2012

Four Uncharted Corners of Anti-Corruption Law: in Search of Remedies to the Sanctioning Effect

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FOUR UNCHARTERED CORNERS OF ANTI-CORRUPTION LAW: IN SEARCH OF REMEDIES TO THE SANCTIONING EFFECT

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This Article is the third installment in a long-term research project that examines the effects of the U.S. Foreign Corrupt Practices Act in relation to its underlying policy goals. It first reiterates the various data points showing that enforcement now has the unintended effect of reducing investment in higher-corruption markets. Because this amounts to the withdrawal of capital from developing countries in protest of their political conditions, I call this the "sanctioning effect." The paper then seeks to push the envelope of current anti-bribery debates by exploring connections to four fields of academic inquiry not typically associated with the FCPA. First, this Article argues that the FCPA deserves a prominent place in the broader securities law discussion of the "bonding thesis," which examines why foreign companies enter U.S. capital markets despite higher costs and liability. The Article explains that because entering the U.S. capital markets triggers jurisdiction over foreign companies, securities laws that are designed to induce such listings can help remedy the sanctioning effect. Second, the Article explores the principle, recently adopted by the Obama Administration, that corruption is properly understood as a human rights issue. It argues that truly embracing this principle as the cornerstone of our anti-corruption agenda would transform FCPA enforcement. Third, the paper shows that the theories of criminal punishment that explain the current enforcement regime are general deterrence and incapacitation, and that these compound the sanctioning effect. It then draws on the contemporary restorative justice debate to begin sketching the contours of an alternative paradigm. Finally, the Article describes several examples of foreign policy concerns dramatically altering FCPA enforcement outcomes and suggests that a more coherent and transparent treatment of the FCPA's foreign policy implications may require establishing a new federal office. The paper provides a preliminary mapping of these uncharted corners in anticipation of future academic (ad)ventures.

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INTRODUCTION

Counsel to U.S. corporations increasingly remark that enforcement of the Foreign Corrupt Practices Act (FCPA)[1] deters foreign investment.[2] This concern is not new and, perhaps surprisingly, it is not unique to the corporate community. Since Congress first considered enacting a prohibition on extraterritorial bribery in the 1970s, companies and even agencies of the U.S. government have at times publicly stated that the statute adversely affects U.S. companies doing business in developing countries.[3] Typically, this concern is cast in terms of the impact on U.S. competitiveness—that the FCPA puts U.S. companies at a competitive disadvantage or, in the oft-used metaphor of FCPA deliberations, that it upsets the "level[] . . . playing field."[4] Indeed, numerous data sources today confirm that FCPA enforcement leads to a reduction in investment by U.S. companies (and foreign companies subject to FCPA jurisdiction) in countries perceived to be relatively corrupt.

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1. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. §§ 78m(b), (d)(1), (g)-(h), 78dd-1 to -3, 78ff (2006)), *amended by* Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107, 1415-25 (codified as amended at 15 U.S.C. §§ 78dd-1 to -3, 78ff (2006)); International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302 (codified as amended at 15 U.S.C. §§ 78dd-1 to -3, 78ff (2006)).

2. *E.g.*, *Foreign Corrupt Practices Act: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 112th Cong. 3 (2011) [hereinafter *Foreign Corrupt Practices Act Hearing*] (statement of Hon. Robert C. "Bobby" Scott, Ranking Member, Senate Committee on Crime, Terrorism, and Homeland Security), *available at* http://judiciary.house.gov/hearings/hear_06142011.html.

3. *Id.*

4. *See The International Anti-Bribery and Fair Competition Act of 1998: Hearing on H.R. 4353 Before the Subcomm. on Finance and Hazardous Materials of the H. Comm. on Commerce*, 105th Cong. 1 (1998) [hereinafter *1998 House Finance Hearing*] (statement of Rep. Michael G. Oxley, Chairman, Subcomm. on Fin. & Hazardous Materials); *id.* at 4 (Statement of Rep. Tom Bliley, Chairman, H. Comm. on Commerce).

However, the discourse of the "competitive disadvantage" and the "level playing field" frames the discussion of the FCPA's adverse consequences solely in terms of its effect on business. It makes no mention of any adverse effects on the countries in which the FCPA violations occur; these, almost without exception, are developing countries. Worse yet, the metaphor depicts these countries as mere "fields" on which multinational corporations "play." But that which corporations call an "unlevel playing field" and a "competitive disadvantage" is, from the perspective of developing countries, something altogether more harmful. This paper is the third installment in a long-term research project[5] demonstrating that the FCPA now operates as de facto economic sanctions against developing countries. This sanctioning effect occurs when FCPA enforcement causes U.S. corporations to withdraw their capital, however incrementally, from developing countries. Like the more familiar (de jure) economic sanctions, this withdrawal of capital too often harms the very people whom our foreign policy ostensibly seeks to protect—the citizens, or victims, of corrupt regimes.

This paper seeks to initiate a more radical rethinking of the aims and methods of international anti-corruption law. It posits that an effective enforcement regime must deter bribery without deterring investment; the cornerstone of anti-corruption law, properly understood, should be the promotion of compliant overseas investment. The aim should be not merely to wash U.S. corporate hands of overseas bribery problems, but rather, to engage U.S. corporations in an anti-corruption regime that more effectively improves the legal and economic conditions of countries in transition. This paper further suggests that developing a coherent and effective anti-corruption regime requires looking well beyond the present confines of anti-corruption deliberations to areas of law and academic inquiry not customarily associated with the FCPA. I call these areas the "four unchartered corners" of anti-corruption law.

Part I will briefly provide the empirical and theoretical basis for the claim that the present FCPA enforcement regime has a sanctioning effect in developing countries. Part II provides a series of charts to begin conceptualizing various approaches to developing a more effective regime. Part III then describes the four unchartered corners,

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5. For the first two installments, see Andrew Brady Spalding, *The Irony of International Business Law: U.S. Progressivism and China's New Laissez-Faire*, 59 UCLA L. REV. 354 (2011) [hereinafter Spalding, *Irony of International Business Law*]; Andrew Brady Spalding, *Unwitting Sanctions: Understanding Anti-Bribery Legislation as Economic Sanctions against Emerging Markets*, 62 FLA. L. REV. 351 (2010) [hereinafter Spalding, *Unwitting Sanctions*].

or areas of law that can be brought to bear on contemporary FCPA deliberations. The paper concludes with reflections on the relevance of the broader legal academic literature to FCPA reform efforts.

I. THE SANCTIONING EFFECT

Three bases exist for believing that FCPA enforcement deters investment in developing countries: the first is history, the second is social science, and the third is common sense.

History teaches that even the U.S. government has publicly admitted to the FCPA's deterrent effect on investment in developing countries. After the FCPA's enactment in 1977, the U.S. government began lobbying the developed world to enact a similar prohibition, ultimately succeeding in 1997 with the OECD Convention on Combating Bribery.[6] In testimony before the U.S. Congress, a common theme was the U.S. business community's loss of business overseas as a result of the FCPA. In his message transmitting the convention, President Bill Clinton noted that the United States "has been alone" in criminalizing overseas bribery and that "United States corporations have contended that this has put them at a significant disadvantage in competing for international contracts with respect to foreign competitors who are not subject to such laws."[7] Numerous congressmen testified that the convention would "level[] the playing field,"[8] as did SEC Associate Director Paul Gerlach.[9] Ultimately, President Clinton would adopt this metaphor in his signing statement.[10] Moreover, the Clinton administration calculated a very specific estimate of the amount of business that U.S. corporations were losing. President Clinton announced that the value of the contracts lost to U.S. businesses each year as a result of the FCPA was $30 billion.[11] The

6. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, *done on* Dec. 17, 1997, 37 I.L.M. 1 (1998).

7. S. TREATY DOC. NO. 105-43, at III (1998).

8. *See, e.g.*, *1998 House Finance Hearing*, *supra* note 4, at 1 (statement of Rep. Michael G. Oxley, Chairman, Subcomm. on Fin. & Hazardous Materials); *id.* at 4 (statement of Rep. Tom Bliley, Chairman, H. Comm. on Commerce).

9. *Id.* at 11 (statement of Paul V. Gerlach, Associate Director, Div. of Enforcement, Sec. & Exch. Comm'n).

10. Presidential Statement on Signing the International Anti-Bribery and Fair Competition Act of 1998, 2 PUB. PAPERS 2011 (Nov. 10, 1998), [hereinafter 1998 Presidential Signing Statement].

11. *Id.*

Undersecretary of State[12] and the General Counsel of the Secretary of Commerce[13] included the same figure in their testimony.

The second source is social science. Two sets of empirical studies on the FCPA found that the statute causes U.S. corporations to do less business in bribery-prone markets. The first preceded the OECD Convention and focused on the impact of the FCPA alone, finding that, controlling for other variables, FCPA enforcement caused a reduction in business in bribery-prone countries.[14] To clarify, the thesis is not that U.S. companies were investing less overall in developing countries in 1995 than they were in 1976—indeed, such a conclusion would be absurd and patently unsupportable. Rather, the study found that companies did less business in such countries than they would if the FCPA were not enforced. This initial study further found that total investment in bribery-prone countries did not drop; rather, U.S. investment was replaced by investment from countries without bribery prohibitions, a process termed "ownership substitution."[15] A second set of studies conducted post-OECD confirmed this finding: as anti-bribery legislation became more prevalent, bribery-prone countries received less of their foreign direct investment (FDI) from OECD nations and more from nations without bribery prohibitions.[16] The study found this pattern in 2005 and then again in 2008.[17]

The third source of evidence for the proposition that FCPA enforcement leads to a reduction in investment in developing countries is, quite simply, common sense: if we increase the costs of conducting business in specific ways, we will of course tend to do less of that business. Indeed, this sense is captured by the rapid accumulation of anecdotal evidence in surveys and congressional testimony. A 2009 Dow Jones Risk Compliance survey, announced in a press release entitled "Confusion About Anti-corruption Laws Leads Companies to Abandon Expansion Initiatives," found that 51% of companies had delayed a business initiative as a result of the FCPA and 14% had

12. S. REP. NO. 105-19, at 45 (1998) (statement of Hon. Stuart E. Eizenstat, Under Secretary of State for Economic, Business, and Agricultural Affairs).

13. *1998 House Finance Hearing*, *supra* note 4, at 6 (statement of Andrew J. Pincus, General Counsel to the U.S. Department of Commerce).

14. James R. Hines, Jr., *Forbidden Payment: Foreign Bribery and American Business after 1977* 1 (Nat'l Bureau of Econ. Research, Working Paper No. 5266, 1995), *available at* http://www.nber.org/papers/w5266.pdf.

15. *Id.* at 20.

16. Alvaro Cuervo-Cazurra, *Who Cares about Corruption?*, 37 J. INT'L BUS. STUD. 807, 818 (2006).

17. Alvaro Cuervo-Cazurra, *The Effectiveness of Laws against Bribery Abroad*, 39 J. INT'L BUS. STUD. 634, 635 (2008).

abandoned an initiative altogether.[18] More recently, a 2011 survey by the accounting firm KPMG found that among executives surveyed in the United States and the United Kingdom, "more than 70% . . . agreed there are places in the world where business cannot be done without engaging in bribery and corruption," and that approximately 30% of the respondents indicated that they deal with this risk by not doing business in certain countries.[19]

During the June 14, 2011, congressional hearing on amending the FCPA, Chairman Jim Sensenbrenner observed, "[i]n 1977, the world was a very different place. . . . Thirty-four years later, the world has turned upside-down," and specifically referenced the rise of China.[20] Another witness, George Terwilliger, noted that while we are realizing the goal of heightened compliance with anti-bribery provisions:

> [T]here is another less desirable effect . . . when companies forgo business opportunity out of concern for FCPA compliance risk. This hurts the creation of [U.S.] jobs and the ability of U.S. companies to compete with companies elsewhere that do not have to concern themselves with uncertainties of the terms and requirements of the FCPA. . . .
>
> [T]here is hidden cost borne of the uncertainties attached to FCPA compliance risk. . . .
>
> [C]ompanies sometimes forgo deals they could otherwise do, take a pass on contemplated projects, or withdraw from ongoing projects and ventures.[21]

Given the multiple sources of data, the question therefore cannot be whether the FCPA deters investment in developing countries. Rather, the question is whether the withdrawal of capital is desirable—that is, whether the effects of this pattern will prove consistent with the statute's underlying policies. Though the era of meaningful FCPA enforcement is quite new, we can draw on analogous experiences in international economic policy to understand the FCPA's likely effects.

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18. *See* Press Release, Dow Jones Risk & Compliance, Dow Jones Survey: Confusion about Anti-corruption Laws Leads Companies to Abandon Expansion Initiatives (Dec. 9, 2009), *available at* http://fis.dowjones.com/riskl09survey.html.

19. Mike Koehler, *Survey Says...*, FCPA PROFESSOR (June 2, 2011, 5:25 AM), http://fcpaprofessor.blogspot.com/2011/06/survey-says.html (quoting KPMG, GLOBAL ANTI-BRIBERY AND CORRUPTION SURVEY 2011, at 18 (2011)).

20. *Foreign Corrupt Practices Act Hearing*, *supra* note 2, at 1 (statement of Hon. F. James Sensenbrenner, Jr., Chairman, Subcomm. on Crime, Terrorism, and Homeland Sec.).

21. *Id.* at 37 (statement of George J. Terwilliger III, Partner, White & Case LLP).

Given the above evidence, FCPA enforcement today amounts to the (partial) withdrawal of capital from developing countries in protest of their political conditions, with the hope that the withdrawal will induce reforms in that country. The name we otherwise attach to this practice is, of course, economic sanctions. Because the experience of economic sanctions is many decades longer, we can look to the literature in economics and political science to understand the impact of our new de facto sanctions. I elaborate on this theory at length in two prior papers[22] and will only summarize it here. The experience of economic sanctions teaches that when some part of the world sanctions a given country, a capital void is left. Because the sanctioned country still needs that capital to stimulate its economic growth, it will look to countries not participating in the sanctions to fill the void. These latter countries are sometimes called "black knights"—they rescue the sanctioned country, but through nefarious means.[23]

Anti-corruption law is today creating a similar sanctioning effect, and the principal black knight is China—a country with ample capital, an aggressive foreign and economic policy, and ineffective anti-corruption laws.[24] When U.S. companies determine that the risk of a bribery violation is too high, and they withdraw from a project, or a sector, or a country, the resulting FDI void is frequently filled by Chinese companies who may engage in bribery without fear of penalty. The net result is that although U.S. corporations (or foreign corporations subject to U.S. jurisdiction) are therefore bribing less, the amount of bribery occurring in developing countries can actually increase. In enforcing the FCPA, we often create the very conditions in which corruption proliferates. Having previously developed this theory, this paper now seeks to begin fashioning remedies.

II. POINTING TOWARD REMEDIES

The sanctioning effect represents a sort of confusion concerning the interplay between the various policy goals of anti-corruption enforcement. The following matrix seeks to clarify these goals and their interrelationships. It can help get us headed down the right path in thinking about how to enforce corruption prohibitions in ways that remedy the sanctioning effect.

22. *See* Spalding, *Irony of International Business Law*, *supra* note 5; Spalding, *Unwitting Sanctions*, *supra* note 5.

23. *See* Spalding, *Unwitting Sanctions*, *supra* note 5, at 397.

24. *See* Spalding, *Irony of International Business Law*, *supra* note 5, at 360–61.

The columns represent two categories of goals: normative (our goals with relation to an anti-corruption norm) and economic. Some of these goals are explicit in the statute; others are articulated in the legislative debates; while others are perhaps more tacit, but still uncontroverted. This paper will reserve for another day a lengthier defense of each of these goals; here, I merely posit them, and assert that they generally would elicit very little disagreement in the international business and anti-corruption communities. The rows represent two sets of actors: the corporations subject to FCPA jurisdiction, and the countries in which alleged FCPA violations occur (which, again, are almost exclusively developing countries).

Accordingly, this chart posits that with respect to corporations, our normative goal is to promote compliance with an anti-corruption norm, while the economic goal is to enable overseas investment. With respect to developing countries, our normative goal is to promote the adoption, in practice, of an anti-corruption norm, while our general economic goal is to promote economic growth. I submit that we can generally agree on these four goals of anti-corruption law. My critique of our current FCPA enforcement regime concerns the interrelationships between goals [1], [2], and [3].

	Normative Goals	Economic Goals
FCPA Corporations:	1: Compliance with Norms	2: Overseas Investment
Developing Countries:	3: Adoption of Norms	[4: Economic Growth]

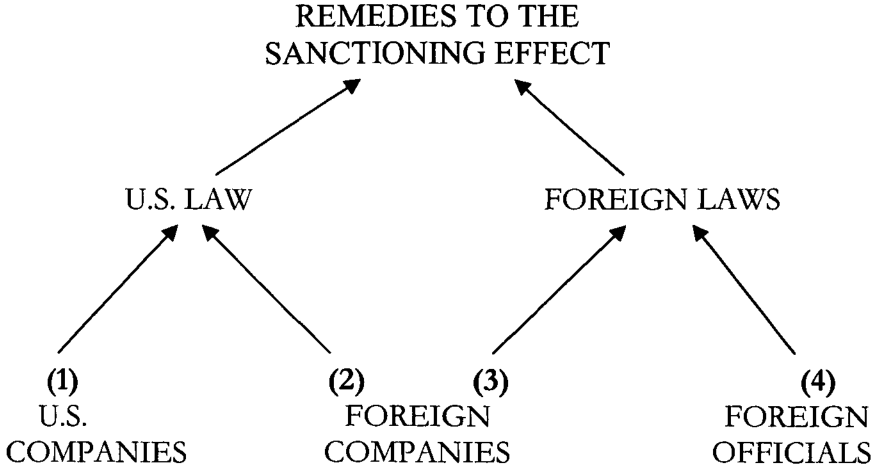
The empirical evidence cited above generally demonstrates that an increase in [1] has caused a decrease in [2]. That is, our efforts to promote compliance with the FCPA have led to a decrease in investment in developing countries. This does not necessarily reflect negligence on the part of our enforcement agencies; plainly, the statute charges the SEC and DOJ with enforcing the statute against corporate violators and thereby promoting their compliance. Strictly speaking, [1] is their job; [2] and [3] are not.

The focus of this paper is the impact of this dynamic on [3]. That is, when we enforce compliance in such a way that investment in developing countries decreases, what is the impact on developing countries' adoption of anti-corruption norms? The answer lies in the existence of black knights, especially China. When we pursue corporate compliance in a way that deters investment, the black knights often move in and engage in rampant corruption. As a result, though bribery by U.S. corporations may have decreased, the total amount of bribery in the developing country has increased. When [1] causes a decrease in [2], it in turn causes a decrease in [3]. A myopic focus on compliance, without regard to its impact on investment, jeopardizes our effort to promote anti-corruption norms across the developing world.

The remedy, then, is to enforce compliance while promoting overseas investment. We must develop an enforcement regime that deters bribery without deterring investment in countries with comparatively high rates of corruption. The only way to promote adoption of anti-corruption norms in developing countries is to actively engage in developing countries in a manner consistent with the anti-corruption norm. The above matrix is designed to suggest a very simple—perhaps embarrassingly simple—lesson: [1] + [2] = [3]. Through our presence, and not our absence, we can more effectively promote anti-corruption norms.

The remainder of this paper thus begins rethinking anti-corruption enforcement. It starts from the premises that current enforcement exerts a downward push on investment in certain countries, that companies not subject to anti-corruption norms often fill the void, and that a regime dedicated to promoting both compliance and investment is in the interest of both the United States and the countries in which U.S. companies do business. The next chart provides a preliminary mapping of the various paths to remedying the sanctioning effect and achieving more effective anti-corruption enforcement.

At the bottom of the chart are three sets of actors: U.S. companies (i.e., companies subject to U.S. jurisdiction), foreign companies (unlike the above matrix, here I will treat U.S. companies and foreign companies separately), and the foreign officials who solicit bribes. The map further suggests two broad categories of anti-corruption laws: U.S. law (principally the FCPA) and foreign laws (principally other countries' domestic laws, often enacted pursuant to international conventions). When considering how these various laws apply to the various actors, four distinct paths emerge: (1) U.S. companies are subject to U.S. law; (2) certain foreign companies are also subject to U.S. jurisdiction (e.g., a foreign company listing on a U.S. exchange becomes subject to FCPA jurisdiction); (3) foreign companies are subject to their own laws; and (4) foreign officials are also subject to their own laws. A comprehensive anti-corruption regime would seek to deter corruption in each of these four ways.



However, the prospects for reform are not equally likely for each of these paths. Indeed, I have structured this chart to present the four paths in the order in which effective reforms appear most likely: (1) reforms to U.S. law governing U.S. companies are most likely, as Congress is considering certain reforms now;[25] (2) the application of U.S. law to foreign companies is discussed perhaps less frequently, but will inevitably result from this reform movement; (3) we are beginning to see foreign countries follow the U.S. lead in enforcing their own extraterritorial anti-bribery laws,[26] though black knights such as China are perhaps many years or even decades from systematic enforcement;[27] and (4) the effective enforcement of other countries' domestic anti-bribery laws against its own officials is the most remote, for the simple reason that the officials who need to enact and enforce such laws are themselves the beneficiaries of bribery. Accordingly, the first three paths are the most fruitful areas of inquiry and are the areas that the remainder of this paper explores.

III. FOUR UNCHARTERED CORNERS OF ANTI-CORRUPTION LAW

In rethinking anti-corruption enforcement, this paper moves well beyond the existing confines of anti-corruption deliberations. Rather

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25. *See, e.g.*, *Foreign Corrupt Practices Act Hearing*, *supra* note 2, at 19–20 (statement of Hon. Michael Mukasey, Partner, Debevoise & Plimpton LLP).

26. *See, e.g.*, FRITZ HEIMANN & GILLIAN DELL, TRANSPARENCY INT'L, PROGRESS REPORT 2010: ENFORCEMENT OF THE OECD CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS 66–67 (2d ed. 2010), *available at* http://www.transparency.cz/doc/2010Progress_Report_2nd_edition_10.9.10.pdf.

27. *See* Spalding, *Irony of International Business Law*, *supra* note 5, at 410.

than focusing on the FCPA-specific issues of facilitating payments or the good-faith compliance defense, we can venture into areas of legal academic debate not typically associated with the FCPA. In particular, four areas of legal academic inquiry prove rich in new ideas to incorporate into our contemporary discussion of anti-corruption reform. These four unchartered corners, if you will, of anti-corruption law include existing academic literatures in securities law, international law, criminal law, and administrative law.

A. Securities Law: Inducing Foreign Companies to Enter U.S. Public Capital Markets

One way that foreign companies become subject to FCPA jurisdiction is by listing on U.S. exchanges.[28] Accordingly, to the extent that foreign—particularly Chinese—companies list on U.S. exchanges, the sanctioning effect goes away: all companies become subject to a common anti-corruption legal regime. For years, corporate law scholars have debated why we see foreign companies listing on U.S. exchanges despite the higher listing expenses, compliance costs, and potential liability for securities fraud.[29] The governing theory to explain this phenomenon is the bonding hypothesis, which holds that in listing on U.S. exchanges, foreign companies commit themselves to higher disclosure standards and to the protection of minority investor rights.[30] This occurs in three basic ways: (1) in becoming subject to the jurisdiction of the SEC, they are obligated to higher disclosure standards and are subject to the SEC's enforcement authority; (2) they in effect provide to their investors the legal remedies of class actions and derivative actions that are largely absent in their home jurisdictions; and (3) they are exposed to the scrutiny of reputational intermediaries such as underwriters, auditors, debt rating agencies, and securities analysts, which are also positioned (often better than the SEC) to expose financial wrongdoing.[31]

The hypothesis has been the subject of some controversy, and with respect to China, it will shortly be tested. The number of Chinese

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28. 15 U.S.C. § 78dd-1 (2006).

29. *See* Anthony Lin, *The Lure of a U.S. Listing Remains Powerful for Some Chinese Companies*, AM LAW DAILY (Mar. 15, 2011, 12:59 PM), http://amlawdaily.typepad.com/amlawdaily/2011/03/asianlawyer0315.html.

30. John C. Coffee, Jr., *Racing towards the Top?: The Impact of Cross-Listings and Stock Market Competition on International Corporate Governance* 28 (Columbia Law Sch.: The Ctr. For Law & Econ. Studies, Working Paper No. 205, 2002), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=315840.

31. *Id.*

companies going public in the United States is expected to skyrocket, while at the same time the costs of such companies listing in the United States is proving perhaps more costly than many anticipated. As of November 2010, the total number of Chinese companies listed on the major U.S. exchanges was 226.[32] However, an estimated 5,000 public companies will enter the public capital markets in the next ten to fifteen years.[33] To the extent that these companies go public in the United States, they cease to be black knights and the sanctioning effect is neutralized.

However, we are also now learning hard lessons about the listing costs to Chinese companies. In the first half of 2011, about forty Chinese companies either admitted accounting problems or had the SEC or U.S. exchanges halt trading in their stocks because of accounting questions.[34] Relatedly, in mid-2010 a pronounced trend began of securities class action filings against Chinese companies.[35]

We are just beginning to understand the causes of this trend. A Public Company Accounting Oversight Board (PCAOB) report indicated a systemic problem of U.S.-registered accounting firms failing to conduct audits of Chinese companies in full compliance with PCAOB standards.[36] The report named several obstacles to adequate auditing of Chinese companies: difficulty understanding the local language, time, and expense associated with travel to the country; difficulty in understanding the local business environment; and the tendency to outsource auditing to native firms and then rely too heavily on their findings.[37] Though the PCAOB has articulated standards for relying on foreign firms to audit local companies, these standards are not uniformly followed. Moody's recently issued a report identifying a series of red flags prevalent in Chinese public companies, including

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32. Kevin LaCroix, *U.S. Listed Chinese Companies Attracting Scrutiny, Securities Suits*, D&O DIARY (Nov. 16, 2010), http://www.dandodiary.com/2010/11/articles/subprime-litigation/us-listed-chinese-companies-attracting-scrutiny-securities-suits/.

33. Aaron Lucchetti, *U.S. Falls behind in Stock Listings*, WALL ST. J., May 26, 2011, at A1.

34. Michael Rapoport, *Auditors Facing 'Reverse' Inquiry*, WALL ST. J., June 3, 2011, at C1.

35. Kevin LaCroix, *Identifying Chinese Characters: Accounting Fraud Lawsuits against Chinese Companies Surge*, D&O DIARY (Apr. 4, 2011), http://www.dandodiary.com/2011/04/articles/securities-litigation/identifying-chinese-characters-accounting-fraud-lawsuits-against-chinese-companies-surge/.

36. PUB. CO. ACCOUNTING OVERSIGHT BD., ACTIVITY SUMMARY AND AUDIT IMPLICATIONS FOR REVERSE MERGERS INVOLVING COMPANIES FROM THE CHINA REGION: JANUARY 1, 2007 THROUGH MARCH 31, 2010 (2011), *available at* http://pcaobus.org/Research/Documents/Chinese_Reverse_Merger_Research_Note.pdf.

37. *Id.* at 2.

weak corporate governance and poor quality in the financial statements.[38] In the wake of these revelations, the SEC began an investigation of the accounting firms that audit U.S.-listed Chinese companies.[39] This exposure of widespread accounting impropriety in Chinese firms may serve to increase the practical costs of listing in the United States, potentially deterring future listings.

A second challenge to the bonding thesis arises from the 2010 U.S. Supreme Court case of *Morrison v. National Australia Bank Ltd.*,[40] which held that Rule 10b-5 applies only to the purchase or sale of securities on U.S. exchanges or otherwise in the United States.[41] The opinion retracted the extraterritorial scope of securities fraud liability by overturning decades of case law that based extraterritorial jurisdiction on the effects and conducts tests. In doing so, *Morrison* significantly increases the incentives for foreign companies to not list on U.S. exchanges—the new law makes avoidance of 10b-5 liability significantly easier for companies based outside the United States. This decision will tend to push firms with weaker securities fraud liability laws away from U.S. exchanges, and thus to a significant extent keep them beyond the bounds of FCPA jurisdiction.

I want to suggest that the sanctioning effect provides another and independent reason to induce foreign firms to list on U.S. exchanges. Despite the increasing disincentives for Chinese companies to list in the United States, we should commit to the policy of incentivizing Chinese companies to enter the U.S. public capital markets. Doing so is in the United States' interest for two distinct but closely related reasons: (1) it makes U.S. companies more competitive; and (2) it allows the United States to more effectively promote anti-bribery, anti-fraud, and related norms in developing countries.

More specifically, inducing Chinese listings could become a substantial part of a broader effort to neutralize the black knights of anti-corruption law and reduce the sanctioning effect. Further research should examine the historical justifications for allowing foreign firms to list, explore the policy tradeoffs, and consider whether the sanctioning effect might lead us to tinker with the costs and benefits of listing.

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38. Kate O'Keeffe, *Moody's Raises Some 'Red Flags' in China*, WALL ST. J., July 12, 2011, at C2.

39. *See* Rapoport, *supra* note 34.

40. 130 S. Ct. 2869 (2010).

41. *Id.* at 2881-82.

B. International Law: Beyond Regional Economic Crime to Universal Human Rights

A second way to subject non-U.S. corporations to meaningful anti-bribery law is to build a more universal legal regime. Anti-bribery law historically has been enforced by nations pursuant to regional conventions. It began with the adoption of the FCPA, followed by the OECD's adoption of the anti-bribery convention. Other regional organizations, such as the African Union and the Organization of American States, have similarly adopted anti-corruption conventions. So, too, has the focus of anti-bribery legislation and enforcement been on the perpetrators—the companies. The FCPA was originally motivated by the perception that revelations of U.S. companies paying bribes tarnished the image of the United States specifically and capitalism generally; that statute, and the OECD Convention that followed, thus focused on ensuring the payors' compliance with these norms, rather than protecting the victims of systemic bribery.

But President Barack Obama has recently indicated a shift in focus that, while subtle, is radical in principle. Obama's 2010 National Security Strategy[42] outlines a set of strategies to "Promote Democracy and Human Rights Abroad."[43] Among them is "Strengthening International Norms Against Corruption."[44] There, the President makes a fairly new claim: "that pervasive corruption is a violation of basic human rights."[45] The report claims that the administration is working with other organizations, such as the United Nations, G-20, OECD, and international financial institutions, to protect this right, and it provides a number of more specific tactics promoting transparency in transactions within and between institutions.[46] The report in effect announces, as a matter of official policy, that freedom from corruption is a new universal human right.

The report is less a rigorous policy paper than a political pamphlet, and it focuses on anti-corruption measures broadly and not the FCPA specifically. But the FCPA is almost certainly the single biggest component of the U.S. government's anti-corruption enforcement effort today, and the rights theory has potentially radical implications for FCPA enforcement. If the principal focus of FCPA enforcement is

42. NATIONAL SECURITY STRATEGY, WHITE HOUSE (2010), *available at* http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf [hereinafter OBAMA REPORT].

43. *Id.* at 37.

44. *Id.* at 38.

45. *Id.*

46. *Id.*

protecting human rights violations, then our emphasis must shift from the corporations to the victims in developing countries. It would require focusing not merely on ensuring simply that U.S. corporations do not participate in bribery, but on the additional goal of reducing bribery in developing countries. Jurisdiction over corporations, and the punishment of corporations, becomes a means rather than an end: we punish corporate bribery not merely to wash our hands of foreign countries' problems, but to actually reduce corruption in those countries.

Were this the guiding principle of enforcement, the sanctioning effect would constitute an unmitigated policy failure. To the extent that U.S. corporations withdraw from projects, sectors, or markets, and companies not subject to bribery liability fill the void, the enforcement effort would be understood as precipitating human rights violations. Shifting to a human rights emphasis would call for reforms in our enforcement regime that could remedy the sanctioning effect. So too would it constitute a movement away from thinking about bribery in merely ethical or economic terms; human rights is an entirely different dimension to the policy analysis. A rights-based FCPA regime, moreover, could become an integral part of a broader movement to promote human rights through overseas corporate conduct. The U.N. has just adopted the "Guiding Principles for Business and Human Rights,"[47] and OECD nations have recently committed to a new, more exacting set of guidelines for corporations in respecting human rights.[48]

Similarly, a shift to human rights would, in turn, move the focus away from regional organizations and toward the prospect of universal anti-corruption law. The potential for a universal regime currently lies in the United Nations Convention Against Corruption (UNCAC), which takes a comprehensive approach to combating corruption. Its very first substantive section concerns "preventive measures," and includes detailed sections on establishing preventive anti-corruption governmental bodies, the effective training of civil servants, and the participation of NGOs.[49] It calls for the criminalization of both the supply and the demand of bribes.[50] It moves beyond bribery to prohibit

47. *See* Press Release, U.N. Human Rights, Office of the High Comm'r, New Guiding Principles on Business and Human Rights Endorsed by the UN Human Rights Council (June 16, 2011), http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-endorsed-16-jun-2011.pdf.

48. OECD, OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES (2011), *available at* http://www.oecd.org/dataoecd/43/29/48004323.pdf.

49. United Nations Convention against Corruption, *opened for signature* Oct. 31, 2003, 2349 U.N.T.S. 41, 148–54, *available at* http://treaties.un.org/doc/publication/UNTS/Volume%202349/v2349.pdf.

50. *Id.* at 154.

money-laundering, embezzlement, trading in influence, abuse of power, etc.[51]

Most importantly, 159 states are currently parties to the convention.[52] The U.N. is currently conducting biannual conferences to promote implementation of the convention.[53] If the United States were to premise its anti-bribery enforcement on the assumption that bribery violates a human right, it would naturally shift from an emphasis away from DOJ enforcement of a white-collar criminal statute pursuant to a regional convention, and toward an emphasis on global recognition of the U.N. Convention. A future paper will explore whether freedom from corruption has become the new universal human right and, if so, the implications for anti-corruption policy broadly, particularly the FCPA.

C. Criminal Law: A New Theory of Criminal Punishment for International Corporate Bribery

My interviews with practitioners across Asia[54] revealed a common perception: that FCPA enforcement does little to benefit the countries in which the bribery occurs. Several interviewees described the U.S. enforcement process, and particularly the imposition of monetary penalties, as merely a means of padding the U.S. Treasury and offsetting the budget deficit. Enforcement may benefit the United States, but does nothing to benefit the victims—the citizens of developing countries.

This criticism points to a more fundamental peculiarity of FCPA enforcement: the true victims of the crime are not within the jurisdiction of the enforcement agencies; they have no nexus to the United States. The DOJ and SEC can reach foreign companies through various jurisdictional hooks, but have no formal authority over, or statutory responsibility for, the citizens of foreign countries. We may hold out as a consolation prize the doctrine of general deterrence, and this is certainly not without value. But it does little to mitigate the

51. *Id.* at 155-57.

52. *See UNCAC Signature and Ratification Status of as 06January2012*, U.N. OFFICE ON DRUGS & CRIME, http://www.unodc.org/unodc/en/treaties/CAC/signatories.html (last visited Feb. 10, 2012).

53. *See* U.N. OFFICE ON DRUGS & CRIME, THIRD SESSION OF THE CONFERENCE OF THE STATES PARTIES TO THE UNITED NATIONS CONVENTION AGAINST CORRUPTION: PROVISIONAL AGENDA AND ANNOTATIONS 2 (2009), *available at* http://www.unodc.org/unodc/en/treaties/CAC/CAC-COSP-session3.html#report.

54. This paper was made possible in large part by a Fulbright Senior Research Grant in 2009-10, in which the author traveled throughout Asia studying the impact of anti-bribery enforcement in developing countries.

perception that FCPA enforcement principally benefits the country that committed the bribery—indeed, our practice gives rise to the perception that just as bribery is exploitative of developing countries, so too is anti-bribery enforcement. This problem—that developing countries do not reap the full benefits of FCPA enforcement—is compounded substantially by the sanctioning effect. Not only do these countries not benefit from the collection of criminal penalties, but, as explained above, enforcement will often create the conditions in which companies not subject to meaningful anti-corruption laws will enter the markets and exploit the countries without liability for corruption and other socially destructive conduct.

This problem is further compounded by the theory of criminal punishment that apparently underlies current FCPA enforcement. Two theories of punishment best explain the U.S. government's current approach: deterrence and incapacitation. Through the imposition of severe criminal fines and other penalties, the government seeks to both specifically and generally deter future wrongdoing. Where the threat of these penalties increases the costs of doing business in corruption-prone countries to the point that companies can no longer afford the risk, the sanctioning effect constitutes a kind of incapacitation.

I want to suggest that the sanctioning effect reflects failed theories of criminal punishment, and that effective anti-bribery enforcement requires a radically different paradigm. A more effective enforcement regime would not only penalize the bribe payors, but also would more directly benefit the countries in which the bribery occurs. The seeds of such a regime may well exist in a contemporary criminal law movement known as restorative justice.

Restorative justice has been defined as "a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future."[55] It is a new model of criminal justice that offers an alternative to both retribution and rehabilitation.[56] The process generally involves moral learning, community participation, respectful dialogue, forgiveness, responsibility, apology, and making amends.[57] The stakeholders are generally the victim(s), the offender(s), and the affected communities, and the process thus aims to restore victims, offenders, and communities.[58]

55. JOHN BRAITHWAITE, RESTORATIVE JUSTICE & RESPONSIVE REGULATION 11 (2002).

56. *Id.* at 10.

57. *Id.* at 11.

58. *Id.*

The movement emerged in the 1970s in response to widespread perceptions that the criminal justice system "neither effectively deterred crime nor successfully rehabilitated offenders."[59] It began in European and former commonwealth countries (United States, Australia, New Zealand, Canada, Netherlands, Austria, and others) as a way of addressing individual crimes committed domestically (theft, assault, etc.). However, in the 1990s restorative justice practices moved from individual acts of wrongdoing to systematic wrongdoing by state actors, such as civil wars and illegitimate regimes such as apartheid.[60] Since then, more than twenty-five developing countries have instituted variations of restorative justice principles to heal from large-scale crimes in which the state participated.[61]

As it has evolved in practice and applied to larger-scale social and political interaction, several core concepts have emerged. Both the offender(s) and the victim(s) participate directly and personally in a process of speaking about their role in the crime and listening to the other's narrative. Each talks about what occurred, why it occurred, and the harm it caused. The offender acknowledges his conduct and its wrongfulness and apologizes to the victim(s). The victim(s) thus draw into a deeper understanding of the causes, sometimes systemic, of the crime, and can sometimes work toward an attitude of forgiveness (but not forgetfulness) of the act. All persons contribute to a determination of the appropriate restitution; among the goals of restitution is the reintegration of the wrongdoer into the larger community. Ideally, the wrongdoer and the victim achieve a degree of reconciliation and a shared understanding of appropriate social norms. Both then try to adopt a future-oriented perspective that focuses on the rebuilding of social relationships.[62] These practices expose deeper truths about state-sanctioned criminality, allow for deeper understandings among the perpetrators and the victims, and can allow a society to "begin anew with transformative understandings of both its past and its future."[63] It may also reduce recidivism, as some data suggest that restorative justice participants "are more likely to develop fellow-feeling, empathy, and a sense of moral responsibility, mutuality, and reciprocity."[64] Both victims and offenders report a higher satisfaction with the restorative

59. Carrie Menkel-Meadow, *Restorative Justice: What Is It and Does It Work?*, 3 ANN. REV. L. & SOC. SCI. 161, 163 (2007).

60. *Id.* at 169.

61. *Id.* at 164.

62. *Id.*

63. *Id.* at 169.

64. *Id.* at 170.

justice process, sometimes by a factor of three or four.[65] Ultimately, scholars believe that restorative justice can enhance "community norm development,"[66] as studies suggest that the Truth and Reconciliation Commission (TRC) in South Africa contributed to the development of a "human rights consciousness" among those who viewed the proceedings.[67]

Just as the early restorative justice advocates maintained that the conventional punishment paradigm failed to deter wrongdoing, rehabilitate offenders, or reintegrate the wrongdoer into the harmed community, the sanctioning effect thesis holds that our current punishment regime has precisely this effect. Corporations withdraw from developing countries without learning, much less teaching, how to conduct business there without bribery. Because of this withdrawal, black knights move in and the overall level of bribery is not reduced; indeed, it may well increase. And the victims of bribery—the citizens of developing countries—often feel that they did not participate in, much less benefit from, the punishment process.

A restorative model of criminal punishment could greatly improve the effectiveness of anti-corruption enforcement. Rather than remedying these problems by de-criminalizing bribery or otherwise dialing back enforcement, a new paradigm of criminal punishment might allow us to more effectively promote an anti-corruption norm while still punishing violations. A public dialogue between the participants of a bribery scheme—the corporation and the state—could greatly enhance our public understanding of the underlying systemic causes of bribery. Agencies could fashion penalties that the corporations perceive as legitimate and proportional, enforcement agencies perceive as fair, and victims perceive as helpful. Outcomes could be more carefully tailored to specific communities in which the corruption occurs. The ultimate goal would be the promotion of an anti-corruption norm in developing countries, the deterrence of bribery by corporations, and the effective reintegration of the corporation into the developing country while embodying ethical, transparent business practices.

The anticipated counterargument is that restorative justice is designed for traditional crimes committed by natural persons rather than corporate crime, and that application to large corporations is neither functionally possible nor normatively appropriate. However, history has already proven that the paradigm can be applied to the state, which of course is an organization that is larger, more bureaucratically

65. *Id.* at 174.

66. *Id.* at 170.

67. *Id.* at 173–74.

complex, and more powerful, than any multinational corporation. If restorative justice can apply to states, why could it not, or should it not, apply to corporations? Indeed, preliminary research on this very point has already occurred. One of the founders of the restorative justice movement, John Braithwaite of Australia National University, has argued for its applicability to corporate crime.[68] He finds that when state regulators participate in negotiations with corporate managers or industry leaders, the resulting enforcement actions are more flexible and realistic, and the punishment is generally much more effective than traditional deterrence measures in promoting corporate compliance.[69] Moreover, FCPA enforcement has, perhaps unwittingly, supplied one high-profile example of a quasi-restorative approach to criminal enforcement. In settling the case of James Giffen, the United States arranged with officials in Kazakhstan and Switzerland to release the $80 million in alleged bribes from their Swiss accounts and establish a trust fund to be managed by a Kazakhstan NGO.[70] This fund was to be used to pay for programs for poor children and improve transparency in the Kazakhstan oil industry.[71] Although this example did not result from a TRC-type tribunal, it does indeed reflect a belief that the aim of punishing bribery should be social rehabilitation. The capacity to fund such educational programs is enormous, given that roughly half of the DOJ's criminal penalties receipts come from the FCPA.[72]

Ultimately, a more effective criminal enforcement regime requires a reconceptualization of criminal justice in a way that promotes the adoption of norms through the presence of compliant businesses, rather than their coerced withdrawal. The Kazakhstan example represents just one component of a potentially broader alternative criminal justice regime, in which corporate bribe payers are reintegrated into the very society in which they committed the criminal conduct. A process of dialogue and reform can educate the public on the nature of corruption, induce the corporation to implement necessary reforms, penalize the corporation in ways that benefit the local community, and work toward creating a set of business practices that comply with anti-corruption norms. Starting from this foundational principle, future scholarship can develop the details of a restorative justice procedure for international corporate crime in general, and anti-corruption law in particular.

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68. *Id.* at 169.

69. *Id.*

70. Michael Steen, *Kazakh "Oil Bribe" Millions to Go to Poor Children*, REUTERS (May 4, 2007), http://www.reuters.com/article/2007/05/04/idUSL04489030.

71. *Id.*

72. Mike Koehler, *Federal Corrupt Practices Act Enforcement in 2010: Big, Bold, and Bizarre*, 6 WHITE COLLAR CRIME REP. 166, 166 (2011).

D. Administrative Law: Do We Need a New Federal Agency?

As noted above, the sanctioning effect suggests that our enforcement of international bribery is not merely a white-collar crime; it raises delicate and complicated questions of foreign policy. However, criminal enforcement of anti-bribery law is presently entrusted entirely to the Fraud Section of the U.S. DOJ's Criminal Division, an office with a very aggressive prosecutorial mission and culture. It is neither designed nor inclined to carefully consider the nuances of foreign policy; we have entrusted the deployment of a highly powerful foreign policy tool to an agency that does not claim foreign policy expertise.

Despite the DOJ's supposedly exclusive authority to prosecute criminal FCPA violations, recent enforcement actions very strongly suggest that foreign policy considerations, almost certainly from outside the DOJ, have been brought to bear on FCPA enforcement. However, the adjustment of enforcement outcomes in response to foreign policy imperatives has been secretive and ad hoc, raising substantial questions about the rule of law. This Section will describe three of those enforcement actions, and how the outcomes seemingly reflected foreign policy pressures of mysterious origins. This Section will then suggest that a coherent international anti-corruption agenda may require a new federal agency.

The limitations—or perhaps, the excesses—of the prosecutorial mindset in the context of international anti-corruption policy became apparent in the recent prosecution of U.S. attorney James Giffen. Giffen had worked in U.S.-Soviet relations during the Cold War and eventually concentrated his energies in Kazakhstan, working his way into the inner circles of power.[73] When Kazakhstan became an independent nation in 1991, it immediately began selling rights to its vast oil and gas reserves to international oil companies.[74] In 1995, Giffen was named a Counselor to the President of Kazakhstan, enabling him to become the go-to guy for western companies seeking to obtain new contracts with the Kazakh government.[75]

Not surprisingly, Giffen was arrested in March of 2003 and charged, inter alia, with violating the FCPA.[76] The charging documents alleged that between 1995 and 1999, Giffen made unlawful payments

73. Mike Koehler, *The Giffen Gaffe—The Final Chapter*, FCPA PROFESSOR (Nov. 22, 2010), http://fcpaprofessor.blogspot.com/2010/11/giffen-gaffe-final-chapter.html.

74. *United States v. Giffen*, 326 F. Supp. 2d 497, 499 (S.D.N.Y. 2004).

75. *Id.* at 499-500.

76. *See id.* at 500. He was also charged with mail and wire fraud and money laundering. *Id.*

totaling approximately $80 million in cash and luxury items to high-ranking Kazakh officials to obtain business for various international oil companies including Mobil, Amoco, and Texaco.[77] He allegedly concealed these payments through a complex set of financial transactions through Swiss banking accounts.[78]

Once in court, Giffen shockingly argued that he bribed Kazakhstan officials with the full approval of the U.S. government.[79] He requested the production of documents to support a "public authority defense," an affirmative defense under which a defendant must prove that he acted in reliance on actual authority from an adequately empowered government official.[80] After extensive delays, the government issued what the judge deemed a "substantial volume" of classified information under the Classified Information Protection Act, which the court promptly put under seal.[81]

In what Professor Mike Koehler called "a mysterious turn,"[82] the DOJ ultimately resolved the case seven years later, in August of 2010, through a one-paragraph superseding information charging only a misdemeanor tax violation to which Giffen pled guilty.[83] Giffen received neither a fine nor probation, much less jail time, and was fined $32,000 for donating two snowmobiles to an unnamed Kazakhstan

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77. *Id.* at 499; *see also* Indictment at 2–3, 46, *Giffen*, 326 F. Supp. 2d 497 (No. S2 03 Cr. 404), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/giffen/08-04-04giffen-second-superseding-indict.pdf.

78. *Giffen*, 326 F. Supp. 2d at 499–500.

79. *No Punishment for 'Hero' Giffen*, FCPA BLOG (Nov. 22, 2010, 1:13 AM), http://www.fcpablog.com/blog/2010/11/22/no-punishment-for-hero-giffen.html. Steve Levine has suggested that the request was "exquisitely timed," given that the Bush Administration was at the time extraordinarily sensitive about releasing even unclassified documents. *See* Steve Levine, *James Giffen Update*, FCPA PROFESSOR (June 3, 2010, 6:32 AM), http://fcpaprofessor.blogspot.com/2010/06/james-giffen-update.html; *see also* Elizabeth Spahn, *Discovering Secrets: Act of State Defenses to Bribery Cases*, 38 HOFSTRA L. REV. 163, 172–73 (2009).

80. *Giffen*, 379 F. Supp. 2d at 341.

81. *James Giffen and America's Secrets*, FCPA BLOG (July 15, 2009, 8:12 PM), http://www.fcpablog.com/blog/2009/7/15/james-giffen-and-americas-secrets.html.

82. Koehler, *supra* note 73.

83. *See* Information 1–2, *Giffen*, 326 F. Supp. 2d 497 (No. S4 03 Cr. 404), *available at* http://www.scribd.com/doc/35488211/Giffen-James-S4-Information; *see also* Letter from Preet Bharara, U.S. Attorney, to William J. Schwartz, Attorney for James Giffen (Aug. 6, 2010), *available at* http://www.scribd.com/doc/35488184/Giffen-James-Plea-Agreement; Letter from Preet Bharara, U.S. Attorney, to William J. Schwartz, Attorney for The Mercator Corp. (Aug. 6, 2010), *available at* http://www.scribd.com/doc/35488265/Mercator-Corporation-Plea-Agreement.

official.[84] The substance of the negotiations that produced this settlement, much like the produced documents, remains confidential. But the comments of the federal district judge during the sentencing hearing are telling. Without divulging the contents of the sealed documents, the judge explained that Giffen had access "to the highest levels of the Soviet Union," that he "advanced the strategic interests of the United States and its interest in Central Asia," that "these relationships, built up over a lifetime, were lost the day of his arrest."[85] He further noted, "Suffice it to say, Mr. Giffen was a significant source of information to the U.S. government and a conduit of secret information from the Soviet Union during the Cold War."[86] He described Giffen as a sort of Cold War hero and, ultimately, suggested that the DOJ should never have brought the case.[87]

Speculation on the precise pressures that resulted in this settlement was rampant. The DOJ had arrested Giffen at the earliest stages of its push to enforce the FCPA, which was a highly significant symbolic gesture to the international business world.[88] But many Kazakhstanis speculated that it would ultimately go nowhere because it was not in the interest of the United States to expose damaging information about the Kazakhstan president.[89] Investigative reporters suggested that "the U.S. Government is not of one mind about the desirability of this prosecution. The Justice Department is standing behind the prosecutors involved . . . [but] the intelligence community, led by the CIA, wants this case to go away because it is poised to reveal some embarrassing chapters in their Central Asian playbook."[90] An anonymous "Washington insider" commented on a blog that "The diplomats usually win over the prosecutors" and that "it would seem Kazakhstan is too important to continue the Giffen case."[91]

The Giffen case was the first example of political pressures generally, and foreign policy pressures specifically, arising from sources on which the public could only speculate. However, it would

84. David Glovin, *Oil Dealer Giffen Avoids Prison in Onetime Bribe Case*, SAN DIEGO SOURCE: DAILY TRANSCRIPT (Nov. 19, 2010), *available at* http://www.sddt.com/News/article.cfm?SourceCode=20101119faq&_t=Oil+Dealer+Giffen+Avoids+Prison+in+Onetime+Bribe+Case.

85. *Id.*

86. Koehler, *supra* note 73.

87. *No Punishment for 'Hero' Giffen*, *supra* note 79.

88. *Id.*

89. Scott Horton, *Kazakhgate Limps Along*, HARPER'S MAG. (July 16, 2010, 4:07 PM), http://harpers.org/archive/2010/07/hbc-90007405.

90. *Id.*

91. *James Giffen and America's Secrets*, *supra* note 81.

prove but the start of a discernible pattern. The second such instance concerned the German technology firm Siemens.[92] Both the press release announcing the charges against Siemens and the criminal information made numerous bribery allegations, including over $800 million in corrupt payments to various foreign officials.[93] The conduct that had given rise to the enforcement action clearly consisted primarily of bribery. But the criminal information contained no substantive bribery charges; rather, the DOJ charged Siemens only with violations of the FCPA's accounting provisions. Siemens ultimately agreed to a fine of approximately $800 million, the largest in FCPA history, but was never charged with a bribery violation. In its sentencing memorandum, the DOJ tacitly alluded to its decision not to file such charges, stating:

> [T]he Department considered a number of factors in its decisions regarding the overall disposition. Those factors included, but were not limited to, Siemens' cooperation and remediation efforts, as well as any collateral consequences, including whether there would be disproportionate harm to the shareholders, pension holders, employees, and other persons not proven personally culpable, and the impact on the public, arising from the prosecution. The Department's analysis of collateral consequences included the consideration of the risk of debarment and exclusion from government contracts.[94]

That is, a substantial factor in its decision was the possibility that Siemens would be debarred from government contracts.

The third case in this pattern of political pressures influencing FCPA enforcement concerned the British company BAE—the world's second-largest defense contractor and fifth largest provider of defense materials to the U.S. government.[95] Amid rumors that BAE had paid substantial bribes to Saudi officials to obtain a contract for fighter jets, the U.K.'s Serious Fraud Office (SFO) began investigating BAE in 2006. When a Saudi prince learned of the investigation, he initially

92. *See* Mike Koehler, *The Façade of FCPA Enforcement*, 41 GEO. J. INT'L. L. 907, 991 (2010). Siemens was subject to FCPA jurisdiction because its shares are traded on the NYSE and certain subsidiaries with U.S. offices participated in the bribery scheme. *Id.*

93. *Id.* at 991-92.

94. Department's Sentencing Memorandum at 11, *United States v. Siemens Aktiengesellschaft*, No. 08-CR-367-RJL (D.D.C. Dec. 12, 2008), *available at* http://www.justice.gov/opa/documents/siemens-sentencing-memo.pdf.

95. Drury D. Stevenson & Nicholas J. Wagoner, *FCPA Sanctions: Too Big to Debar?*, 80 FORDHAM L. REV. 775, 798, 800-01 (2011).

threatened to rescind the contract and take his offer to another country. When this did not deter the SFO, Saudi officials then threatened to cut off all cooperation with the U.K. in gathering terrorism-related intelligence.[96] Tony Blair pressured the SFO to drop its investigation, and explained, "[L]et me make one thing very clear to you—I don't believe the investigation would have led anywhere except to the complete wreckage of a vital strategic relationship for our country."[97]

Seemingly disappointed by the SFO's soft line, the U.S. DOJ initiated its own investigation of BAE and arrested the CEO in 2008.[98] In 2010, it filed a criminal information that detailed a complex network of illicit payments. It alleged that BAE sold aircraft and other technology and services to the U.K. government, which in turn sold them to the Kingdom of Saudi Arabia.[99] It further alleged that BAE transferred extraordinary sums, exceeding ten million British Pounds and $9,000,000 U.S., to an intermediary's Swiss bank account with the understanding that at least portions would then be channeled to an unnamed Saudi official, rumored to be Prince Bandar bin Sultan, the then-Ambassador to the United States.[100]

The information was carefully phrased to support the FCPA's anti-bribery provisions: it alleged that BAE was aware of a "high probability" that the intermediary used the transferred money to make an illicit payment to a government official,[101] and that BAE made separate payments to Saudi officials "through various payment mechanisms . . . in the territorial jurisdiction of the U.S."[102] However, the DOJ ultimately did not charge BAE with a substantive bribery violation. Instead, it charged BAE merely with conspiracy to make false statements to the U.S. government, including a statement that it had not knowingly violated the FCPA.[103] But despite the government's tacit allegation here that BAE had knowingly violated the FCPA, it did not charge BAE with a substantive FCPA violation. BAE ultimately

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96. *Id.* at 798-99.

97. *Id.* at 799 (quoting *Frontline: Black Money*, PBS, http://www.pbs.org/wgbh/pages/frontline/blackmoney/etc/script.html (last visited Feb. 14, 2012) (transcript of PBS television broadcast of Apr. 7, 2009)).

98. *Id.*

99. Information ¶ 41, *United States v. BAE Sys.*, No. 1:10-cr-00035-JDB (D.D.C. Feb. 4, 2010), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/bae-systems/02-01-10baesystems-info.pdf.

100. Koehler, *supra* note 92, at 995.

101. *Id.*

102. *Id.* at 994.

103. *See* Information ¶¶ 5, 9, *BAE Sys.*, No. 1:10-cr-00035-JDB.

pled guilty to the conspiracy charge and agreed to pay a $400 million criminal fine.[104]

Perhaps the government simply felt in the Siemens and BAE cases that debarment was unfair. Substantially more likely, the government decided that it could not afford to lose the benefits that these two government contractors provided. Two scholars noted that, like the investment banks that were too big to fail, BAE was "too big to debar."[105] Such determinations would not likely have been made by the DOJ in isolation; they were more likely made under the influence of persons outside of, or above, the DOJ.

Giffen, BAE, and Siemens collectively raise the very strong suspicion that foreign policy considerations have already impacted FCPA enforcement. However, the bringing to bear of foreign policy considerations on FCPA enforcement to date has been covert and ad hoc, rather than transparent and systematic. Moreover, the Giffen case is not the only instance of the U.S. government allegedly tolerating, endorsing, or even paying bribes to carry out foreign policy objectives. The U.S. government and/or its contractors have reportedly paid bribes systematically to aid the war effort in Afghanistan; U.S. officials have admitted accepting bribes from Afghanis in awarding constructing contracts to local companies.[106] Corruption and foreign policy are thus intersecting in myriad and complex ways.

The infiltration of foreign policy considerations into anti-bribery enforcement has raised at least three problems. First, it seems to introduce a contradiction in U.S. anti-bribery policy in which the DOJ will prosecute bribe payers, while other agencies will pay bribes or tacitly condone it. Second, it suggests that the United States will suspend FCPA enforcement actions under foreign policy pressure without a transparent process or a coherent policy. We do not know who has been involved in these higher-level decisions or what criteria guided the decisions; it is the classic smoke-filled room. Third, the Giffen and BAE examples illustrate the DOJ's tendency to enforce, or attempt to enforce, the FCPA without regard to its impact on economic or legal development, alliance-building, or other foreign policy considerations. Indeed, these cases suggest that the United States has been on both ends of the awkward and yet unexplored relationship between anti-bribery law and foreign policy.

104. *See* Press Release, Dep't of Justice, BAE Systems PLC Pleads Guilty and Ordered to Pay $400 Million Criminal Fine (Mar. 1, 2010), *available at* www.justice.gov/opa/pr/2010/March/10-cm-209.html.

105. *See* Stevenson & Wagoner, *supra* note 95, at 775.

106. *See U.S. Official Accepted Bribes from Afghans*, PRESSTV (May 14, 2011, 2:16 PM), http://www.presstv.ir/detail/179871.html.

These experiences suggest a need to achieve a higher level of consistency and coherence in anti-corruption enforcement. We need to intelligently consider how anti-corruption intersects with foreign policy and can yield a coherent and effective international anti-corruption agenda. Foreign policy considerations must promote our anti-corruption effort, and not undermine it with suspect and covert practices that call into question the legitimacy of the government's efforts.

I want to argue that an anti-corruption agenda that carefully balances the various interests at stake, is founded on a sophisticated understanding of global legal and economic conditions, benefits both the United States and the nations in which it does business, and is harmonized with broader foreign policy aims requires a new federal office. This office, likely located outside the Department of Justice and perhaps in the Department of State or Commerce, would need formal legal authority to participate in the design and implementation of anti-corruption policy. It could systematically study the various interests at stake, the interrelationships between them, and render recommendations for enforcement procedures or textual amendments. Overall, it would have two specific objectives: (1) to ensure that anti-corruption enforcement is consistent across agencies; and (2) to ensure that such enforcement has the effect in developing countries of promoting anti-corruption norms and protecting the victims of bribery.

This proposal will raise myriad administrative law questions about the division of enforcement and policy functions within and across agencies, the extent of executive and legislative control over agency discretion, policy formulation in the absence of either adjudication or rulemaking, and ultimately, the delegation of legislative authority to the executive branch. What would be the nature of its authority over DOJ/SEC decisions—merely advisory or more formal? Could it veto enforcement decisions? What are the best examples of policy-oriented offices having formal authority to influence enforcement decisions, and which lessons do they teach? In addition to foreign policy advisory power, should a new corruption office have features of other administrative agencies, such as rulemaking authority, or administrative adjudication? Relatedly, might a new corruption regime include a private cause of action, something the FCPA now lacks? Future research will address these questions conceptually and develop a more specific blueprint for the design and operation of the office.

CONCLUSION: IMAGINE THERE'S NO BRIBERY

The subtitle of this conclusion deliberately, if facetiously, evokes John Lennon's utopian vision of a world without religious conflict; indeed, some in anti-corruption circles many contend that the ideas suggested above are no less remote. But the current state of our anti-corruption deliberations reflects a legal subdiscipline truly in its infancy—the United States government began enforcing the FCPA a mere decade ago, and academics began rigorously studying the FCPA even more recently. We probably understand international anti-corruption law as well now as we did the federal securities laws (to which the FCPA is an amendment) in the 1940s or 1950s. As with those laws, the movement toward effective universal anti-corruption law will be measured, as it has been thus far, not in years but in decades.

Accordingly, this paper takes a longer-term view of anti-corruption reforms. It is an initial attempt to locate the fascinating and complex problems of anti-corruption law in a broader intellectual context. Ensuing articles will draw on diverse academic literatures to understand anti-corruption law more broadly and, in turn, will seek to contribute something novel from the anti-corruption experience to those well-established debates. Ultimately, this paper marks out a nascent research project in the hopes that other scholars will similarly broaden their analyses of anti-corruption law and policy.