a potential government-substitute role is one that TI itself has never endorsed for itself. Yet the notion of NGOs taking on more aggressive quasi-governmental functions is gaining ground in internationalized contexts,¹³³ and with good reason. NGOs can serve as neutral institutions that are ideally positioned to act quickly and to overcome parochial sovereign interests of government.

¹²⁸ See Miguel Diaz, *Lenders are Leaning on Governments to Clean Up Corruption*, LATIN FINANCE, Sept. 2000, at 54 (noting the growing role of the war against corruption in the IMF's lending policies).

¹²⁹ See Kenneth R. Timmerman, *Q: Is the World Bank Still Needed in Today's Global Economy?; No: Stop the Flow of Taxpayer Funds that Prop Up Many Corrupt Third World Regimes*, INSIGHT ON THE NEWS, May 22, 2000, at 41 ("[T]he World Bank now sees its mission as alleviating poverty and fighting corruption in developing nations").

¹³⁰ See, e.g., Barbara Crutchfield George et al., *The 1998 OECD Convention: An Impetus for Worldwide Changes in Attitudes toward Corruption in Business Transactions*, 37 AM. BUS. L.J. 485, 522 (2000) (referring to United Nations General Assembly Resolution: Action Against Corruption and Bribery in International Commercial Transactions); Press Release, Transparency International, *United Nations Issues Landmark Declaration Against Corruption* (Dec. 18, 1996), available at <http://www.transparency.de/documents/pressreleases/1996/1996.12.18.un.html> (announcing the United Nations' issuance of its "Declaration Against Corruption and Bribery in International Commercial Transactions").

¹³¹ For a discussion of this criticism, see *Reforms Needed to Restore IMF Credibility*, TORONTO STAR, Oct. 26, 2000, at BU02; Doug Henwood, *Stiglitz and the Limits of 'Reform': The Recent Departures of the World Bank's Chief Economist and an Expert He Brought Makes it Clear That the 'Washington Consensus' Still Rules*, NATION, Oct. 2, 2000, at 20.

¹³² See, e.g., Transparency International Programs and Activities, available at <http://www.transparency.de/activities/index.html> (last visited Dec. 7, 2000) ("We work to ensure that the agendas of international organizations give high priority to curbing corruption. We are promoting new inter-governmental agreements to fight corruption in an internationally co-ordinated manner. Both the TI Secretariat and TI National Chapters around the world actively monitor the implementation of such agreements by the signatory countries. This includes monitoring of Conventions included within the framework of the OECD, the Council of Europe, the European Union and the Organization of American States. Special emphasis is on monitoring the OECD Convention on Combating Bribery of Foreign Public Officials").

¹³³ For a more detailed discussion of this function of NGOs, see C. David Lee, *Legal Reform in China: A Role for Nongovernmental Organizations*, 25 YALE J. INT'L L. 363 (2000).

There is recent precedent for serious, authoritative, quasi-governmental roles among NGOs in modern global society. Consider in particular the role that the Internet Corporation for Assigned Names and Numbers ("ICANN") is taking in the arena of Internet domain name policy.¹³⁴ The remainder of this Section describes the development of this model for NGO assumption of quasi-governmental functions. The intent is to demonstrate the potential of NGOs in this arena, in order to open discussion among scholars regarding a possible analogous enhanced NGO application in the war against bribery and corruption.

Created in October of 1998, ICANN has been ceded governmental authority to administer dispute resolution, which it does under the Uniform Domain-Name Dispute Resolution Policy.¹³⁵ Specifically, ICANN is a not-for-profit organization that oversees the distribution of domain names and the resolution of domain-name disputes.¹³⁶ Although ICANN itself is entirely private, it was created at the behest of the U.S. Commerce Department, largely in response to concerns over the role and functions of Network Solutions, Inc. ("NSI").¹³⁷ In particular, critics were concerned about NSI's government-sanctioned monopoly over in the domain name registration market, as well as NSI's purported lack of a policy for the resolution of domain name disputes.¹³⁸

For a non-governmental entity, ICANN's Board maintains an impressive amount of power and influence, in regard to both individual-level decisions and the establishment of broad public policy.¹³⁹ For example, in managing the creation of new top-level domains ("TLDs"), ICANN recently created rules and procedures that resemble traditionally governmental administrative processes:

The Board unanimously adopted the roll out of new TLDs in a measured and responsible manner as recommended by the Names Council, and will issue a formal call for applications by those seeking to sponsor or operate a new TLD as of August 1, 2000, with a roll out expected as early as the beginning of next year.

¹³⁴ See *Gordian Knotwork: What's in a Name? On the Internet, at Least, the Answer is Technology, Politics, Money and Ego*, ECONOMIST, July 31, 1999, at 58 (discussing the high stakes in which ICANN was given an enormous interest upon its creation).

¹³⁵ See Monica B. Richman, *Update: Five Recent Domain Name Cases Raise Novel Issues of First Impression*, E-COMMERCE, Sept. 2000, at 8.

¹³⁶ See Claire Barliant, *Rough Justice*, AM. LAW, Sept. 2000, at 71 (discussing the roles and responsibilities of ICANN).

¹³⁷ See Luke A. Walker, *ICANN's Uniform Domain Name Dispute Resolution Policy*, 15 BERKELEY TECH. L.J. 289, 294-95 (2000).

¹³⁸ See *id.* The monopoly has since been dismantled, and others now compete with NSI in the domain name registration market.

¹³⁹ Indeed, ICANN's enormous power has generated criticism. See Mike France, *What's in a Name.com? Plenty: A Brawl Over Net Names Could Threaten Web Self-Governance*, BUS. WK., Sept. 6, 1999, at 86 (noting two criticisms of ICANN—its alleged secret operations and its alleged usurpation of an excessive amount of power).

According to ICANN, proposed operators must provide the following in addition to the U.S. \$ 50,000 non-refundable application fee: (1) full information about their technical, business, management, and financial capabilities, (2) detailed description of the policies contemplated to promote orderly registration of names in the initial phases of introduction of the TLD, (3) full details concerning arrangements proposed to protect user in the event of failure, and (4) measures proposed for minimizing use of the TLD to carry out infringements or other abuse of intellectual property rights.¹⁴⁰

Moreover, ICANN provides guidelines for the implementation of its procedures, and these guidelines resemble administrative guidelines of classic governmental regulatory processes:

The Board provide[s] guidelines that it will consider in assessing applications, which include the need to maintain the Internet's stability, the enhancement of competition for registration and the utility of the DNS, and the importance of appropriate protections of rights of others, including intellectual property right, in connection with the operation of the TLD, especially during the start-up phases. The Board will consider all types of TLDs including fully open, restricted and chartered with limited scope, noncommercial, and personal. While some in the Internet community felt the Board's resolution was somewhat vague, the bottom-up consensus building process of ICANN did not produce a consensus on the specific type of TLD or the model under which they should be added.¹⁴¹

Finally, ICANN serves a quasi-governmental accrediting function, as it accredits alternative dispute resolution providers for the arbitration of Internet domain name disputes.¹⁴²

Despite its tremendous governance power,¹⁴³ everything about ICANN is nongovernmental in nature. It is a non-governmental entity, and it is advised largely by non-governmental experts on Domain Name System policy issues—i.e., by the “Names Council,” whose members are experts in e-commerce, intellectual property, and technology.¹⁴⁴

While ICANN is an NGO created by and in the United States, there can be no doubt that its impact will be enormous around the world. This is largely because, while “dot-com” top-level domain names are a U.S. crea-

¹⁴⁰ See Caroline G. Chicoine, *Summary of ICANN Yokohama Meeting*, INTELL. PROP. TODAY, Sept. 2000, at 37.

¹⁴¹ See *id.*

¹⁴² See *Developments in the Law- The Paths of Civil Litigation* (pt. VI), 113 HARV. L. REV. 1851, 1856 n.39 (2000).

¹⁴³ See Neil Weinstock Netanel, *Cyberspace Self-Governance: A Skeptical View from Liberal Democratic Theory*, 88 CAL. L. REV. 395, 485 (2000) (“ICANN's future power should not be underestimated. No one can establish a publicly accessible web site without an Internet domain name. Accordingly, if ICANN should decide that domain name registrars may (or must) deny registration unless the applicant forswears certain sorts of expression, meets specified criteria of ‘good standing,’ or pays a substantial fee, then those who fail to do so will effectively have no presence on the web”).

¹⁴⁴ See Chicoine, *supra* note 140, at 37.

tion under U.S. control, they are also a global elite standard for e-commerce entities.¹⁴⁵ Moreover, controversies over domain name rights and infringements are going to be enormously global and complex by their very nature, as the same second-level and third-level domain names are registered under an increasingly wide range of TLD names. ICANN's role as a global arbiter is guaranteed by virtue of these phenomena; this prospective role could also prove desirable, given the world's need for an integrated, inclusive policy in this area of law.

The precedent established by ICANN tells us that NGOs can play an increasingly substantial role in global regulation. This role is likely to continue to grow, in an increasingly wider range of sectors, as all worldwide activity becomes more and more globally interdependent. The questions that remain are whether ICANN's NGO-governance precedent makes sense,¹⁴⁶ and whether there are good reasons to expand the notion to areas such as corruption control. While this Perspective doesn't attempt to answer these questions, the remainder of this Section identifies some of the advantages that can be gained by a growing NGO role in this and other areas of international governance.

What ICANN represents is an expansive governance role accorded to a non-governmental entity.¹⁴⁷ The fact that ICANN plays this role in an unprecedented way¹⁴⁸ is probably not a coincidence. Because it is a quickly

¹⁴⁵ See Christopher P. Rains, *A Domain Name by Any Other Name: Forging International Solutions for the Governance of Internet Domain Names*, 14 EMORY INT'L L. REV. 355, 369 ("[R]egistration of TLDs as '.com,' in widespread use by parties in many nations, is delegated to a United States organization alone (and a private sector organization, at that)").

¹⁴⁶ For one vocal vote of "no," see A. Michael Froomkin, *Wrong Turn in Cyberspace: Using ICANN to Route Around the APA and the Constitution*, 50 DUKE L.J. 17, 29 (2000) ("There is a danger, however, that ICANN may not be unique for long. One administration spokesperson has already suggested that ICANN should be a model for regulation of other Internet-related issues such as accreditation standards for distance learning and e-commerce over business-to-business 'closed' networks. The specter of a series of ICANN clones in the United States or in cyberspace should give one pause, because ICANN is a very bad model, one that undermines the procedural values that motivate both the APA and the Due Process Clause of the Constitution. DoC's reliance on ICANN has (1) reduced public participation in decision making over public issues, (2) vested key decision making power in an essentially unaccountable private body that many feel has already abused its authority in at least small ways and is indisputably capable of abusing it in big ways, and (3) nearly (but, as argued below, not quite) eliminated the possibilities for judicial review of critical decisions regarding the DNS. So far, ICANN appears to be accountable to no one except DoC itself, a department with a strong vested interest in declaring its DNS 'privatization' policy to be a success").

¹⁴⁷ See *Developments in the Law- The Law of Cyberspace* (pt. V), 112 HARV. L. REV. 1657, 1675 (1999) (referring to ICANN as a "powerful corporation embarking on a worldwide mission").

¹⁴⁸ See Derek Scally, *New Moves in the Name Game: There are Changes Afoot at the Organization Which Assigns Domain Names*, IRISH TIMES, Oct. 30, 2000, at 12 (referring to ICANN's "unprecedented influence over the Internet's future use and growth").

developing global technology that defies borders,¹⁴⁹ the Internet magnifies international governance challenges and increases their urgency. Domain name registration and protection are an enormous concern that didn't exist ten years ago.¹⁵⁰ Like many Internet issues, domain name management is a big challenge for which we have had little planning time.

Because interactive computer technology resists, ignores, and easily surmounts international borders, Internet domain name protection challenges have been difficult to address either locally or domestically. Due to the need for global coordination, orderly domain name registration requires immediate international standardization not easily accomplished by government sovereignty.

Traditional sovereign government may well lack the tools to face this essential global standardization challenge, as regulatory procedures are notoriously slow and cumbersome—indeed, the phrase “government bureaucracy” has come to connote the essence of intolerable sluggishness. ICANN's amazingly speedy accession of global power as an NGO is a model for a new paradigm. It suggests that, when global interests fear inertia and resistance in reform measures, coordination and orchestration of change may be more readily achieved by NGOs than by government organizations.

The potential of NGOs in the arena of international change goes beyond their ability to circumvent inaction. Unlike governments, NGOs can embody objectivity, if they are truly beholden to no one sovereignty over another.¹⁵¹ In this capacity, an NGO bears several crucial advantages over government-initiated reform. First, NGOs have the potential to garner speedy transnational support without having to overcome the suspicion and caution that can accompany sovereign initiatives. Second, NGOs can incorporate a variety of perspectives in a disinterested way, and this disinterestedness may result in superior policies as a result of openness to all viewpoints. Third, NGOs can avoid cumbersome delays that result from decentralization. Provided the world accepts ICANN's role, ICANN can move quickly and efficiently as a single organization. Finally, if the NGO is a legitimate organization with global support, its policies are automati-

¹⁴⁹ See Karen Beville, *Copyright Infringement and Access: Has the Access Requirement Lost Its Probative Value?*, 52 *RUTGERS L. REV.* 311, 330 (1999) (discussing the borderless nature of the Internet).

¹⁵⁰ The Internet was not publicly available until the early to middle 1990s. Before this time, few even knew what a domain name was.

¹⁵¹ This condition is not a given for NGOs, and indeed it is easy to imagine NGOs that are formed at the instigation of particular governmental entities, and which therefore have organizational loyalties and dependencies on one government over another. While some NGOs certainly can be beholden to particular nations, NGOs have the potential to be neutral in ways that governments never can replicate. The utility of NGOs as discussed in this Section presumes that the organizations are created and funded in ways that avert dependency on particular nations, as well as other potential conflicts of interest.

cally globally unified in a way that would be logistically difficult to replicate among hundreds of nations in a heterogeneous world.

These are substantial advantages. Moreover, they are advantages that may be well-suited to the challenges of controlling international corruption. It is time for serious discussion and assessment of the NGO's potential to supplant government regulation in the sphere of corruption control.

VI. CONCLUSION: CAN WORLD CULTURES CHANGE TO PLACE DECREASING EMPHASIS ON PATRONAGE?

Future legal scholarship must address the direction of future global convergence efforts. To foster a transnational conversation, and ultimately a truer global accord, what topics of conversation are most promising? In this Conclusion, I provide one example of an important subject for global colloquy: reform of the system of patronage and the ethos of patrimony. Like corruption itself,¹⁵² the values of reciprocity and patronage are deeply embedded in some cultures,¹⁵³ and therefore are promising targets for effective worldwide dialogue and reform efforts.

Patronage and patrimony are promising topics of global dialogue in another sense—they are targets potentially reformed with greater effectiveness and efficiency than other institutional targets, such as global poverty. In an earlier article, I observed that grand-scale bribery is motivated by greed rather than by need,¹⁵⁴ so that what is arguably the worst form of corruption¹⁵⁵ is also that form least amenable to some of the most obvious systemic reform efforts. Reducing poverty, for example, would not reduce greed among higher-level officials who are seeking luxury rather than subsistence in the form of substantial bribes.¹⁵⁶

Accordingly, amelioration of poverty and augmentation of public sector salaries should reduce petty bribery, and should do so efficiently, because it is a systemic change that benefits from systemic efficiencies.¹⁵⁷ However, addressing poverty and salaries of officials is unlikely to affect the more serious problem of grand bribery, which is not attributable to

¹⁵² See, e.g., Jane M. Picker & Sidney Picker, Jr., *Educating Russia's Future Lawyers—Any Role for the United States?*, 33 VAND. J. TRANSNAT'L L. 17, 25-26 n.34 (2000) (describing corruption as “endemic to Russian culture”).

¹⁵³ See, e.g., P. Steidlmeier, *Gift Giving, Bribery and Corruption: Ethical Management of Business Relationships in China*, 20 J. BUS. ETHICS 121 (1999) (calling reciprocity “a foundational pillar of social intercourse” in China, where “[t]o approach another and bring nothing is unusual,” and “[t]o accept a gift and not reciprocate is perceived as morally wrong”).

¹⁵⁴ See generally Salbu, *Delicate Balance*, *supra* note 4.

¹⁵⁵ See *id.* (arguing that grand bribery not only is quantitatively more destructive than petty bribery, but also tends to be qualitatively more destructive, in that grand bribes often yield more harmful or devastating concessions and results).

¹⁵⁶ See *id.*

¹⁵⁷ See generally Salbu, *Information Technology*, *supra* note 4.

need. This means that poverty and salary solutions, while more efficient than legislative alternatives, are unlikely to be effective against the most devastating kinds of corruption.

In contrast, focusing the global conversation and global reforms on patronage and the ethos of patrimony is both efficient and effective against the most harmful kinds of corruption—i.e., against grand bribery. Reinforcing and elaborating Bosworth-Davies' contention that corruption is partially a function of entrenched patronage and nepotism,¹⁵⁸ Theobald explains grand corruption in terms of a "patrimonial' ethos."¹⁵⁹ Especially prevalent in developing nations but also peripherally present in developed nations,¹⁶⁰ this mindset entails "an administrative apparatus which coheres around a network of personal dependencies rather than objective administrative structures, and in which there is no clear-cut separation between incumbent and office, between public resources and private interests."¹⁶¹

This description contains two clues that may help nations to fashion their own systemic reforms to fight global corruption. The first pertains to the entrenchment of a patrimonial "network of personal dependencies," and the second pertains to the absence of "objective administrative structures." A critical question arises from these clues: how do we replace informal socio-cultural networks—breeding grounds for abuses and aberrations generally and nepotism specifically—with formalized administrative structures, the rules, guidelines and policies of which reduce opportunities for the abusive exercise of discretion?

This challenge is confounded by the fact that administrative structures imposed to date have proven to be anything but objective. Mbaku discusses state controls in Africa, intended to effect the kinds of reforms I have been discussing.¹⁶² Rather than ridding African society of poverty, deprivation, and corruption, rigorous state control has "encouraged and advanced nepotism, bureaucratic and political corruption, and constrained the development of viable and sustainable economic governmental systems."¹⁶³ Mbaku attributes the subversion of bureaucratic solutions to bad economic policies.¹⁶⁴ These include the nationalization of valuable resources, which

¹⁵⁸ See Rowan Bosworth-Davies, *Corruption: The Prisoner's Dilemma*, FIN. TIMES BUS. REP., FRAUD REP., Nov. 1, 1997, at 6.

¹⁵⁹ Robin Theobald, *Lancing the Swollen African State: Will it Alleviate the Problem of Corruption?*, 32 J. MODERN AFRICAN STUD. 701, 703 (1994).

¹⁶⁰ See *id.* at 704.

¹⁶¹ See *id.* at 703.

¹⁶² See John Mukum Mbaku, *Bureaucratic Corruption and Policy Reform in Africa*, 19 J. SOC., POL. & ECON. STUD. 149 (1994).

¹⁶³ *Id.* at 151.

¹⁶⁴ See *id.*

places them under bureaucratic control, thereby enhancing both bureaucratic power and its potential abuse.¹⁶⁵

Indeed, combining bureaucratic prerogative with control over resources logically facilitates corruption. This proposition is simply the reciprocal form of another familiar premise: that capitalist separation of centralized power and valuable national resources, through industry privatization, deters corruption.¹⁶⁶ While bureaucrats under either kind of system may have motives to take bribes,¹⁶⁷ bureaucrats operating in the context of heavily nationalized industries have more opportunities to do so. The heightened role they play in the management of their nations' business development gives them substantial access to and control over business opportunities—levels of access and control that would be held by private hands under capitalist regimes.¹⁶⁸ Until and unless the ethos of patrimony is extirpated around the world, these dynamics are virtual guarantors of corruption's longevity.

This is a serious problem. We have seen that bribery and corruption are major challenges of the 21st Century. Our ability to face these challenges effectively will be crucial to all sectors of modern global society—to businesses, governments, local communities, nongovernmental organizations, small groups, and individuals. Directly or indirectly, all of these classes will be affected by the proliferation or the decline of corruption.

Legal scholarship is at the point where many of the basics have been debated in some detail. The time is ripe for expansive examination of major policy questions, and especially for examination of new and creative solutions. The discussion in this article has attempted to focus attention on some of the big questions in the anti-corruption debate that have not yet received substantial or adequate attention, or that are novel, highly controversial, and worthy of serious consideration.

¹⁶⁵ *See id.*

¹⁶⁶ Along these lines, Milton Friedman suggests that capitalist systems are necessary to the maintenance of social and political freedoms, in part because capitalism separates the accumulation of wealth from centralized governmental authority. For detailed discussion of this concept, see MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 7-21 (1962).

¹⁶⁷ While motives for bureaucrats to take bribes certainly exist in both communist and capitalist economies, the motives may be more compelling in the former than in the latter, since capitalist systems are more likely to generate greater social wealth, and therefore bureaucrats in capitalist economies are less likely to be motivated by need to solicit or accept bribes.

¹⁶⁸ *See* Mbaku, *supra* note 162, at 155 (“[R]egulation and ownership created opportunities for bureaucrats to appropriate national resources for their own use.”).