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Corruption, Corporations, and the New Human Right

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ABSTRACT

We should no longer expect the Alien Tort Statute to be the principal federal statute that deters overseas corporate rights violations. That distinction rightly belongs to the Foreign Corrupt Practices Act, an anti-bribery statute that rests on undisputed principles of corporate liability, contains a clear congressional statement of extraterritorial application, and routinely collects penalties from multinational corporate defendants. Scholars have not associated the FCPA with human rights, owing principally to a thin understanding of rights theory. But freedom from corruption can and should be understood as a human right, one that is as old as social contract theory but new to federal and international law. With specific reforms—one modeled after environmental law and the other after intellectual property—the FCPA can become a more powerful statutory tool for deterring overseas corporate rights violations than the ATS ever was or will be.

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INTRODUCTION

The Supreme Court is thought to have dealt a near-fatal blow to the doctrine of corporate liability for overseas human rights violations. *Kiobel v. Royal Dutch Petroleum Co.*[1] limited the extraterritorial application of the Alien Tort Statute ("ATS") almost to the point of nonexistence. Because the ATS is (or was) widely regarded as the sole provision of the U.S. Code holding corporations liable for overseas rights abuses, we assume the doctrine now lies on its deathbed.

But the ATS may not have been particularly well-suited to protect human rights from overseas corporate intrusions. The 225-year-old, one-

1. Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013).

sentence statute contains no express grant of extraterritorial application.[2] Neither does it provide for the liability of corporations.[3] And its capacity to deter violations has been greatly hampered by the near impossibility of collecting corporate judgments.[4] As the cornerstone of a federal statutory regime, the ATS was rather precarious. Perhaps we should not be surprised to now bemoan its fate.

What the world needs now is a federal statute that holds both U.S. and foreign companies liable for overseas human rights abuses; a statute that contains an express congressional statement of extraterritorial application and rests on well-established principles of corporate liability. Ideally, the statute would plainly provide a specific cause of action, amply supported by an accessible legislative history. It would not have the courts unilaterally intervening in delicate foreign affairs, but would involve the executive branch in enforcement. And in the best of all possible worlds, its settlements would be consistently won and collected, inducing an international culture of compliance. What we need, in other words, is a statute that does the work the ATS never could and, after *Kiobel*, likely never will.

That statute already exists. It is the U.S. Foreign Corrupt Practices Act ("FCPA"), which criminalizes the bribery of overseas officials for business purposes.[5] Congress originally enacted this statute in 1977 specifically to promote democratic values across the world through international business.[6] The FCPA recently accounted for half of all criminal penalties collected by the U.S. Department of Justice.[7] Indeed, that agency has publicly stated that after fighting terrorism, combating overseas corporate bribery is its first priority.[8]

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2. The full text of the ATS reads, "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350 (2012). For a discussion of extraterritoriality, see, e.g., Austen L. Parrish, *Reclaiming International Law from Extraterritoriality*, 93 MINN. L. REV. 815 (2009) (discussing the debate).

3. *See* 28 U.S.C. § 1350.

4. *See* Donald Earl Childress III, *The Alien Tort Statute, Federalism, and the Next Wave of Transnational Litigation*, 100 GEO. L.J. 709 (2012) (reviewing the challenges ATS plaintiffs face in collecting judgments against corporate defendants).

5. Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78dd-1–3 (2012).

6. *See infra* Part I.A.

7. Press Release, U.S. Dep't of Justice, Department of Justice Secures More than $2 Billion in Judgments and Settlements as a Result of Enforcement Actions Led by the Criminal Division (Jan. 21, 2011), *available at* http://www.justice.gov/opa/pr/2011/January/11-crm-085.html.

8. Daniel J. Grimm, *The Foreign Corrupt Practices Act in Merger and Acquisition Transactions: Successor Liability and Its Consequences*, 7 N.Y.U. J.L. & BUS. 247, 249–50 (2010).

Still, anti-bribery law is not generally thought of in relation to the broader movement to hold corporations accountable for human rights violations, for two reasons. The first is an impoverished understanding of rights. While we may consider corruption to be a means of violating human rights, we do not generally regard it as an inherent rights violation.[9] Secondly, we enforce, and regard, overseas corporate bribery as essentially an issue of white-collar crime. This owes to a historical accident whereby Congress codified the bribery prohibition as an amendment to the 1934 Exchange Act, vesting enforcement authority with the Securities and Exchange Commission.[10] We thus enforce a prohibition on corrupting foreign governments as if that conduct were really no different than domestic insider trading or market manipulation.

But history is proving circular, and we must now rediscover that which we once understood all too well. Corruption does indeed violate a human right: the right to a liberty that can be realized only in civil society, where the government confers benefits in accordance with standing laws, common to everyone, and directed to the public good.[11] In Lockean political theory, it is the right to not be under "the arbitrary will of another."[12] The violation of this right voids the social contract, destroys civil society, and returns humankind to the state of nature. Indeed, Locke claimed that abusing public office for private gain was the very definition of tyranny.[13]

So too is corporate bribery closely associated with other rights already recognized in international law: the right to equal protection, to political representation, to self-determination, to food, housing, and medical care, to education, to equal access to a country's public services, to safe working conditions, to control natural resources, and indeed to the very rule of law itself.[14] Corruption, properly defined, is the source from which so many other violations spring.

The starting point for reframing federal corruption policy lies in a recent policy paper of the Obama Administration. In 2010, the Administration publicly claimed that "corruption is a violation of basic

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9. *See infra* Part II.B.
10. *See infra* Part II.A.
11. *See infra* Part II.B.
12. JOHN LOCKE, THE SECOND TREATISE ON CIVIL GOVERNMENT 34 (Prometheus Books ed. 1986).
13. *See infra* Part II.B.
14. *See infra* Part II.C.

human rights."[15] The paper was both underpublicized, and undertheorized; it did little to promote or defend this assertion. But when subjected to a rigorous philosophical defense, this executive statement of foreign policy can begin to fill the void that the judicial branch's *Kiobel* decision has created.

Meanwhile, the catalyst for a broad public debate on anti-bribery policy lies in a now-pending FCPA enforcement action that should prove the highest-profile in history: Wal-Mart, perhaps the most infamous U.S.-based multinational corporation, is under investigation for systematically paying bribes across the developing world, inducing violations of various long-recognized rights.[16] With the convergence of these forces, now is the time to reconceptualize corporate bribery as an issue of human rights.

This Article undertakes that project, making three claims. First, corruption generally, and bribery specifically, can and must be regarded as violating a human right. Second, once the FCPA is understood as a human rights statute, it provides a far more effective model for deterring overseas rights abuses by corporations than the ATS ever did, or could. Third, with two specific reforms modeled after other areas of federal law, we could more fully achieve the FCPA's purpose of promoting human rights through international business.

The analysis proceeds as follows. Part I demonstrates that the FCPA was, at its inception, understood as a statute for promoting democratic values in developing countries through ethical commerce. It then provides empirical data which show that enforcement now creates the conditions in which bribery proliferates: enforcement deters investment in countries perceived to be corrupt, leaving a foreign direct investment void which is filled by aggressive bribe-payors from nondemocratic jurisdictions. I have previously called this dynamic the sanctioning effect of anti-bribery law.[17] Part II first provides a new definition of corruption that is suitable to the era of anti-bribery enforcement, then demonstrates that corruption, properly defined, can and indeed must be regarded as violating a right. Having reframed bribery as a human rights issue, Part III explains how the FCPA provides a far surer foundation on which to build a federal statutory regime of corporate liability for overseas rights violations than the ATS

15. THE WHITE HOUSE NATIONAL SECURITY STRATEGY 38 (2010), *available at* http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf [hereinafter OBAMA REPORT].

16. *See infra* Part II.C.

17. *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); Andrew Brady Spalding, *Unwitting Sanctions: Understanding Anti-Bribery Legislation as Economic Sanctions against Emerging Markets*, 62 FLA. L. REV. 351 (2010).

ever could. It proposes two specific reforms, the first based on environmental law and the second on intellectual property law, to more fully achieve anti-bribery's original purpose. Corporate liability for human rights violations is thus a legal principle that must lose its life to find it: with its imminent death in the ATS, it can find new life in the FCPA.I. Anti-Bribery's Paradox: The Foreign Policy Problem with a White-Collar Crime Solution

At its inception, Congress understood the FCPA as an instrument for promoting democratic values in developing countries. As this Part will show, that vision was deeply shaped by the historical context of the Cold War. But with the collapse of Soviet Union, we ceased to see the world through that lens, and the foreign policy implications of anti-bribery law gradually grew obscure. The goal of promoting democracy would be displaced with "leveling the playing field," a metaphor that pervades congressional testimony of the 1980s and 90s[18] and popular commentary of the last decade.[19] The metaphor goes only to the FCPA's anti-competitive effects on U.S. companies, tellingly capturing the limitations of our present anti-bribery paradigm. If business is a game and multinational companies are the players, what then are the developing countries in which they do business? The spectators? Or the turf? The original understanding of anti-bribery's aims is sorely in need of recovery.

Part I.A recounts the legislative history surrounding the FCPA's enactment, showing that those who testified understood the statute as an instrument of promoting democratic values overseas. Part I.B draws on several sources of empirical data to show that our modern white-collar crime enforcement regime is actually causing compliant companies to withdraw from developing countries and, moreover, leads companies from countries that do not enforce anti-bribery laws to move in and fill the void. Part I.C illustrates how reframing bribery as a human rights violation can realign enforcement with the statute's original purpose.

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18. *See* Andrew Brady Spalding, *Four Unchartered Corners of Anti-Corruption Law: In Search of Remedies to the Sanctioning Effect*, 2012 WIS. L. REV. 661, 662.

19. *See, e.g.*, ANDREW WEISSMANN & ALIXANDRA SMITH, RESTORING BALANCE: PROPOSED AMENDMENTS TO THE FOREIGN CORRUPT PRACTICES ACT, U.S. CHAMBER INST. FOR LEGAL REFORM (2010), *available at* http://www.uschamber.com/reports/restoring-balance-proposed-amendments-foreign-corrupt-practices-act.

A. *The FCPA's Original Ideal of Spreading Democracy Through Commerce*

Congressional deliberations on the need for an extraterritorial anti-bribery statute in the 1970s were initially precipitated by the discovery that the Lockheed Corporation, the flagship U.S. defense contractor, had paid bribes to government officials in Japan, the Netherlands, and Italy to win bids.[20] Each of these countries was thought critical to the growth of democratic institutions, and revelations of corporate bribery undermined liberalism's credibility.

Perhaps the most sophisticated and telling explanation of international bribery's foreign policy implications was provided by Congressman Stephen Solarz, a Democrat from New York. In 1976, he testified before Congress, "It is important to look at the problem of overseas payments in broader terms than simply a matter of economics or even morality."[21] Solarz's view that an additional dimension to the problem of overseas bribery existed would prove to be a universal and predominant theme in the congressional testimony. Solarz explained that Lockheed's payments to Japanese officials put "'[t]he democratic system in Japan . . . in grave danger.'"[22] Opponents within Japan of the Japanese-U.S. alliance were handed what he called:

> a terribly effective weapon to drive a wedge between two close allies. At a time of uncertainty due to the shifting balances of power in Asia, our strongest and most stable ally in the region [was] undergoing unnecessary turbulence, and [a] relationship which is at the very heart of our foreign policy [was] potentially jeopardized.[23]

Solarz thought the "most serious" and "delicate" situation was in Italy, which was "one of the keys to the southern flank of NATO" and whose government was equally split between a liberal party and the Communist

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20. *See* WILLIAM D. HARTUNG, PROPHETS OF WAR: LOCKHEED MARTIN AND THE MAKING OF THE MILITARY-INDUSTRIAL COMPLEX 189, 192 (2011).

21. *Foreign Payments Disclosure: Hearings Before the Subcomm. on Consumer Prot. and Fin. of the H. Comm. on Interstate and Foreign Commerce*, 94th Cong. 140 (1976) [hereinafter *1976 House Consumer Prot. Subcomm. Hearing*] (statement of Rep. Stephen J. Solarz).

22. *Unlawful Corporate Payments Act of 1977: Hearings Before the Subcomm. on Consumer Prot. and Fin. of the H. Comm. on Interstate and Foreign Commerce*, 95th Cong. 172 (1977) [hereinafter *1977 Prot. Hearings*] (statement of Rep. Stephen J. Solarz) (quoting "a very senior politician close to former [Japanese] Prime Minister Takeo Mike").

23. *1976 House Consumer Prot. Subcomm. Hearing*, *supra* note 21, at 141 (statement of Rep. Stephen J. Solarz).

Party.[24] He noted that "[a]llegations of payments by Lockheed served to advance the Communist cause in Italy where the Communist bloc was strengthened by the sight of corrupt capitalism."[25]

Congress feared that the Communist Party could gain a majority in the Italian parliament and the prospects for building democratic institutions would be lost.[26] The implications of corporate bribery for the U.S. effort to promote the growth of democratic institutions were thus "staggering and in some cases, perhaps irreversible."[27] The example of Italy demonstrated that "[c]ommunist and other anti-U.S. forces are quick to take advantage of any evidence of immorality or corruption associated with pro-Western governments. Both fear and resentment are generated among foreign officials who become increasingly hostile as the United States continues to expose traditional corrupt practices abroad."[28] Solarz continued, "[W]hat is at stake is much more than the individual interests of corporations which are competing for a share of foreign markets. What is in fact at stake is the foreign policy and national interest of the United States."[29] Ultimately, "The resulting economic and political instability is certainly detrimental . . . when it results in a backlash against American ideals . . . ."[30]

This seemingly hawkish view would actually prove non-partisan. It was articulated with equal force by members of both the Ford and Carter Administrations. Mark B. Feldman, Deputy Legal Adviser in the Department of State under President Ford, testified that corruption "jeopardizes the important interests we share with our friends abroad" because it undermines a form of government "upon which social progress, economic justice, and perhaps, ultimately, world peace depends."[31] Treasury Secretary William E. Simon further stated that it "adversely affects our relations with foreign governments and can contribute to a general deterioration in the climate for fair and open international trade and investment."[32] Ford's Commerce Secretary, Elliot L. Richardson,

24. *Id.*

25. *1977 Prot. Hearings*, *supra* note 22, at 173 (statement of Rep. Stephen J. Solarz).

26. *1976 House Consumer Prot. Subcomm. Hearing*, *supra* note 21, at 141 (statement of Rep. Stephen J. Solarz).

27. *Id.* at 2 (statement of John M. Murphy, Chairman).

28. 1977 *Prot. Hearings*, *supra* note 22, at 173 (statement of Rep. Stephen J. Solarz).

29. *Id.*

30. *Id.*

31. *The Activities of American Multinational Corporations Abroad*: *Hearings Before the Subcomm. on Int'l Econ. Policy of the H. Comm. on Int'l Relations*, 94th Cong. 23–24 (1975) (statement of Mark B. Feldman, Deputy Legal Adviser, U.S. Dep't of State).

32. *Foreign and Corporate Bribes: Hearings Before the S. Comm. on Banking, Housing and Urban Affairs*, 94th Cong. 85 (1976) [hereinafter *1976 Senate Banking Hearings*] (statement of William E. Simon, Sec'y of the U.S. Dep't of the Treasury).

further articulated: "Bribery . . . threatens to poison relationships between the United States and nations with which we have long had mutually beneficial political and commercial ties."[33] Ultimately, President Ford would formally state that reports of bribery "tend to destroy confidence" in liberal-democratic institutions.[34] When the Carter Administration moved in, his Treasury Secretary stated, "The Carter Administration believes that it is damaging both to our country and to a healthy world economic system for American corporations to bribe foreign officials."[35] President Carter ultimately explained in his signing statement that "[c]orrupt practices between corporations and public officials overseas undermine the integrity and stability of governments and harm our relations with other countries. Recent revelations of widespread overseas bribery have eroded public confidence in our basic institutions."[36]

This view was expressed most forcefully by Democrat George Ball, who had become famous as a member of the Kennedy and Johnson administrations for his opposition to the Vietnam War. Ball explained:

> The vast volume of speeches, pamphlets, and advertising copy and propaganda leaflets extolling the virtues of free enterprise are cancelled every night when managements demonstrate by their conduct that a sector of multinational business activity is not free; it is bought and paid for. This is a problem that, like so many others, has relevance in the struggle of antagonistic ideologies; for, when our enterprises stoop to bribery and kickbacks, they give substance to the communist myth—already widely believed in Third World countries—that capitalism is fundamentally corrupt.[37]

Thus, even the most liberal, reform-minded advocates recognized the urgent foreign policy implications of international corporate bribery.

Whether we sought to promote democracy overseas out of concern for those countries, or merely to advance our strategic interests, is of course debatable. But that is a question as to why we should promote democracy

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33. *Id.* at 76.

34. FOREIGN PAYMENT DISCLOSURE, MESSAGE FROM THE PRESIDENT OF THE UNITED STATES URGING ENACTMENT OF PROPOSED LEGISLATION TO REQUIRE THE DISCLOSURE OF PAYMENTS TO FOREIGN OFFICIALS, H.R. DOC NO. 94-572, at 1 (1976).

35. *Foreign Corrupt Practices and Domestic and Foreign Investment Disclosure: Hearing Before the S. Comm. on Banking, Housing, and Urban Affairs*, 95th Cong. 67 (1977) at 67 (statement of W. Michael Blumenthal, Sec'y of the U.S. Dep't of the Treasury).

36. Foreign Corrupt Practices and Investment Disclosure Bill: Statement on Signing S. 305 into Law, 13 WEEKLY COMP. PRES. DOC. 1909, 1909 (Dec. 20, 1977).

37. *1976 Senate Banking Hearings*, *supra* note 32, at 41–42 (statement of George Ball, Lehman Bros.).

through commerce, not whether we should do so. And though Congress then used the language of democracy rather than of human rights, the meaning is essentially the same. With the integration of these themes into both the Senate[38] and House[39] Reports, the bipartisan consensus concerning the FCPA's intended effect becomes clear.

But Congress ultimately entrusted enforcement authority to an agency that publicly admitted it lacked the foreign policy savvy necessary to effectively enforce a bribery prohibition. The Securities and Exchange Commission ("SEC") stated that overseas corporate bribery

> was a question beyond the scope of the SEC's authority and expertise because it "presents a broad issue of national policy with important implications for international trade and commerce, the appropriateness of application of United States law to transactions by United States citizens in foreign countries, and the possible impact of such legislation upon the foreign relations of the United States."[40]

Professor Barbara Black has recently documented in impressive detail the awkwardness of this arrangement as felt by the SEC itself.[41] Reading the legislative history, she notes that while the SEC was quite willing to accept enforcement responsibility for the books and records provisions of the FCPA,[42] the SEC was not interested in enforcing the anti-bribery provisions and, in fact, "expressed no views on 'whether there should be a general statutory prohibition against the making of certain kinds of foreign payments.'"[43] Then-Chairman of the SEC, Roderick Hills, testified before Congress that the SEC would "prefer not to be involved" in enforcing a bribery prohibition because it would "embody separate distinct policies from those underlying the federal securities laws" and this policy "does not easily fit within the [SEC's] mandate."[44]

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38. S. REP. NO. 95-114, at 3 (1977).

39. H. REP. NO. 95-640, at 4 (1977).

40. Barbara Black, *The SEC and the Foreign Corrupt Practices Act: Fighting Global Corruption Is* Not *Part of the SEC's Mission*, 73 OHIO ST. L.J. 1093, 1098 (2012).

41. *Id.* (quoting U.S. SEC. & EXCH. COMM'N, REPORT OF THE SECURITIES AND EXCHANGE COMMISSION ON QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES, U.S. Senate 157 (94th Sess., 2d Sess.) (May 1976) at 61-62 [hereinafter SEC REPORT]).

42. In addition to the anti-bribery provisions, the FCPA includes books and records and internal control provisions designed to prevent accounting and governance lapses.

43. Black, *supra* note 40, at 1098 (quoting SEC REPORT, *supra* note 41, at 61).

44. *Id.* at 1098–99 (quoting *Foreign Corrupt Practices and Domestic and Foreign Inv. Disclosure: Hearing on S.305 Before the Comm. On Banking, Housing, and Urban Affairs*, 95th Cong. 124–25 (1977) (statement of Roderick Hills, Chairman, Sec. & Exch. Comm'n)). *See also id.* at 1099 n.22 ("we do not seek nor entirely wish to have the responsibility for stopping these kinds of

The SEC fully appreciated that international bribery was, first and foremost, a question of foreign policy that a white-collar crime agency is ill-equipped to handle. Given the incongruence between the statute's goals and its implementation, we should not be surprised to find the modern FCPA missile getting sideways.

B. Empirical Evidence that Modern Enforcement Harms Developing Countries

Empirical data from multiple sources demonstrate that anti-bribery enforcement causes companies subject to FCPA jurisdiction to withdraw their capital from developing countries. This, in turn, creates the very conditions in which bribery proliferates and illiberal regimes gain influence.

Two sets of economic studies have demonstrated that anti-bribery enforcement causes corporations subject to its jurisdiction to do less business in bribery-prone markets. The first, in 1995 by James Hines, 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.[45] 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 finding was that companies did less business in such countries than they would have if the FCPA did not exist. 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."[46]

A second set of studies conducted after enactment of the OECD Convention Against Bribery confirmed the finding that 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.[47] Professor Alvaro Cuervo-

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payments."); Mike Koehler, *The Story of the Foreign Corrupt Practices Act*, 73 OHIO ST. L.J. 929, 961–69 (2012).

45. 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.

46. *Id.* at 20.

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

Cazurra essentially confirmed and expanded upon Hines' thesis.[48] Cuervo-Cazurra's study was narrower than Hines' in that he focused exclusively on FDI, but broader in that Cuervo-Cazurra used data on bilateral FDI inflows from 183 home economies to 106 host economies with varying quantified corruption levels.[49]

Cuervo-Cazurra further found that the phenomenon of businesses from countries with anti-bribery legislation investing less in highly corrupt countries was not limited to the United States. Rather, high levels of corruption in a host country generally resulted in less FDI from signatories to the OECD convention.[50] The same phenomenon that Hines identified with respect to the United States thus became more widespread as a result of the OECD convention. The underside of the phenomenon that Hines first identified—countries that are not bound by anti-bribery legislation continue to invest in corrupt countries—was likewise confirmed by Cuervo-Cazurra. Post-OECD, as signatory countries invested less in corrupt countries, countries with higher levels of corruption received relatively more FDI from countries with similarly higher corruption levels.[51] The result of these trends is that as anti-bribery legislation became more widespread, corrupt countries received less of their FDI from less-corrupt countries and more of their FDI from more-corrupt countries.[52]

In a second empirical study,[53] Cuervo-Cazurra verified and restated his finding that countries which implemented the OECD Convention had become "more sensitive" to corruption and had reduced their FDI in more-corrupt countries.[54] He then proposed a modification of Hines' original thesis, concluding that prior to the OECD convention, U.S. investors were

48. *Id.* at 814. Cuervo-Cazurra further noted that Hines' study had become subject to various methodological disputes, as noted in Shang-Jin Wei, *How Taxing is Corruption on International Investors?*, 82 REV. ECON. & STAT. 1 (2000). Cuervo-Cazurra believed that he had improved upon Hines' methodology and yet confirmed the results. *See* Cuervo-Cazurra, *supra* note 47, at 808–09. Evaluating these methodologies is not the purpose of this Article. For further empirical studies confirming FCPA enforcement's negative impact on FDI, see also Paul J. Beck et al., *The Impact of the Foreign Corrupt Practices Act on US Exports,* 12 MANAGERIAL & DECISION ECON. 295, 300 (1991); Rajib Sanyal and Subarna Samanta, *Effect of Perception of Corruption on Outward U.S. Foreign Direct Investment,* 10 GLOBAL BUS. & ECON. REV. 123, 137 (2008); OHANN GRAF LAMBSDORFF, THE INSTITUTIONAL ECONOMICS OF CORRUPTION AND REFORM: THEORY, EVIDENCE AND POLICY 174 (2007); Anna D'Souza, *The OECD Anti-Bribery Convention: Changing the Currents of Trade,* 97 J. DEV. ECON. 73, 79 (2012).

49. Cuervo-Cazurra, *supra* note 47, at 811.

50. *Id.* at 807–08.

51. *Id.* at 808.

52. *Id.*

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

54. *Id.* at 644.

not in fact investing less in corrupt countries, but that they began investing less after OECD ratification.[55] In other words, the FCPA standing alone did not induce U.S. investors to invest less in corrupt countries, but rather the OECD induced both U.S. and other OECD signatories to invest less.[56]

We may be surprised to discover that for a period, the U.S. government formally adopted and publicly embraced this very position: that FCPA enforcement reduced U.S. investment in developing countries. After the FCPA's enactment in 1977, the U.S. government began lobbying the western world to enact a similar prohibition, ultimately succeeding in 1997 with the OECD Convention on Combating Bribery.[57] In the testimony before Congress, a common theme was that the U.S. business community was losing business overseas as a result of the FCPA. In his message transmitting the Convention, President Bill Clinton noted that the United States "ha[d] 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."[58] Numerous congressmen testified that the Convention would "level[] the playing field,"[59] as did SEC Associate Director Paul Gerlach.[60] Ultimately, President Clinton would adopt this metaphor in his signing statement.[61] Moreover, the Clinton Administration calculated a very specific estimate of the amount of business that U.S. corporations were losing. President Clinton indicated in his signing statement that the value of the contracts lost to U.S. businesses each year as a result of the FCPA was $30 billion.[62] An Undersecretary of State and the General Counsel of the Office of the Secretary of Commerce[63] encompassed the same figure in their testimony.

55. *Id.* at 645.

56. *See also* D'Souza, *supra* note 48.

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

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

59. *See, e.g.*, *The International Anti-Bribery and Fair Competition Act of 1998 Hearing Before the Finance and Hazardous Materials Subcomm. 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).

60. *Id.* at 11 (statement of Paul V. Gerlach, Assoc. Dir., Div. of Enforcement, Sec. & Exch. Comm'n).

61. 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].

62. *Id.*

63. *1998 House Finance Hearing*, *supra* note 59, at 6 (statement of Andrew J. Pincus, General Counsel to the U.S. Dep't of Commerce).

The argument proved persuasive and the U.S. joined the OECD Convention.

But the empirical studies merely confirm what common sense would teach: if we increase the costs of conducting business through the FCPA, we will tend to do less business in corrupt countries. 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, "Amid Confusion About Anti-corruption Laws, Companies Abandon Expansion Initiatives," found that 51% of companies had delayed a business initiative as a result of the FCPA and 14% had abandoned an initiative altogether.[64] 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." Approximately 30% of the respondents indicated that they deal with this risk by not doing business in certain countries.[65]

This capital withdrawal, and other countries' exploitation of it, recently reappeared in congressional testimony. During the June 2011 hearing on amending the FCPA, attorney 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.[66]

64. *See* Press Release, Dow Jones Risk & Compliance, Dow Jones Survey: Amid confusion about Anti-corruption Laws, Companies Abandon Expansion Initiatives (Dec. 9, 2009), *available at* http://fis.dowjones.com/risk/09survey.html (last visited Aug. 25, 2014).

65. 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)).

66. *Testimony of George J. Terwilliger III, Esq., Partner, White & Case LLP before the House*

We have a name for this dynamic, and that name is not flattering. The label we generally attach to the government-induced withdrawal of capital from developing countries in protest of their political conditions is "economic sanctions." The broader project of which this paper is a part analyzes the "sanctioning effect" of anti-bribery law.[67] Economic sanctions literature teaches that when some part of the world sanctions a given country, a capital void is created. Because the sanctioned country still needs that capital (i.e., FDI) 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.[68]

Anti-corruption law is today creating a similar sanctioning effect, as the empirical evidence above concerning "ownership substitution" and the survey data both demonstrate. The principal black knight in the anti-bribery space is China—a country with ample capital, an aggressive foreign and economic policy, and a near-complete absence of extraterritorial anti-corruption enforcement.[69] When companies subject to U.S. jurisdiction find the risk of a bribery violation too high, and they withdraw from a project, or a sector, or a country, and the resulting FDI void is frequently filled by Chinese or other "black knight" 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 committing bribery less often, the overall amount of bribery occurring in developing countries can actually increase. Although the proliferation of FCPA compliance practices among U.S. law firms suggests the FCPA has deterred bribery among companies subject to its jurisdiction,[70] it has simultaneously done something else altogether: it has created the very conditions in which corruption proliferates.

But we can fix this problem, as the next Part begins to describe.

Judiciary Committee Subcommittee on Crime, Terrorism, and Homeland Security Hearing on The Foreign Corrupt Practices Act, WHITE & CASE, LLP., *available at* http://www.whitecase.com/files/Publication/c6278e72-532d-4e06-9560-399f13e044e2/Presentation/PublicationAttachment/5c656213-2a02-4bf0-ba94-42caf31a7218/alert_George_Terwilliger_Testify_FCPA_Reform.pdf.

67. *See* Spalding, *Irony of International Business Law*, *supra* note 17; Spalding, *Four Unchartered Corners*, *supra* note 18; Spalding, *Unwitting Sanctions*, *supra* note 17. Portions of Parts I.A. and I.B. have been adapted from material that previously appeared in one or more of those papers.

68. *See* Spalding, *Unwitting Sanctions*, *supra* note 17, at 397.

69. *See* Spalding, *Irony of International Business Law*, *supra* note 17, at 360–61.

70. Jordan Weissmann, *The Corruption Law That Scares the Bejeesus Out of Corporate America*, THE ATLANTIC (Apr. 25, 2012, 5:08 PM), http://www.theatlantic.com/business/archive/2012/04/the-corruption-law-that-scares-the-bejesus-out-of-corporate-america/256314/; *see also* Joe Palazzollo, *FCPA Inc.: The Business of Bribery*, WALL ST. J. (Oct. 2, 2012), http://online.wsj.com/news/articles/SB10000872396390443862604578028462294611352.

C. How a Rights Paradigm Resolves the Paradox

An alternative enforcement regime would focus on promoting liberal-democratic values and institutions through ethical commerce, just as those who testified before Congress originally imagined. Or, put another way, it would seek to actually improve the conditions of the citizens in countries where U.S. companies do business.

A new regime could accomplish this through an approach with two prongs, neither of which is currently practiced to a meaningful degree nor lies within the white-collar-crime paradigm. The first prong would involve preventing the black knights from filling the capital void left by withdrawing companies. To achieve this goal, the black knights must become subject to meaningfully enforced anti-bribery laws. While the FCPA's jurisdictional scope is indeed broad, it is also limited; true global enforcement requires the world's principal capital-exporting nations to adopt and enforce their own extraterritorial bribery prohibitions. If all multinational companies were subject to such laws, there would be no black knights, no ownership substitution, and FCPA enforcement would not cause foreign bribery to proliferate. The second prong would directly address the damage done by corporate bribery in the communities in which the bribery occurred. That is, our enforcement agencies could use FCPA enforcement to remedy the harms of large-scale corporate bribery and improve the political cultures and institutions in developing countries.

The seeds of a radical rethinking of anti-bribery policy lie in the Obama Administration's recent policy pronouncement. The 2010 National Security Strategy[71] outlines a set of ways to "Promote Democracy and Human Rights Abroad."[72] Among them is "Strengthening International Norms Against Corruption."[73] There, the President announced "that pervasive corruption is a violation of basic human rights."[74] The report explains 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 for promoting transparency in transactions within and between institutions.[75]

71. *See* OBAMA REPORT, *supra* note 15.
72. *Id.* at 37.
73. *Id.* at 38.
74. *Id.*
75. *Id.*

Though in hushed tones, the report in effect announces that as a matter of official policy, freedom from corruption is a new universal human right. The potential impact of this paradigm shift is vast. In the bribery context specifically, this is best illustrated in two case studies. The first, the 2008 Siemens case, is certainly the highest-profile enforcement action in FCPA history; the second, the now-pending Wal-Mart investigation, is likely to displace it.

Siemens' systematic bribery in multiple sectors across the developing world violated an assortment of widely-recognized human rights. But the government's filings are remarkably silent on the issue of overseas impact. These filings are instead written in what we might call the discourse of white-collar crime. Siemens, a Germany-based manufacturer of industrial and consumer products,[76] is the quintessential multinational corporation. After World War II had destroyed much of its business,[77] Siemens began building a multinational operation that now consists of over 1800 legal entities with 400,000 employees in 190 countries.[78] In 2001, it listed American Depository Shares on the New York Stock Exchange, thus becoming an "issuer" for purposes of the FCPA and triggering its jurisdiction.[79] Siemens may now regret that decision; it ultimately paid a total of $1.6 billion in fines, penalties, and disgorgement of profits, the largest settlement in FCPA history.[80] The SEC alleged that between 2001 and 2007 the conglomerate made at least 4200 payments, totaling over $1.4 billion, to bribe government officials around the world in return for business.[81]

As the government's pleadings described in detail, Siemens' bribery scheme would corrupt various sectors of society in numerous countries. Regarding infrastructure, arguably the most critical sector to a developing country's growth, Siemens and its subsidiaries paid Chinese officials $22 million to fraudulently obtain contracts for rail construction[82] and $25

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76. Siemens builds including locomotives, traffic control systems, and electrical power plants, as well as building control systems, medical equipment and electrical components. *See* Complaint at 3, Sec. & Exch. Comm'n v. Siemens Aktiengesellschaft, (D.D.C. 2008) (No. 08 Civ. 02167) [hereinafter "SEC Complaint"].

77. *Id.* at 8–9.

78. *Id.* at 3.

79. *Id.* at 4.

80. Press Release, Dep't of Justice, Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay $450 Million in Combined Criminal Fines (Dec. 15, 2008), *available at* http://www.justice.gov/opa/pr/2008/December/08-crm-1105.html [hereinafter "DOJ Press Release"].

81. SEC Complaint, *supra* note 76, at 2.

82. *Id.* at 16–17.

million to construct high-voltage transmission lines;[83] $17 million in Venezuela for more railway contracts;[84] $800,000 for the construction of traffic control systems in Russia;[85] $20 million in Israel for contracts to build and service power plants;[86] $2.6 million in connection with refinery projects in Mexico;[87] $5 million for a contract to install mobile telephone services in Bangladesh;"[88] and $12 million in connection with telecommunications in projects in Nigeria, where Siemens' bribery practices were allegedly "long-standing and systematic."[89] In the health care sector, Siemens paid $14 million in connection with the sale of medical equipment to state-owned hospitals;[90] $55 million in connection with the sales of medical equipment in Russia, routed through Dubai;[91] in Vietnam, a Siemens representative picked up an envelope with $183,000 left by a Hong Kong businessman in a Singapore hotel, flew to the Hanoi airport to pass on to another Siemens representative, and used it to bribe the Vietnamese Ministry of Health.[92]

But perhaps most egregious from a foreign policy perspective was Siemens' role in corrupting the U.N. Oil for Food Program. The program was designed to alleviate the suffering of Iraqi citizens caused by the economic sanctions imposed against the Hussein regime following the Gulf War.[93] The Hussein regime soon adopted a policy, enforced across the Iraqi ministries, to require suppliers to pay government officials a ten percent kickback on each contract.[94] Foreign suppliers were instructed to inflate their bids and purchase orders by ten percent, allowing the suppliers to collect the money from the UN escrow account and then redirect it to Hussein's officials.[95] The suppliers thus became middlemen, transferring money from the sale of crude oil back into the hands of the

83. *Id.* at 18.
84. *Id.* at 28–29.
85. *Id.* at 25–26.
86. *Id.* at 17–18.
87. *Id.* at 26.
88. *Id.* at 19.
89. *Id.* at 29.
90. *Id.* at 23.
91. *Id.* at 27.
92. *Id.* at 22–23.
93. Under the program, Iraq could sell its oil and deposit the proceeds in a UN-managed escrow account. Funds in the account would thus be used for the limited purpose of purchasing food, medicine, and infrastructure supplies. *See, e.g.*, Susan A. Notar, *The Oil-For-Food Program and the Need for Oversight Entities to Monitor UN Sanctions Regimes*, 101 AM. SOC'Y INT'L L. PROC. 163 (2007).
94. *Id.* at 165.
95. *Id.*

officials, and thereby directly undermining the UN-imposed sanctions regime and perpetuating Hussein's rule. Former Federal Reserve Chairman Paul Volcker would ultimately be asked to lead an independent UN-commissioned committee and found that the Hussein regime had collected $1.7 billion in bribes.[96] Operating through French, Turkish, and Middle East subsidiaries, Siemens paid kickbacks to the Hussein regime of approximately $1.7 million.[97] These bribes allowed the conglomerate to fraudulently obtain contracts that would yield approximately $38 million in profits.[98]

Siemens' bribes across the developing world thus variously compromised rights to medical care, to equality of access to public services, to self-determination, to political representation, and ultimately to the basic rule of law. But despite these manifest human rights implications, the way in which the SEC and DOJ ultimately characterized Siemens' misconduct made for a sharp and telling contrast. The settlement documents noted that Siemens created payment schemes that the "company's inadequate internal controls allowed to flourish."[99] Siemens used numerous "slush funds" and "off-books accounts maintained at unconsolidated entities."[100] Indeed, the "tone at the top" at Siemens was "inconsistent with an effective FCPA compliance program" and "created a corporate culture in which bribery was tolerated and even rewarded at the highest levels of the company."[101] The SEC's press release quoted an associate director of the Enforcement Division to say, "[t]he day is past when multi-national corporations could regard illicit payments to foreign officials as simply another cost of doing business."[102] Similarly, the SEC's litigation release notes that Siemens' Managing Board "was ineffective in implementing controls" and in meeting the "U.S. regulatory requirements that Siemens was subject to following its . . . listing on the New York Stock Exchange."[103] It further explained that "[f]alse invoices and

96. PAUL A. VOLCKER ET AL., INDEP. INQUIRY COMM. INTO THE UNITED NATIONS OIL-FOR-FOOD PROGRAMME, MANIPULATION OF THE OIL-FOR-FOOD PROGRAMME BY THE IRAQI REGIME (2005), *available at* http://www.iic-offp.org/documents/IIC%20Final%20Report%2027Oct2005.pdf.

97. SEC Complaint, *supra* note 76, at 29–31.

98. *Id.*

99. Press Release, Sec. & Exch. Comm'n, SEC Charges Siemens AG for Engaging in Worldwide Bribery (Dec. 15, 2008), *available at* http://www.sec.gov/news/press/2008/2008-294.htm.

100. *Id.*

101. *Id.*

102. *Id.*

103. Litigation Release 20829, Sec. & Exch. Comm'n, Sec. & Exch. Comm'n v. Siemens Aktiengesellschaft, Civil Action No. 08 CV 02167 (D.D.C.) (Dec. 15, 2008), *available at* http://www.sec.gov/litigation/ litreleases/2008/lr20829.htm.

payment documentation was created to make payments to business consultants under false [] agreements," and that "illicit payments were falsely recorded as expenses for management fees, consulting fees, supply contracts . . . and commissions."[104] The DOJ ultimately proclaimed that its enforcement efforts would "level the business playing field, making it . . . fair to those who seek to participate in it."[105]

This is the discourse of white-collar crime enforcement, not of human rights. The difference, and its inherent shortcomings, are apparent in two ways. First, the SEC and DOJ documents make virtually no mention of the damage done to these communities. Besides cursory uses of terms like "corruption," the legal claims are resolved without any evident regard for the resulting human rights abuses in Iraq, China, Russia, Venezuela, Vietnam, and the other countries encompassed by Siemens' bribery scheme. Second, the notion that FCPA enforcement "levels the playing field" makes a critical assumption about the conduct of the other "players" in international business: that they are not paying bribes. It assumes that the payment of bribes tips the playing field in favor of the bribe payor. But if its competitors are paying bribes, enforcement does not make the playing field "level." Quite the contrary: FCPA enforcement could only level the playing field if all companies were subject to its jurisdiction. The settlement documents thus fail to acknowledge what occurs in these markets when companies subject to FCPA jurisdiction begin to pull out, as the empirical evidence indicates. Our enforcement is oblivious to the human rights implications of anti-bribery law generally, and more specifically, of the sanctioning effect.

The Wal-Mart enforcement action provides perhaps an optimal opportunity to reset this paradigm. The issue exploded in the public consciousness in April 2012 with an extensive and detailed New York Times exposé.[106] Wal-Mart's internal investigation found evidence of tens of millions of dollars in bribes to Mexican officials that had been accounted for as "legal fees," paid through local middlemen known as "gestores."[107] The bribes allegedly enabled Wal-Mart to fraudulently obtain zoning and environmental approvals, eliminate fines, evade taxes,

104. *Id.*

105. DOJ Press Release, *supra* note 80.

106. David Barstow, *Vast Mexico Bribery Case Hushed Up by Wal-Mart After Top-Level Struggle*, N.Y. TIMES, Apr. 22, 2012, at A01. Wal-Mart had disclosed as early as December 2011 that it was subject to FCPA scrutiny. WAL-MART STORES, INC., FORM 10-Q, *available at* http://www.sec.gov/Archives/edgar/data/104169/000119312511335177/d233066d10q.htm (filed Dec. 8, 2011).

107. Barstow, *Mexico Bribery Case Hushed Up*, *supra* note 106.

and obtain confidential information.[108] Some bribes permitted Wal-Mart to fraudulently circumvent zoning restrictions and construct a new store immediately adjacent to the ancient pyramids of Teotihuacan, despite the hunger strikes and sit-ins of local community activists.[109] Wal-Mart would eventually promote the CEO of the Mexican subsidiary to vice-chairman of the parent company due to his "outstanding results" in Mexico.[110]

The case has and will continue to garner widespread attention because of the defendant: the quintessential U.S.-based multinational corporation with an aggressive growth strategy whose practices and tactics were already controversial. Indeed, more than half of Wal-Mart's roughly 10,500 stores are international; it is Mexico's largest private employer.[111] But the Wal-Mart case also tees up, more perfectly than this author could have dreamed, the larger issues of bribery's nature and impact across the developing world. In November 2012, Wal-Mart announced in an SEC filing that its bribery investigation had expanded to other countries, including but not limited to Brazil, India, and China.[112] The Wal-Mart case now presents arguably the most (in)famous U.S.-based multinational corporation investing in the world's flagship emerging markets and using bribery to circumvent key regulations designed to protect human rights to health and safety. When the eventual settlement thrusts this case back into the public consciousness, it will create a historic opportunity to reexamine the impact of anti-bribery enforcement on developing countries.

II. REFRAMING BRIBERY: FROM WHITE-COLLAR CRIME TO HUMAN RIGHTS

The Obama policy announcement was as cursory as it was bold; it made no effort to ground its assertion that corruption violates a human right in deeper rights theory. This Part will pick up where the President left off, by developing a philosophical justification for the principle that corruption is properly understood as a violation of basic human rights. To be clear, this Part will not argue that the right to be free from corruption is

108. *Id.*

109. David Barstow, *The Bribery Aisle: How Wal-Mart Used Payoffs to Get Its Way in Mexico*, N.Y. TIMES, Dec. 18, 2012, at A01.

110. Barstow, *Mexico Bribery Case Hushed Up*, *supra* note 106.

111. Stephanie Clifford & David Barstow, *Wal-Mart Takes a Broader Look at Bribery Cases*, N.Y. TIMES, Nov. 16, 2012, at A1.

112. WAL-MART STORES, INC. FORM 8-K, *available at* http://www.sec.gov/Archives/edgar/data/104169/000119312512471604/d440140d8k.htm (filed Nov. 15, 2012).

at present legally binding right under existing international covenants,[113] or customary international law[114] more broadly. Rather, it argues that irrespective of what international covenants and customs now require, anti-corruption laws generally and anti-bribery laws specifically should be enforced as if they implicated human rights.

Part II.A will first develop a definition of corruption that is suitable to the twenty-first century, an era in which bribery may be the quintessential form of anti-corruption enforcement. Part II.B will then draw on the political philosophy of John Locke to demonstrate that corruption, properly defined, is correctly understood as violating a right. Part II.C will then illustrate how a new rights-based paradigm for understanding corruption would transform our understanding of large-scale corporate bribery by considering two recent case studies.

A. Redefining Corruption for the Anti-Bribery Era

Three definitions, or approaches to defining corruption, now circulate in corruption law discussions: I will call them the United Nations approach, the World Bank approach, and the Black's Law Dictionary approach. Because none of these enables a sophisticated discussion of how corruption law operates today, I propose a new definition.

The study of corruption is multidisciplinary, and various disciplines have produced their definitions, each viewing the phenomenon through its

113. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 2, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter "UDHR"]; International Covenant on Civil and Political Rights, art. 9, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171 [hereinafter "ICCPR"].

114. The Statute of the International Court of Justice defines international custom as "a general practice accepted as law," thus having two elements: 1) a general practice (meaning that most states, (including those whose interests are specially affected, should follow the practice); that is 2) accepted as law. *See* Charter of the United Nations, June 16, 1945, 59 Stat. 1031 [hereinafter "U.N. Charter"]; Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 933 [hereinafter "I.C.J. Statute"]. The second prong is easily satisfied; virtually every jurisdiction prohibits bribery, embezzlement, and various other forms of corruption. The critical question for a customary international law analysis is whether that legal prohibition is satisfied by a general practice. To the extent that this practice would consist of active enforcement, the first prong would almost certainly not be satisfied; most of the world, especially the developing countries that would be "specially affected" by international corruption law, devotes egregiously insufficient resources to anti-corruption enforcement. But satisfying both prongs still would not demonstrate that corruption as a right is customary international law and that states thus have a duty to treat corruption as rights violations. *See* U.N. Charter, *supra*; I.C.J. Statute, *supra*. *See also* STEPHEN C. MCCAFFREY, UNDERSTANDING INTERNATIONAL LAW 45–46 (2006). For a discussion of whether bribery could constitute a violation under the ATS, see Matt A. Vega, *Balancing Judicial Cognizance and Caution: Whether Transnational Corporations are Liable for Foreign Bribery Under the Alien Tort Statute*, 31 MICH. J. INT'L L. 385 (2010).

own lens.[115] Political scientists see corruption in the abuse of state power resulting from the absence of checks.[116] Economists see corruption when the benefit of acting contrary to duty outweighs the cost, where public goods are sold for personal gain, or where public officials use their monopoly to exploit economic rents.[117] Sociologists will sometimes see corruption as an absence of socially accepted norms, occurring in countries where historical and socio-cultural conflict has resulted from conflicting values within social groups.[118]

When searching for a proper legal definition, we must first clarify that our focus must be on the noun, "corruption," and not "corrupt" or "corruptly"; this has proven to be far more than a grammatical distinction. The adjective and adverb are indeed central features of criminal law, generally describing an intent; case in point, corrupt intent is an element of the Foreign Corrupt Practices Act.[119] And generally (though not in the FCPA), courts have paid substantial attention to defining intent, typically through reference to an evil purpose.[120] The corruption at issue in this Article, rather, is a more specific subset of criminal activity. Defining that subset—legally proscribed acts that we would generally think of as belonging in the category of "corruption"—is the task at hand.

Though I call the first definition the "United Nations approach," it might also be called the "Justice Potter Stewart approach." His infamous non-definition of obscenity—"I know it when I see it"[121]—may apply just as well to corruption. And ironically (or not), this is precisely the approach taken by what is probably the most widely-cited corruption document in

115. For an excellent survey of various disciplines' approaches, see Ibrahim F.I. Shihata, *Corruption—A General Review with an Emphasis on the Role of the World Bank*, 15 DICK. J. INT'L L. 451, 453–58 (1997).

116. *See, e.g.*, SUSAN ROSE-ACKERMAN, CORRUPTION: A STUDY IN POLITICAL ECONOMY 9 (1978); SUSAN ROSE-ACKERMAN, CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES, AND REFORM (1999); Michael Johnston, *The Political Consequences of Corruption: A Reassessment*, 18 COMP. POL. 459, 464 (1986).

117. *See, e.g.*, ROBERT KLITGAARD, CONTROLLING CORRUPTION 22 (1988); Andrei Shleifer & Robert W. Vishny, *Corruption*, 108 Q. J. ECON. 599, 599 (1993); Moisés Naím, *The Corruption Eruption*, 2 BROWN J. WORLD AFF. 245, 248 (1995).

118. *See, e.g.*, Shihata, *supra* note 115, at 456–57. *See generally* Vito Tanzi, *Corruption, Governmental Activities, and Markets* (Int'l Monetary Fund, IMF Working Paper No. 94/99, 1994), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=883840; James C. Scott, *The Analysis of Corruption in Developing Nations*, in BUREAUCRATIC CORRUPTION IN SUB-SAHARAN AFRICA: TOWARD A SEARCH FOR CAUSES AND CONSEQUENCES (Monday U. Epko ed., 1979).

119. Foreign Corrupt Practices Act of 1977,15 U.S.C. §§ 78dd-1(a), -2(a), -3(a) (2012).

120. *See* U.S. v. Strand, 574 F.2d 993, 996 (9th Cir. 1978); United States v. Dorri, 15 F.3d 888, 894 (9th Cir. 1994).

121. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (J., Stewart, concurring).

the world, the United Nations Convention Against Corruption.[122] Though the Convention uses the term in its title, and enumerates various specific forms of corruption (bribery, embezzlement, trading in influence, etc.), nowhere within the document is a definition for the term. Thus, this approach essentially punts on the definitional problem, avoiding it altogether.

Of the substantive legal definitions now in circulation, the most common is what I will call the "World Bank definition": "the abuse of public office for private gain," or minor variations thereon. The World Bank has formally adopted or, to use its term, "settled" on this definition.[123] Minor variants of the definition, such as the illegal use of public resources for personal gain,[124] appear in other World Bank publications.[125] Transparency International, the world's leading anti-corruption NGO,[126] has similarly adopted "the abuse of entrusted power for private gain."[127] The United States Agency for International Development has in turn adopted a variation: "the abuse of entrusted authority for private gain."[128] This slightly broader definition encompasses private-sector corruption, such as bank fraud, in addition to the more familiar public-sector corruption.[129]

Tracing the World Bank definition's intellectual heritage reveals its inherent limitations. In the wake of Watergate, political scientists sought to broaden the definition of corruption to encompass various forms of

122. United Nations Convention Against Corruption, G.A. Res. 58/4, U.N. Doc. A/58/4 (Oct. 31, 2003), *reprinted in* 43 I.L.M. 37 (2004) [hereinafter UNCAC].

123. THE WORLD BANK GROUP, HELPING COUNTRIES COMBAT CORRUPTION: THE ROLE OF THE WORLD BANK 8 (1997), *available at* http://www1.worldbank.org/publicsector/anticorrupt/corruptn/corrptn.pdf [hereinafter WORLD BANK REPORT].

124. *Id.* at 19.

125. The Bank considered and rejected other, more narrow definitions, such as Susan Rose-Ackerman's "an illegal payment to a public agent to obtain a benefit that may or may not be deserved in the absence of payoffs" or Shleifer and Vishny's "the sale by government officials of government property for personal gain." *See id.* at 19–20 n.1 (citing ROSE-ACKERMAN, CORRUPTION: A STUDY IN POLITICAL ECONOMY, *supra* note 116; Andre Shleifer & Robert Vishny, *Corruption*, 108 Q. J. ECON. 599 (1993)).

126. Transparency International is an international NGO that "work[s] with partners in government, business and civil society to put effective measures in place to tackle corruption." *See Who We Are: Our Organisation*, TRANSPARENCY INT'L, http://www.transparency.org/whoweare/organization (last visited Apr. 21, 2014).

127. INT'L COUNCIL ON HUMAN RIGHTS POLICY & TRANSPARENCY INT'L, CORRUPTION AND HUMAN RIGHTS: MAKING THE CONNECTION 16 (2009), *available at* http://www.ichrp.org/files/reports/40/131_web.pdf [hereinafter MAKING THE CONNECTION].

128. U.S. AGENCY FOR INT'L DEV., AN ANTICORRUPTION READER: SUPPLEMENTAL SOURCES ON TRANSPARENCY, ACCOUNTABILITY, PREVENTION, ENFORCEMENT & EDUCATION 14 (2005), *available at* http://pdf.usaid.gov/pdf_docs/PNADF530.pdf [hereinafter USAID REPORT].

129. *Id.*

illicit behavior that the Watergate investigation exposed.[130] The effort to develop a more inclusive definition gave rise to remarkably broad definitions. One group of scholars produced: "the misuse of authority as a result of considerations of personal gain, which need not be monetary."[131] Another scholar of this era defined corruption as "all illegal or unethical use of governmental authority as a result of considerations of personal or political gain."[132] Notably, these definitions are roughly contemporaneous with another fruit of the Watergate investigations, the Foreign Corrupt Practices Act itself.[133]

But scholars immediately criticized the newly-broadened definition for "sacrific[ing] clarity to brevity."[134] Political scientists argued that

> the looseness of contemporary definitions provides infinite scope for argument. . . . [T]he danger here seems to be that clarity and consistency in analysis may have been sacrificed for comprehensiveness.
>
> . . . .
>
> The fundamental weakness of the recent literature on corruption lies in the use of vague criteria and inappropriate perspectives which distort, exaggerate or otherwise over-simplify explanations of corruption . . . .[135]

Though the broader World Bank definition's appeal is that it encompasses more than bribery (extortion, embezzlement, trading in influence, etc.), it includes far too much to be of use. Specifically, it encompasses conduct that, while controversial and perhaps distasteful, is not generally thought to be the kind of corruption that the law can or should proscribe. Consider the elected official who changes her position to win the support of a targeted voting demographic, or votes against her conscience to placate a donor. These may well constitute the abuse of

130. Arnold J. Heidenheimer, *Terms, Concepts, and Definitions*, *in* PUBLIC SECTOR CORRUPTION: CONCEPTS & CONTEXTS 112 (Michael Johnston ed., 2010).

131. *Id.* at 114 (quoting this idea without citation).

132. *Id.* at 113 (quoting GEORGE C.S. BENSON, POLITICAL CORRUPTION IN AMERICA xiii (1978)). *See also* Carl J. Friedrich, *Political Pathology*, 37 POL. Q. 70, 74 (1966) ("deviant behavior associated with a particular motivation, namely that of private gain at public expense.").

133. *See, e.g.*, U.S. DEP'T OF JUSTICE & U.S. SEC. & EXCH. COMM'N., A RESOURCE GUIDE TO THE FOREIGN CORRUPT PRACTICES ACT 3 (2012), *available at* http://www.justice.gov/criminal/fraud/fcpa/guide.pdf.

134. Heidenheimer, *supra* note 130, at 111 (quoting ARNOLD J. HEIDENHEIMER & MICHAEL JOHNSTON, POLITICAL CORRUPTION: A HANDBOOK 3 (1989)).

135. Robert J. Williams, *Political Corruption in the United States*, 29 POL. STUD. 126–29 (1981).

public office for public gain, and may elicit criticism. But, for better or for worse, they are extraordinarily common even in societies not generally thought to be relatively corrupt, and are not objects of the anti-corruption movement. We live with them, resigned as we may be to human and institutional imperfection, and are not especially eager to criminalize them. So while the World Bank definition may serve the broader anti-corruption effort, it is not particularly useful for legal purposes.

A more precise, but still inadequate, legal definition comes from Black's Law Dictionary. When not focusing specifically on the personal moral corrupt intent of criminal law, Black's defines corruption as "a fiduciary's or official's use of a station or office to procure some benefit either personally or for someone else, contrary to the rights of others."[136] This definition has gained some traction in federal case law on the domestic bribery statute,[137] and is sometimes mentioned tangentially in relation to corrupt motive criminal litigation.[138] But the definition does not appear to have been formulated by courts. Black's cites a series of late-nineteenth century cases, but none actually uses the definition.[139] Other legal dictionaries from the early twentieth century cited variations thereof.[140] More recent cases will cite the definition, but none claims credit for developing it; each will cite to it as Black's.[141] To adopt Judge Friendly's characterization of the ATS, the Black's definition is a bit of a "legal Lohengrin"—no one knows whence it came.[142] The definition may well be the product not of courts or legislatures, but of dictionary editors.

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136. BLACK'S LAW DICTIONARY (9th ed. 2009).

137. *See* United States v. Rooney, 37 F.3d 847, 852 (2d Cir. 1994); United States v. Revis, 22 F. Supp. 2d 1242, 1250 (N.D. Okla. 1998).

138. *See, e.g.*, United States v. Ogle, 613 F.2d 233, 238 (10th Cir. 1979); United States v. Aguilar, 515 U.S. 593, 597 (1995).

139. Wight v. Rindskopf, 43 Wis. 344, 347–48, 351 (1877) ("When an act is of such a nature that a payment to the person by whom it is to be done would be at variance with good morals and the best interests of society, a promise to pay another for inducing him to do it by secret and undue solicitation, as distinguished form fair and open advocacy, will be deemed contrary to public policy, as giving occasion for fraud and corruption. . . . Corruption is a hard word, not always accurately understood; covering a multitude of official delinquencies, great and little. But it is strictly accurate to apply it to any color of influence, of mere relation of any kind, on the administration of justice."). *See also* Worsham v. Murchison, 66 Ga. 715 (1881); United States v. Edwards, 43 F. 67 (S.D. Ala. 1890); State v. Ragsdale, 59 Mo. App. 590 (1984).

140. *See* WALTER A. SHUMAKER & GEORGE FOSTER LONGSDORF, THE CYCLOPEDIC DICTIONARY OF LAW WITH AN EXHAUSTIVE COLLECTION OF LEGAL MAXIMS 210 (1901); BALLANTINE'S LAW DICTIONARY 276 (3d ed. 1969). *See also* "*Corruption*"*: Legal Definition*, DUHAIME.ORG, http://www.duhaime.org/LegalDictionary/C/Corruption.aspx (last visited Aug. 21, 2013).

141. *See, e.g.*, United States v. Evans, 572 F.2d 455, 480 (5th Cir. 1978).

142. IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975), *abrogated on other grounds by* Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869 (2010).

However well it may have encompassed the principal forms of legally proscribed corruption in days of old, the advent of the modern anti-bribery regime renders this definition antiquated. To understand the limitations of this definition, consider a scenario in which a sole proprietorship successfully bribes a foreign official for business purposes. By Black's definition, the public official has indeed engaged in corruption; she has used her office to procure some benefit for herself that is contrary to the rights of others. But has the bribe payor, the sole proprietor, engaged in corruption? Black's provides two categories of perpetrators: officials and fiduciaries. The sole proprietor is neither: he is not the official, and because he is not in an agent-principal relationship, he is not a fiduciary. Accordingly, by Black's definition, our sole proprietor has not engaged in corruption; he has merely induced, or aided and abetted, corruption.

This definition is thus inconsistent with our modern sense of the word. Nearly all would agree that the FCPA, for example, prohibits a specific form of corruption—namely, bribery. And the FCPA criminalizes the offering, but not the receipt, of a bribe.[143] Few would accept that bribery merely targets inducements or aids to corruption; we would agree that the bribe is itself an act of corruption.

Indeed, two recently enacted legal documents reflect this contemporary sense of the word, and in so doing tacitly refute Black's. Perhaps most telling is the definition of corruption implicit in the OECD Convention on Combating Bribery.[144] Unlike UNCAC, the OECD Convention concerns bribery specifically, and not the more general phenomenon of corruption and its various manifestations. However, the Convention's first endnote, or "commentary," explains that the Convention deals with "active bribery," which is the payment or offering of a bribe by a private actor to a foreign official (also known as supply-side bribery).[145] But the note goes on to explain that active bribery is also often referred to in various countries as "active corruption."[146] Note that corruption, by this contemporary definition, extends to the offering or payment of a bribe by a private actor.

Similarly, the U.K. recently enacted a Bribery Law that aimed to bring its antiquated corruption laws into conformity with the modern standards

143. Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78dd-1(a)), -2(a), -3(a) (2012).

144. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Nov. 21, 1997, S. Treaty Doc. No. 105-43, *available at* http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf.

145. *Id.* at 14, para. 1.

146. *Id.*

reflected in the OECD Convention or the FCPA.[147] The parliamentary reports explain that since enacting the Prevention of Corruption Act in 1906, U.K. law defined corruption to require an agent/principal relationship; absent this relationship, an act may well be improper but was not, strictly speaking, a legally recognized form of corruption.[148] After years of consideration, Parliament elected to drop this requirement, stating that it wished to "avoid the need for an agent to betray a principal as in [past] legislation. The offence [of bribery] would be committed by someone who offers an advantage to another as a reward for breaching a trust, or breaching a duty to act impartially . . . ."[149] Both the OECD and the U.K., then, have abandoned the notion that a private actor engages in corruption only insofar as she breaches a fiduciary duty.

The anticipated defense of Black's proves unpersuasive on several counts. The defense would be that for most commercial entities, the bribe payor will be an agent acting on behalf of its principal, the entity. Because committing an illegal act constitutes a violation of fiduciary duty, the bribe payor has now fallen within Black's definition. But this explanation suffers from three distinct problems. First, by this logic the bribe payment constitutes corruption only because the law prohibits the bribe; prior to enactment of the FCPA, the act was not illegal and the fiduciary therefore did not violate a duty. But we do not deem bribery corrupt because it is illegal; we have made it illegal because it is corrupt. As the legislative history shows, congressional debates focused on the question of whether to prohibit this form of corruption, not whether we should consider the conduct corrupt. Black's definition, which precedes these debates by decades, does not capture our more modern sense.

The second reason Black's definition fails is that it does not capture our sense of who the victims of bribery truly are. The victim of a breach of fiduciary duty is the principal—the company, its shareholders. Although shareholders are among the victims of FCPA violations, as evidenced by contemporary shareholder suits, once again this is true only because we have made bribery illegal. But bribery had its victims long before the FCPA was enacted, and we enacted it in very large part to protect those victims. Commentators have generally acknowledged that overseas

147. Bribery Act, 2010, ch. 23 (U.K.).

148. Prevention of Corruption Act, 1906, 6 Edw. 7, ch. 34, § 1 (U.K.). *See also Joint Committee on the Draft Corruption Bill*, Report 2002-3, H.L., H.C., HL Paper 157, HC 705, para. 3 (U.K.), *available at* http://www.publications.parliament.uk/pa/jt200203/jtselect/jtcorr/157/15702.htm.

149. *See* House of Commons Library, Bribery Bill [HL], Bill No 69 § 2.3 (H.C. Research Paper 10/19, 2010) (U.K), *available at* http://www.parliament.uk/documents/commons/lib/research/rp2010/rp10-019.pdf.

corporate bribery has two kinds of victims: the citizens of corrupt regimes, whose regulations are circumvented and whose safety and prosperity are thereby jeopardized,[150] and the companies who comply with anti-bribery norms only to lose business to noncompliant companies.[151] Defining the victims of bribery in this way, Black's definition fails to capture that the payor has done anything harmful.

To divine the third reason for the failure of Black's, consider who has engaged in the wrongful conduct under its definition, and consequently who is liable. Officials and fiduciaries evidently bear liability for violations under the definition—they are the only ones who have violated a duty. But in the vast majority of settled FCPA cases, the defendant is neither an official nor a fiduciary; it is a corporation. Because Black's definition tacitly limits private-actor liability to fiduciaries, a corporation, much like a sole proprietor, cannot be liable. This plainly contradicts our contemporary sense of corruption.

Accordingly, I want to propose a new definition of corruption, one that corrects each of the deficiencies in Black's. That definition is:

> "Conduct by a public or private actor that is intended to procure some benefit, either personally or for someone else, the granting of which would contravene official or fiduciary duty and the rights of others."

By this definition, any private individual, whether natural or juridical, may engage in corruption. Such private conduct is not narrowly tied to fiduciary duty: although the granting of the benefit may be wrong by virtue of a fiduciary breach, the bribe payor need not violate a fiduciary duty, or even be a fiduciary, to engage in corruption. The granting of the benefit must violate either an official or fiduciary duty: officials are prohibited from accepting bribes in virtually every jurisdiction in the world; and the definition includes fiduciaries to encompass private-sector forms of corruption. Accordingly, by this definition, a company that bribes

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150. Philip Segal, *Coming Clean on Dirty Dealing: Time for a Fact-Based Evaluation of the Foreign Corrupt Practices Act*, 18 FLA. J. INT'L L. 169, 172 (2006); Bill Shaw, *The Foreign Corrupt Practices Act and Progeny: Morally Unassailable*, 33 CORNELL INT'L L.J. 689, 691–94 (2000).

151. *See* Kenneth W. Abbott & Duncan Snidal, *Values and Interest: International Legalization in the Fight Against Corruption*, 31 J. LEGAL STUD. S141, S167 (2002); David A. Gantz, *Globalizing Sanctions Against Foreign Bribery: The Emergence of a New International Legal Consensus*, 18 NW. J. INT'L L. & BUS. 457, 461 (1998); Jacqueline L. Bonneau, Note, *Combating Foreign Bribery: Legislative Reform in the United Kingdom and Prospects for Increased Global Enforcement*, 49 COLUM. J. TRANSNAT'L L. 365, 367–68 (2011). *See also Corruption Data*, TRANSPARENCY INT'L U.K., http://www.transparency.org.uk/corruption-data (last visited Feb. 27, 2011).

an overseas official for business purposes has engaged in an act of corruption.

This definition not only captures our modern sense of the word, but as the next Part shows, it also captures our philosophical legacy.

B. Rediscovering Corruption as a Violation of Natural Rights

Rooting a theory of international human rights in a particular philosophical tradition proves culturally sensitive, but necessary. As the United Nations went to work drafting the 1948 Universal of Declaration of Human Rights—the first document purporting to make a statement of universal human rights with the support of nearly all nations of the world—it solicited contributions from thinkers of various cultural and philosophical traditions: American, European, Chinese, Indian, Middle Eastern, and others.[152] The committee was astonished to find that despite the radically divergent philosophical underpinnings, the core principles were present in many cultural and religious traditions.[153] The subgroup charged with drafting the document, the U.N. Educational, Scientific and Cultural Organization (UNESCO), would come to believe that peoples could agree on what rights were, even if they could not agree on the proper philosophical justification for them. As one UNESCO drafter reportedly quipped, "we agree about the rights but on condition no one asks us why."[154]

Louis Henkin would similarly write that in the modern era, "[t]he justification of human rights is rhetorical, not philosophical" and that the idea of human rights "does not ground or justify itself . . . in any . . . political theory."[155] But be that as it may, this Article is disinclined toward rhetorical exercises; it seeks a deeper philosophical foundation for the rights claim, even if it requires making the somewhat unfashionable choice of a particular philosophical tradition.

With some embarrassment, we should probably concede that cultural preferences are at present built into anti-bribery enforcement itself. Though corruption prohibitions are increasingly garnering universal support, it is a regrettable truth that the vast majority of enforcement activity now occurs in what might loosely be deemed the Anglo-Saxon

152. *See* MARY ANN GLENDON, A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS 73 (2001).

153. *Id.* at 76.

154. *Id.* at 77.

155. LOUIS HENKIN, THE AGE OF RIGHTS 2 (1990).

world. The U.S. has taken the lead in enforcement, which is why most of this Article concerns the U.S. statute. The second most newsworthy enforcement jurisdiction today is probably the U.K., which passed a new statute in 2010 with which MNCs around the world are now struggling to comply. A distant third (and indeed, a distant relative of the modern Anglo-Saxon world) might be Germany, which has worked with the U.S. to bring significant fines against corporate bribe-payors.[156]

Accordingly, I base this Article's rights argument in the Anglo-Saxon philosophical tradition, particularly the foundational rights philosophy of John Locke. As a British philosopher whose ideas provided the foundation for the later U.S. revolution against Britain, Locke's thinking has exerted the dominant intellectual influence on thinking about rights. And natural law theory, tracing its origins to Locke, is again the topic of a vibrant intellectual debate within the legal academy, engaged in by such luminaries as Randy Barnett, Richard Epstein, and Jeremy Waldron.[157]

Though Locke did not use the term, the concept as herein defined—conduct by a public or private actor that is intended to procure some benefit, either personally or for someone else, the granting of which would contravene official or fiduciary duty and the rights of others—pervaded his rights theory. Locke holds that we can discern the function of government by first reflecting on what the human condition is or would be in its absence. Locke posits a natural condition of "freedom to order their actions, and dispose of their possessions and persons as they think fit, within the bounds of the law of Nature."[158] In this condition of natural freedom, we also live in a state of "equality, wherein all the power and jurisdiction is reciprocal, no one having more than another."[159] Each being free and equal, with none possessing a greater jurisdiction than another, the enforcement of the law is "put into every man's hands, whereby every one has a right to punish the transgressors of that law to such a degree as may hinder its violation."[160] Although humans thus have a natural right to

156. Gesetz zur Bekämpfung der Korruption [Anti-Corruption Act], August 19, 1997, BGBl. I at 2038.

157. *See, e.g.*, Randy E. Barnett, *The Imperative of Natural Rights in Today's World* (Boston Univ. Sch. of Law, Working Paper Series, Public Law & Legal Theory, Working Paper No. 03-20, 2003); Richard Epstein, *The Natural Law Bridge Between Private Law and Public International Law*, 13 CHI. J. INT'L L. 47 (2012); Jeremy Waldron, *What is Natural Law Like?* (NYU Sch. of Law, Research Paper No. 12-27, 2012); Jeremy Waldron, *The Decline of the Natural Right* (NYU Sch. of Law, Research Paper No. 09-38, 2009).

158. JOHN LOCKE, THE SECOND TREATISE ON CIVIL GOVERNMENT 8 (Prometheus Books ed. 1986).

159. *Id.*

160. *Id.* at 10.

liberty and equality, we would not yet speak of a right to be free of corruption. Corruption as defined above could not occur; because there is no government in the state of nature, there are no official duties and thus no granting of benefits in contravention of those duties.

But natural liberty and natural equality turn out to be rather incompatible, as the latter ruins the former. Experience teaches that "it is unreasonable for men to be judges in their own cases, that self-love will make men partial to themselves and their friends; and, on the other side, ill-nature, passion, and revenge will carry them too far in punishing others, and hence nothing but confusion and disorder will follow."[161] In seeking to protect our own rights under color of enforcing the law of nature, we tend to encroach upon the rights of others. What is lacking in the state of nature is a "common measure to decide all controversies," "a known and indifferent" source of power.[162] The precariousness of our natural freedom induces us to establish a government, the defining purpose of which is to "be the remedy of those evils which necessarily follow from men being judges in their own cases."[163]

At this moment, having established a government that preserves the freedom that in nature is violated, civil society begins.

> Those who are united into one body, and have a common established law and judicature to appeal to, with authority to decide controversies between them . . . are in civil society one with another; but those who have no such common appeal . . . are still in the state of Nature.[164]

The difference between civil society and the state of nature is the existence of a government that is "bound to govern by established standing laws, promulgated and known by the people, and not by extemporary decrees."[165] And this government, thus constituted, must be "directed to no other end than the peace, safety, and public good of the people."[166] Indeed, the very definition of legitimate political power is the "right of making laws, with penalties of death and all less penalties . . . only for the public good."[167]

161. *Id.* at 13.
162. *Id.* at 70.
163. *Id.* at 13.
164. *Id.* at 49.
165. *Id.* at 72.
166. *Id.*
167. *Id.* at 8.

Civil society, instituted by creating a government, thus makes possible a freedom that could not exist in the state of nature. This conclusion is ironic, given Locke's strong claim of natural freedom. But the irony is not lost on Locke, and he responds:

> If man in the state of Nature be so free . . . why will he part with his freedom . . . and subject himself to the dominion and control of any other power? To which it is obvious to answer, that though in the state of Nature he hath such a right, yet the enjoyment of it is very uncertain and constantly exposed to the invasion of others . . . the enjoyment of his property is very unsafe, very insecure . . . full of fears and continual dangers.[168]

Locke fully recognizes that though freedom exists in nature, full freedom is only realized in civil society: "the end of law is not to abolish or restrain, but to preserve and enlarge freedom."[169] Put another way, "[f]or in all the states of created beings, capable of laws, where there is no law there is no freedom. For liberty is to be free from restraint and violence from others, which cannot be where there is no law."[170] Liberty, to which we are entitled by nature, can therefore only exist under a properly constituted government.

To the extent that the government rules by standing laws, known by and promulgated to the people and directed to the public good, our natural right to liberty is protected and enjoyed. To the extent that the government rules otherwise, the right is violated or, to use Locke's term, "invaded." Thus he writes, "[t]he liberty of man in society is to be under no other legislative power but that established by consent in the commonwealth, nor under the dominion of any will, or restraint of any law, but what that legislative shall enact according to the trust put in it."[171] And freedom, by definition, is "to have a standing rule to live by, common to every one of that society, and made by the legislative power . . . not to be subject to the inconstant, uncertain, unknown, arbitrary will of another man."[172]

At this point the relationship between natural rights and corruption becomes clear. Locke's freedom, though natural, can only exist where government confers benefits in accordance with the official duty to govern by standing rules directed to the common good. The natural right to liberty

168. *Id.* at 69.
169. *Id.* at 33.
170. *Id.*
171. *Id.* at 17.
172. *Id.*

is thus violated when officials confer benefits in contravention of standing law, official duty, and the public good. Note the striking similarity between this basic and uncontroversial Lockean reading, and this Article's definition of corruption: "Conduct by a public or private actor that is intended to procure some benefit, either personally or for someone else, the granting of which would contravene official or fiduciary duty and the rights of others." Official conduct that procures a benefit in violation of official duty, and contrary to the rights of others, is but another way of describing the failure to govern by standing laws directed to the public good. Where the government has ceased to rule by standing laws without preference, where benefits are granted contrary to official duty and the rights of others, citizens "have no such decisive power to appeal to, [and] they are still in the state of Nature."[173] Corruption thus voids the social contract, destroys government, and returns society to a state of nature. Indeed, when Locke defines tyranny as "making use of the power any one has in his hands not for the good of those who are under it, but for his own private, separate advantage,"[174] he is describing corruption by a different name.

C. *Rejecting the Modern View of Corruption as Merely a Means of Violating Rights*

The Lockean philosophy of natural rights temporarily fell out of fashion with the end of the Enlightenment, displaced by the utilitarianism of Jeremy Bentham[175] and John Stuart Mill.[176] Nations, particularly the United States, came to embrace utilitarianism as philosophical justification for the rise of the welfare state,[177] and by the early twentieth century rights talk had substantially receded. However, this would change in dramatic fashion with World War II and the Holocaust, which reignited interest in the proposition that irrespective of aggregate happiness, there are some things that governments simply may not do.

Though the more pluralistic intellectual climate would favor the less sectarian philosophy of Immanuel Kant,[178] Lockean themes are still

173. *Id.* at 50.

174. *Id.* at 108. *See also id.* at 109 ("Wherever law ends, tyranny begins, if the law be transgressed to another's harm.").

175. *See, e.g.*, JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (1789).

176. *See, e.g.*, JOHN STUART MILL, UTILITARIANISM (1863).

177. HENKIN, *supra* note 155, at 5.

178. *See, e.g.*, IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS (1785).

evident in the 1948 Universal Declaration of Human Rights. Article 3 provides that "[e]veryone has the right to life, liberty and security of person."[179] Article 10 provides that "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations . . . ."[180] Government is, of course, to be neutral; the Declaration affirms the right not to be subject to what Locke called "the inconstant, uncertain, unknown, arbitrary will of another man."[181] Article 29 provides that

> In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.[182]

This is but a restatement of the Lockean right to be subject to no restraint save that which a duly constituted government has established for the public good. And of course, these claims to rights are universal, as Article 28 provides that "[e]veryone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized."[183]

The Declaration thus contemplates an international order in which relations between nations further protect these rights. Though the Declaration does not use the word "corruption," the concept is there by another name. In reacting against tyranny it defines legitimate government, and in so doing articulates those themes that the above analysis shows are fundamentally about corruption.

Despite this modern invocation of anti-corruption themes, contemporary anti-corruption writings have not yet embraced the principle that corruption is an inherent rights violation, asserting instead that corruption is merely the means of violating rights. The leading anti-corruption NGO, Transparency International, teamed with the International Council on Human Rights Policy to author what is perhaps the defining modern work on the relationship between corruption and rights. In *Corruption and Human Rights: Making the Connection*,[184] they

179. UDHR, *supra* note 113, art. 3.
180. *Id.* art. 10.
181. *See supra* text accompanying note 172.
182. UDHR, *supra* note 113, art. 29.
183. *Id.* art. 28.
184. MAKING THE CONNECTION, *supra* note 127.

argue that "the cycle of corruption facilitates, perpetuates and institutionalises [sic] human rights violations."[185] Acknowledging the possibility of framing corruption as an inherent violation, the document instead "takes a different approach" by applying "human rights principles and methods usefully in anti-corruption programmes."[186] They acknowledge that "where corruption is widespread, states cannot comply with their human rights obligations,"[187] but ultimately find that the most direct connection between corruption and human rights exists where "a corrupt act is deliberately used as a means to violate a right."[188]

The means-ends framework now dominates the academic scholarship,[189] and can be traced to what may be the foundational academic work on the relationship between corruption and human rights, Professor Ndiva Kofele-Kale's, *The Right to a Corruption-Free Society as an Individual and Collective Human Right: Elevating Official Corruption to a Crime Under International Law.*[190] Kofele-Kale comes close to seeing corruption as an inherent violation, but ultimately stops just shy of that mark. He begins by asserting that the "right to a corruption-free society" is a "fundamental human right; a right that should be recognized as a

185. *Id.* at vi.

186. *Id.* at 3.

187. *Id.* at 23.

188. *Id.* at 27. *See also* Andreanna M. Truelove, Note, *Oil, Diamonds, and Sunlight: Fostering Human Rights Through Transparency in Revenues from Natural Resources*, 35 GEO. J. INT'L L. 207 (2003) ("Government corruption provides both an incentive and a means for human rights violations.").

189. *See* MARTINE BOERSMA, CORRUPTION: A VIOLATION OF HUMAN RIGHTS AND A CRIME UNDER INTERNATIONAL LAW? 202–64 (2012) (enumerating the various specific and already-recognized rights that corruption violates); C. RAJ KUMAR, CORRUPTION AND HUMAN RIGHTS IN INDIA: COMPARATIVE PERSPECTIVES ON TRANSPARENCY AND GOOD GOVERNANCE 42 (2011) ("The first step in developing a theoretical framework for recognizing corruption as a human rights issue is to examine the different types of human rights that are affected through corruption."); John Hatchard, *Adopting a Human Rights Approach Towards Combating Corruption*, *in* CORRUPTION & HUMAN RIGHTS: INTERDISCIPLINARY PERSPECTIVES (Martine Boersma & Hans Nelen eds., 2010); Magdalena Supelveda Carmona & Julio Bacio-Terracino, *Corruption and Human Rights: Making the Connection*, in CORRUPTION & HUMAN RIGHTS, *supra*; James Thuo Gathi, *Defining the Relationship Between Human Rights and Corruption*, 31 U. PA. J. INT'L. L. 125 (2009); Ndiva Kofele-Kale, *Change or the Illusion of Change: the War Against Official Corruption in Africa*, 38 GEO. WASH. INT'L L. REV. 697 (2006); Thomas R. Snider & Won Kidane, *Combating Corruption Through International Law in Africa: A Comparative Analysis*, 40 CORNELL INT'L L.J. 691 (2007); Kenny Feng, *The Human Rights Implications of Corruption: An Alien Tort Claims Act-Based Analysis* 1 (Wharton Undergraduate Research Scholars, Research Paper No. WH-299-301, 2004). For scholars who are more skeptical of the effort to frame corruption as a human rights problem, see, e.g., Morag Goodwin & Kate Rose-Sender, *Linking Corruption and Human Rights: An Unwelcome Addition to the Development Discourse*, in CORRUPTION & HUMAN RIGHTS, *supra*.

190. Ndiva Kofele-Kale, *The Right to a Corruption-Free Society as an Individual and Collective Human Right: Elevating Official Corruption to a Crime Under International Law*, 34 INT'L LAW. 149 (2000) [hereinafter Kofele-Kale, *Elevating*].

component part of the right to economic self-determination and the right to development."[191] He first invokes the Kantian language that human rights are "derived from the belief that all human beings are born equal in dignity and rights, and that these moral claims are inalienable and inherent in all human individuals by virtue of their humanity."[192] He also marries the asserted right to earlier social contract theory, arguing that "the owners of these evidently basic rights of humankind—life, liberty and property—have never surrendered them to the state. Rather, all that the individual surrenders to the state upon entering civil society is the right to have these rights enforced by the state."[193]

Kofele-Kale never fully articulates the precise reason why corruption violates a right, thus remaining stuck in corruption-as-means analysis. He makes significant progress when asserting that "life, dignity, and other important human values depend on" a government free from corruption.[194] Kofele-Kale further argues that the right "flows from" the "right to economic self-determination."[195] While this is true, it does not quite establish corruption as an inherent rights violation. Kofele-Kale has identified a close connection between corruption and other rights, but that which "flows from" a right is not necessarily a right. In this same vein, he finds that corruption "also implicates the collective right to development," that economic development "will better enable a country to guarantee the economic and social rights of its inhabitants," and that "societal development is essential for individual development which is necessary to enable individuals to know their rights, to claim them, to realize and to enjoy them and the human dignity they promise."[196] Again, though the relationship between corruption and development is persuasive and compelling, it does little to establish corruption as an inherent rights violation.

Kofele-Kale ultimately argues that freedom from corruption "can be viewed as a freestanding, autonomous right,"[197] and his analysis gets us partway there.[198] So too are other scholars locked into a means-end

191. *Id.* at 152.
192. *Id.* at 163.
193. *Id.*
194. *Id.*
195. *Id.* at 163–64.
196. *Id.* at 165. *See also* Declaration on the Right to Development, G.A. Res. 41/128, U.N. GAOR, 41st Sess., Supp. No. 53, at 186, U.N. Doc. A/41/53 (1986).
197. Kofele-Kale, *Elevating*, *supra* note 190, at 152.
198. *See also* Nihal Jayawickrama, *The Impact of Corruption on Human Rights*, UNITED NATIONS CONFERENCE OF ANTI-CORRUPTION MEASURES, GOOD GOVERNANCE AND HUMAN RIGHTS 8 (2006), *available at* http://www.ohchr.org/Documents/Issues/Development/GoodGovernance/HR.POL.GG.

conception of the relationship between corruption and human rights.[199] The present Article aspires to move the academic literature forward by drawing on Lockean thought to demonstrate that freedom from corruption can, and should, be understood as a foundational human right, indeed the defining right of civil society.

III. A NEW CORNERSTONE: REBUILDING CORPORATE LIABILITY AFTER *KIOBEL*

The ATS was always a strange candidate to serve as the cornerstone of a federal statutory regime for deterring overseas corporate rights violations. But we would not let the perfect be the enemy of the good, seizing upon that ambiguous statute because it seemed the best available for pursuing this compelling goal.

That perception is wrong-headed. This Part argues that the ATS never has been and, after *Kiobel*, never will be the principal federal statute by which corporations are held liable for overseas human rights violations. The FCPA represents a better statutory model for deterring overseas, rights-related corporate misconduct. Post-*Kiobel*, scholars should come to recognize the FCPA as the principal federal statute for deterring such conduct, and should direct their energies to better understanding how the FCPA can more effectively achieve this goal.

Part III.A will compare the two statutes to illustrate how the FCPA is a more legally sound and practically effective cornerstone on which to build a federal statutory regime of corporate liability for human rights abuses. But if the FCPA is to fully achieve its goal, two sets of reforms are needed: first, we must develop a scheme for remedying the harms that known incidences of large-scale corporate bribery caused; and second, we must work more effectively to create uniform enforcement among the capital-exporting nations. But neither of these reforms is unprecedented in federal law: to discern the first we can look to environmental law, and for the second to intellectual property.

SEM.2006.BP.1.pdf ("[T]he campaign to contain corruption and the movement for the promotion and protection of human rights are not disparate processes. They are inextricably linked and interdependent."); Truelove, *supra* note 188, at 207.

199. *See generally* Gaathi, *supra* note 189; Kofele-Kale, *supra* note 189; Snider & Kidane, *supra* note 189; Feng, *supra* note 189.

A. The FCPA as the ATS Might Have Been

The ATS has been the crux of what Harold Koh famously called "transnational legal process," in which domestic courts are used to develop standards of international law.[200] Koh argued that bringing suits under international law in U.S. courts result in the development, and perhaps the incorporation, of international human rights norms into U.S. law.[201] His followers urged usage of this strategy to create a "dialogic process of transnational judicial dialogue itself—of interaction, interpretation, and internalization among the world's judges—that ensures the generation and proliferation of norms that are 'legitimate' on the international plane."[202] The ATS has been widely thought to provide a means of achieving this goal and indeed, among U.S. statutes is perhaps uniquely situated to do so.

But the ATS's strength may have proven to be its liability. The process of incorporating international human rights standards into U.S. law through the ATS has yielded a number of legal issues that go to the very essence of the statute's purpose. Scholars, litigants, and judges have vigorously disputed such fundamental questions as why Congress enacted the statute in the first place; the origin of its cause of action; whether jurisdiction is universal; whether the presumption against extraterritoriality, recently affirmed by the Supreme Court in *Morrison*,[203] should apply to the ATS, and if so, to what extent; whether liability extends to corporations or is limited to natural persons; what the ATS's impact on foreign relations could be; and whether that impact should be relevant to the courts' construction of its application.[204] The ATS has thus

200. *See, e.g.*, Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997) (reviewing ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS (1995); THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS (1995)); Harold Hongju Koh, Lecture, *How is International Human Rights Law Enforced?*, 74 IND. L.J. 1397, 1413–14 (1999); Harold Hongju Koh, Address, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 HOUS. L. REV. 623, 646–55, 663–66 (1998).

201. Koh, *How is International Human Rights Law Enforced?*, *supra* note 200, at 1415–16.

202. Melissa A. Waters, *Normativity in the "New" Schools: Assessing the Legitimacy of International Legal Norms Created by Domestic Courts*, 32 YALE J. INT'L L. 455, 463 (2007).

203. Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869 (2010).

204. *See generally* Supplemental Brief of Yale Law School Center for Global Legal Challenges as Amicus Curiae in Support of Petitioners, Kiobel v. Royal Dutch Petroleum Co., 132 S. Ct. 1738 (2012) (No. 10-1491), 2012 WL 2165340; *Special Feature: Kiobel Symposium*, SCOTUSBLOG (July 6–26, 2012), http://www.scotusblog.com/category/special-features/kiobel-symposium/. For the foreign policy debate specifically, see, e.g., Edward T. Swaine, *The Constitutionality of International Delegations*, 104 COLUM. L. REV. 1492 (2004); J. Harvie Wilkinson III, *Our Structural Constitution*, 104 COLUM. L. REV. 1687 (2004).

proven to be a rather shaky foundation on which to build a regime of corporate liability for overseas human rights violations.

The FCPA, by contrast, is vulnerable to none of these disputes. It eschews the attempted incorporation of international law into federal common law by the federal judiciary in favor of a clear congressional directive based on undisputed constitutional authority and well-established common-law liability.

The first U.S. Congress enacted the ATS as part of the 1789 Judiciary Act, the full text providing merely that "district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[205] From its enactment until 1980, the law was invoked only twenty-one times,[206] and only two courts had ever upheld jurisdiction under the statute.[207] With the watershed case of *Filartiga v. Pena-Irala*[208] in 1980, the statute found new life and perhaps even assumed a new identity: an instrument for allowing aliens to hold persons liable for overseas human rights abuses in U.S. courts.

From 1997 until 2010, the courts regularly used the ATS to hold corporate defendants liable for rights violations.[209] Though the Supreme Court had subtly raised the question of whether corporations could be liable in a footnote to its only decision on the ATS,[210] no lower court accepted the court's invitation to overturn corporate liability until 2011. Then, in *Kiobel v. Royal Dutch Petroleum*,[211] the Second Circuit heard the appeal of a Nigerian national who has sued three international companies for allegedly arranging with the Nigerian government to militarily suppress resistance to the companies' oil drilling. The Second Circuit held that corporations are not liable under the ATS because the principle of corporate liability has not been established specifically in international law.[212]

The Supreme Court granted Kiobel's writ of certiorari and held an initial hearing in February 2011 on the question of whether corporations

205. 28 U.S.C. § 1350 (2012).

206. Kenneth C. Randall, *Federal Jurisdiction Over International Law Claims: Inquiries Into the Alien Tort Statute*, 18 N.Y.U. J. INT'L L. & POL. 1, 4–5 n.15 (1985).

207. *See* Adra v. Clift, 195 F. Supp. 857 (D. Md. 1961); Bolchos v. Darrell, 3 F. Cas. 810 (D.S.C. 1795) (No. 1067).

208. Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).

209. Doe I v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002).

210. Sosa v. Alvarez-Machain, 542 U.S. 692, 732 n.20 (2004).

211. Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2d Cir. 2010).

212. *Id.* at 145.

could be liable for human rights violations under customary international law. During the hearing, some justices expressed concern about whether the statute authorized U.S. courts to hear cases alleging violations of international law that occurred on foreign soil, and the Court took the extraordinary step of ordering a second round of briefing and argument to explore that precise topic.[213] Though Congress plainly has the constitutional authority to enact statutes with application beyond the U.S. borders,[214] courts have developed a presumption against extraterritorial application that may only be rebutted by "the affirmative intention of the Congress clearly expressed" in the language of the relevant act.[215] The Supreme Court affirmed this presumption in 2010, finding that Section 10-b of the 1934 Exchange Act lacked such a statement of congressional intent and therefore did not provide a cause of action to foreign plaintiffs suing a foreign company for fraud in relation to securities purchased on a foreign exchange.[216]

The Supreme Court in *Sosa* ominously warned of courts using the ATS to "claim a limit on the power of foreign governments over their own citizens."[217] That warning proved prescient. The Court's April 2013 *Kiobel* opinion never even reached corporate liability under international law, instead ruling entirely on extraterritorial application. Finding that "the presumption against extraterritoriality applies to claims under the ATS, and that nothing in the statute rebuts that presumption," the Nigerian petitioners' claim was barred.[218] In dicta, the Court further stated that for an ATS claim to be valid, the conduct in question must "touch and concern" the territory of the U.S. with "sufficient force to displace the presumption against extraterritoriality."[219] But although the Court provided almost no guidance on how that test should apply in practice, the vast majority of the cases historically brought under the ATS would almost certainly fail this test. *Kiobel* thus does not quite eliminate liability for overseas rights violations, but comes terribly close.

By contrast, there may be no better example of a clear expression of affirmative intention to apply extraterritorially than the FCPA. The statute

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213. Oral Argument at 10:02, Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (No. 10-1491), *available at* http://harvardhumanrights.files.wordpress.com/2012/10/10-1491rearg.pdf.

214. *See* EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991) ("Congress has the authority to enforce its laws beyond the territorial boundaries of the United States.").

215. *Id.*

216. Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2875, 2883 (2010).

217. Sosa v. Alvarez-Machain, 542 U.S. 692, 727 (2004).

218. Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1669 (2013).

219. *Id.* at 1669.

prohibits making payments to "foreign officials,"[220] and this is understood by all to routinely occur on foreign soil. Moreover, unlike the ATS, the FCPA's legislative history makes abundantly clear that the statute is designed specifically to address bribes that actually did occur there. Indeed, the FCPA represents the quintessential congressional grant of extraterritorial application that the Supreme Court did not find in the Exchange Act or the ATS.

One can imagine, however, an ATS case involving a corporate defendant that did indeed satisfy the touch and concern test. That case would likely then become the occasion to revisit the original question before the Court of corporate liability. And this issue remains highly unsettled. In the wake of the Second Circuit's ruling, scholars and advocates have raised a staggering number of sub-issues on which little agreement seems to exist. Did the framers who ratified the 1789 Judiciary Act intend to exempt any class of defendant?[221] Does the proper source today for determining whether corporations are liable lie in international or federal common law?[222] If the former, is corporate liability now recognized in international human rights law?[223] Is corporate liability even desirable as a matter of policy,[224] and would it promote or deter investment in developing countries?[225] Here, the weaknesses of transnational legal process are perhaps clearest; looking to international law to establish corporate liability has proven a minefield.

The FCPA does not invite such disputation. There is no doubt that both juridical and natural persons may be both civilly and criminally liable for

220. FCPA, 28 U.S.C. §§ 78dd-1(a), - 2(a), - 3(a) (2012).

221. *See* Brief of Amici Curiae Professors of Legal History William R. Casto, Martin S. Flaherty, Robert W. Gordon, Nasser Hussain, and John v. Orth in Support of Petitioners, Kiobel v. Royal Dutch Petroleum Co., 132 S. Ct. 1738 (2012) (No. 10-1491), 2012 WL 2165340.

222. *See* Supplemental Brief for the United States as Amicus Curiae in Partial Support of Affirmance, Kiobel v. Royal Dutch Petroleum Co., 132 S. Ct. 1738 (2012) (No. 10-1491), 2012 WL 2161290.

223. *See* Brief of Yale Law School Center for Global Legal Challenges as Amicus Curiae Supporting Petitioners, Kiobel v. Royal Dutch Petroleum Co., 132 S. Ct. 1738 (2012) (No. 10-1491), 2012 WL 2165340.

224. *See, e.g.*, Alan O. Sykes, *Corporate Liability for Extraterritorial Torts Under the Alien Tort Statute and Beyond: An Economic Analysis*, 100 GEO. L.J. 2161 (2012).

225. *See* Brief of Joseph E. Stiglitz as Amicus Curiae in Support of Petitioners, Mohamad v. Palestinian Auth., 132 S. Ct. 1702 (2011) (Nos. 11-88, 10-1491), 2011 WL 6813580 (arguing that ATS enforcement promotes long-term investment and economic growth); Brief of the Clearing House Ass'n L.L.C. as Amicus Curiae in Support of Respondents, *Kiobel*, 132 S. Ct. 738 (No. 10-1491) (arguing that aiding-and-abetting claims discourage corporations from doing business in developing countries); Brief For the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Respondents, *Kiobel*, 132 S. Ct. 738 (No. 10-1491) (also arguing deterrence).

violations. The statute makes this explicit,[226] and is supported by a century of case law that has extended criminal liability to corporations.[227] While questions remain concerning whether criminal law specifically may deter investment in developing countries, these disputes are academic and would gain no traction in a court of law. And even among academics, there is no question that corporations must be at least civilly liable if the statute is to have any meaning whatsoever. But more to the point, none can deny that the statute makes both civil and criminal liability explicit and that they both rest on the sound legal footing of congressional enactment, constitutional authority, and well-established case law.

But even if none of these legal vulnerabilities existed, one would still wonder how effective the ATS had ever become in deterring overseas corporate misconduct. Admittedly, the ATS has played an important role in the recent global development of enforceable human rights norms.[228] But prior to and independently of *Kiobel*, federal courts had begun to constrain the ability of plaintiffs to sue corporate defendants, principally through pleading standards, *forum non conveniens*, and exhaustion of remedies requirements.[229] Though ATS filings continue in federal court, the vast majority have resulted in favorable rulings for the defendant and only a relative handful seem to have settled.[230] Indeed, one scholar recently characterized the chances for plaintiffs to receive meaningful restitution under the ATS as "dim."[231]

Perhaps for this reason, among corporate law firms one observes very little attention paid to compliance with the ATS, creating a dramatic contrast with what has facetiously been called "FCPA Inc."[232] Though such firms might briefly mention recent decisions on their websites,[233] one will rarely see these firms sponsoring compliance training seminars for the ATS. Exactly the opposite has proven true for the FCPA. Anti-bribery compliance has become among the most rapidly-growing practice areas of

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226. FCPA 28 U.S.C. § 78dd-2(g)(1)—(2) (2012).

227. *See, e.g.*, United States v. Wise, 370 U.S. 405 (1962).

228. Sarah H. Cleveland, *The Alien Tort Statute, Civil Society, and Corporate Responsibility*, 56 RUTGERS L. REV. 971, 971 (2004).

229. *See* Childress, *supra* note 4.

230. *See, e.g.*, Jonathan C. Drimmer & Sarah R. Lamoree, *Think Globally, Sue Locally: Trends and Out-of Court Tactics in Transnational Tort Actions*, 29 BERKELEY J. INT'L L. 456 (2011); Michael Goldhaber, *The Life and Death of the Corporate Alien Tort*, THE AM. LAWYER (Oct. 12, 2010), *available at* http:/www.law.com/jsp/law/international/LawArticleINtl.jsp?id=1202473215797.

231. Childress, *supra* note 4, at 725.

232. Joe Palazollo, *FCPA Inc.: The Business of Bribery*, WALL ST. J., Oct. 2, 2012, at B1.

233. *See, e.g.*, *Alien Tort Statute*, O'MELVENY & MYERS LLP, http://www.omm.com/alientort statute/ (last visited Aug. 21, 2014).

the last decade, as compliance training opportunities abound and firms develop specialty FCPA practice groups. The rise of this industry is due in large part to the FCPA's proven record to obtain, and collect, settlements against multinational companies in the tens or hundreds of millions of dollars and on occasion even surpassing $1 billion.[234] While actual compliance with a given statute is difficult to quantify, to the extent that publicly-advertised corporate compliance training may be taken as a rough gauge of corporate concern there can be no doubt that the FCPA has induced corporate compliance in a way that the ATS never did.

In comparing these two statutes' capacity to deter rights violations, the very different rights that each statute touches will immediately rise into relief. Under the ATS, plaintiffs have typically brought suit for the most egregious of rights violations: kidnapping,[235] torture,[236] arbitrary detention,[237] murder,[238] genocide,[239] slavery,[240] sexual assault,[241] and others.[242] Causes of actions for these violations could obviously never be brought under an anti-bribery statute; admittedly, this represents a limitation in the use of the FCPA as a human rights tool.

But we should not discount those rights violations that an anti-bribery statute does indeed touch, both directly and indirectly. As this Article has already shown, bribery should be regarded in the first instance as an inherent rights violation.[243] And as the two case studies illustrated above, bribery is also a tool by which a number of other rights violations occur: the right to equal protection before the law, to political representation, to self-determination, to food, housing, and medical care, to education, to equal access to a country's public services, to safe working conditions, and to control natural resources.[244] While perhaps not as dramatic as the ATS rights, or as harmful to any given individual victim, the FCPA rights are more pervasive and more systematic, impacting a far broader cross-section of society, and the world, than the ATS rights ever have. While I would

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234. *See* Richard L. Cassin, *Who Will Crack the Top Ten?*, THE FCPA BLOG (Aug. 3, 2012, 11:18 AM), http://www.fcpablog.com/blog/2012/8/3/who-will-crack-the-top-ten.html.

235. *See* Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).

236. *See* Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).

237. *See* Rasul v. Bush, 542 U.S. 466 (2004).

238. *See* Yousuf v. Samantar, 699 F.3d 763 (4th Cir. 2012); Habyarimana v. Kagame, 696 F.3d 1029 (10th Cir. 2012).

239. *See* Sarei v. Rio Tinto, 671 F.3d 736 (9th Cir. 2011).

240. *See* Velez v. Sanchez, 693 F.3d 308 (2d Cir. 2012).

241. *See* Doe v. Exxon Mobil Corp., 654 F.3d 11 (D.C. Cir. 2011).

242. *See, e.g*., Pamela J. Stephens, *Spinning* Sosa*: Federal Common Law, the Alien Tort Statute, and Judicial Restraint*, 25 B.U. INT'L L.J. 1, 32–33 (2007).

243. *See supra* Part I.B.

244. *See supra* Part II.C.

not suggest that the ATS rights are somehow less important or deserving of redress, this Article does argue that effectively reducing violations of those rights that the FCPA touches would constitute no less significant an achievement.

The FCPA thus provides a welcome alternative to the transnational legal process of the ATS. Rather than asking the courts to discern ill-defined international standards and incorporate them in to federal common law, Congress exercised its constitutional authority to engage both the executive and judicial branches in the enforcement and interpretation of a relatively straightforward statutory prohibition. The bribery prohibition can more fully achieve its potential as a human rights tool with two specific amendments, as the next Parts describe.

B. Compensating Victims by Following the Precedent of Environmental Law

Though the FCPA can thus address the rights violations that a majority of the world's population faces daily, this Article has shown that the FCPA has fallen far short of its potential to improve the legal and social conditions victims.[245] The first step in remedying this problem lies in using enforcement mechanisms to compensate the communities victimized by large-scale corporate corruption.

Outside the U.S., the idea of compensating victims of international corporate bribery has gained some traction; in particular, the U.K. has twice endorsed the idea publicly. When the British defense contractor BAE entered into a £30 million settlement in connection with illicit payments in Tanzania,[246] the sentencing judge declared that the "real victims" of these bribes were the people of Tanzania.[247] Accordingly, the SFO, the Department for International Development (DFID), the Government of Tanzania, and BAE eventually agreed that most of the settlement would be used to fund educational projects in Tanzania, including the purchase of desks, textbooks and teacher instruction manuals for elementary schools.[248] Then-Director of the SFO, Richard Alderman,

245. *See supra* Part I.B.

246. *See* Press Release, Serious Fraud Office, BAE Systems Plc (Feb. 5, 2010), *available at* http://www.sfo.gov.uk/press-room/press-release-archive/press-releases-2010/bae-systems-plc.aspx.

247. *See* Adam Greaves, *Tanzania Urged to Prosecute Over the BAE Systems Bribery Claim*, THE FRAUD BOARD (Nov. 30, 2011), http://www.thefraudboard.com/public-officials/tanzania-urged-to-prosecute-over-the-bae-systems-bribery-claim/.

248. *See* Press Release, Serious Fraud Office, BAE Systems Will Pay Towards Educating Children in Tanzania After Signing an Agreement Brokered by the Serious Fraud Office (Mar. 15,

described it as providing "a satisfactory outcome for all concerned but most of all for the Tanzanian people."[249] Similarly, when the British engineering firm of Mabey & Johnson paid £6.6 million in criminal fines for bribes allegedly paid in Jamaica and Ghana, the UK returned a portion of those funds to the people of those countries, declaring, "[t]he SFO is committed to the interests of the victims of overseas corporate corruption."[250]

One would search in vain for any such quotations from U.S. enforcement officials. The DOJ and SEC simply have not embraced the notion that the fines and penalties from FCPA enforcement actions should benefit bribery's victims. But this is not because victims groups have not tried. Specifically, two approaches have been attempted, both of which are bound to fail. This Part will describe those attempts and then propose a more promising alternative, drawing on the example of environmental law.

The first failed attempt involved certain victims seeking formal recognition under U.S. victims' rights laws. These statutes emerged from the victims' rights movement of the last couple of decades and are designed to afford the victims of federal crimes restitution and other rights. The Mandatory Victims Restitution Act ("MVRA"), enacted as part of the Anti-Terrorism and Effective Death Penalty Act,[251] makes restitution mandatory[252] (unlike its predecessor, the Victims Witness and Protection Act in which restitution was discretionary[253]). It defines "victim" to mean a "person directly and proximately harmed" as a result of a federal crime, and person is defined to include organizations.[254] Similarly, the Crime Victims' Rights Act of 2004 affords several enumerated rights to victims, including the right to attend and to speak at criminal proceedings, the right to protection from the accused, and the

2012), *available at* http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2012/bae-systems-will-pay-towards-educating-children-in-tanzania-after-signing-an-agreement-brokered-by-the-serious-fraud-office.aspx.

249. *Id.*

250. *See* Richard L. Cassin, *Breakthrough in Britain*, THE FCPA BLOG (Sept. 29, 2009, 8:02 PM), http://www.fcpablog.com/blog/2009/9/30/breakthrough-in-britain.html (discussing the Mabey & Johnson settlement).

251. Mandatory Victims Restitution Act of 1996 ("MVRA"), Pub. L. No. 104-132, § 204(a), 110 Stat. 1227 (1996) (codified as amended at 18 U.S.C. § 3663A); Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, §§ 101-108, 110 Stat. 1214, 1217-26 (1996) (codified in part at 28 U.S.C. §§ 2244-2267 (2000)).

252. MVRA, 18 U.S.C. § 3663A(1).

253. Victims Witness and Protection Act of 1996 ("VWPA"), Pub. L. No. 97-291, 96 Stat. 1248 (1982) (codified as amended in scattered sections of 18 U.S.C., with the restitution provision at 18 U.S.C. § 3663 (2000)).

254. *Id.* § 3663A(2).

right to restitution.[255] It too defines victims broadly to include both natural and legal persons directly and proximately harmed by the commission of a federal crime.[256] Under these statutes, courts have accordingly ordered restitution to corporations,[257] universities,[258] neighborhood associations,[259] and government agencies.[260]

These statutes were recently brought to bear on FCPA enforcement in the Alcatel-Lucent action, in which the French parent company and several of its subsidiaries paid $17 million to several officials in Costa Rica to obtain telecommunications contracts.[261] The bribe recipients were employees of the Instituto Costarricense de Electricidad, S.A. ("ICE"), the country's government-run electricity and telecommunications provider. As France and the U.S. were concluding its joint investigation, ICE sought to compel the U.S. government to provide restitution on the grounds that ICE was entitled to be deemed a victim under various of these statutes.[262] ICE argued in federal court that although certain of its employees had accepted bribes, the entity in general was the victim—it had awarded hundreds of millions of dollars in contracts fraudulently.[263] The DOJ marshaled substantial evidence that regardless of which particular employees may have received Alcatel-Lucent's bribes, "corruption at ICE was pervasive in the tender process and occurred at the highest reaches of ICE" such that awarding the agency victim status "would undermine the meaning and

255. Crime Victim Rights' Act of 2004 ("CVRA"), Pub. L. No. 108-405, 118 Stat. 2261 (2004) (codified as amended at 18 USC § 3771 (2006)). The CVRA was preceded by the Victims' Rights and Restitution Act of 1990 ("VRRA"), Pub. L. No. 101-647, 104 Stat 4820 (1990) (codified at 42 USC § 10606 (2000)), *repealed by* CVRA, 118 Stat. at 2264.

256. CVRA, 18 U.S.C. § 3771(e).

257. *See* United States v. Cummings, 189 F. Supp. 2d 67 (S.D.N.Y. 2002) (finding corporation entitled to restitution for losses sustained when it was required to file restated financial statements after a partner manipulated the corporation's financial records).

258. United States v. Bryant, 655 F.3d 232 (3d Cir. 2011) (holding that restitution to the university was appropriate in the prosecution of a dean and a state senator for honest services fraud and bribery wherein the senator's agreement with the university caused it to suffer a financial loss of over $2 million).

259. United States v. Washington, 434 F.3d 1265 (11th Cir. 2006) (holding that because police cars and condominium property were damaged during a police chase after a bank robbery, the damages sustained by the condominium association were a direct and proximate result of the bank robbery).

260. United States v. Caldwell, 302 F.3d 399 (5th Cir. 2002) (awarding to State); United States v. Mitrione, 357 F.3d 712 (7th Cir. 2004) (awarding to Medicare); United States v. Donaby, 349 F.3d 1046 (7th Cir. 2003) (awarding to a police department); United States v. Senty-Haugen, 449 F.3d 862 (8th Cir. 2006) (awarding to the IRS).

261. Petition for Writ of Mandamus Pursuant to the Crime Victims' Rights Act, United States v. Alcatel-Lucent France, SA, 688 F.3d 1301 (11th Cir. 2012) (Nos. 11-12716, 11-12802) [hereinafter "Alcatel-Lucent Writ"].

262. *Id.*

263. *Id.*

purpose behind these victim rights."[264] Indeed, both the U.S. District Court for the Southern District of Florida and the Eleventh Circuit agreed that the government agency was more accurately understood as a co-conspirator than a victim.[265]

Because this systemic and high-reaching corruption is undoubtedly typical of the government agencies in the developing countries where nearly all FCPA enforcement actions occur, the victims compensation statutes are bound to fail. Trying to identify the "victim" as the government agency that employed the bribe solicitors would thus seem an inherently doomed approach. The communities that these agencies purport to serve are the victims, not the agencies themselves; indeed, the communities are victims in large part because their governments serve them so poorly. Likely for this reason, the DOJ's usage of the restitution remedy, while not unprecedented, has been practically nonexistent. Since the modern enforcement era began roughly ten years ago, the DOJ has only awarded restitution damages once, where the victim was the United States government itself[266] rather than the developing countries in which FCPA enforcement actions almost invariably occur.[267]

One might imagine, alternatively, that non-governmental, community-based organizations could better represent the victims of bribery, but this too will fall short of the victims' rights statutes. The inherent problem with deeming such community-based organizations as victims under these statutes is that the organizations are not themselves the victims. They would merely represent the victims. But the statutes require compensation directly to the victims, making no provision for awarding restitution to groups who advocate on the victims' behalf. Though U.S. courts have deemed some non-governmental organizations victims under the statutes, these organizations were themselves the victims and had suffered direct and measureable harm: a neighborhood association received restitution from a bank robbery because the robbery damaged association property;[268] a university received restitution from a dean and state senator for honest

264. Government's Response to Instituto Constarricense de Electricidad of Costa Rica's Petition for Victim Status and Restitution at 7, *Alcatel-Lucent*, 688 F.3d 1301.

265. *In re* Instituto Costarricense de Electricidad, No. 11-12708-G, at 2 (11th Cir. June 17, 2011) (citing U.S. v. Lazarenko, 624 F.3d 1247, 1252 (9th Cir. 2010)), *available at* http://www.mediafire.com/?turaenl 2l0ppdz6.

266. United States v. Juan Diaz, No. 1:09-cr-20346-JEM (S.D. Fla. May 23, 2012).

267. In its more distant history, the U.S. awarded restitution two other times. *See* United States v. F.G. Mason Eng'g, B-90-29-JAC (D. Conn. Nov. 15,1990); United States v. Kenny Int'l Corp., 79-CR-372 (D.C.C. Aug. 2, 1979). But again, those enforcement actions did not occur in developing countries; the victim governments were Germany and New Zealand (Cook Islands), respectively.

268. United States v. Washington, 434 F.3d 1265 (11th Cir. 2006).

services fraud where the senator's agreement with the university caused it to suffer a substantial financial loss;[269] a corporation's stock dropped after restating its financials following the discovery of accounting fraud;[270] and an insurance company was compensated for duplicative bills it paid.[271] These precedents are qualitatively different from bribery: the organizations were the victims, not merely the victims' representatives. Because these statutes require a showing of "direct and proximate" harm to a discrete person or group of persons, they are inherently ill-suited to provide restitution to the victims of bribery.

A second strategy, developed by a Nigerian NGO, proposed compensating community organizations not through victims' rights statutes but through the reallocation of disgorged profits. The Socio-Economic Rights and Accountability Project ("SERAP)[272] sent a letter to the SEC[273] in March of 2012 proposing this remedy on a case-by-case basis. Disgorgement requires corporations to forfeit the amount of "ill-gotten gain" from bribery,[274] deriving from principles of restitution whereby "a person who has been unjustly enriched at the expense of another is required to make restitution to the other."[275] Although the FCPA contains no express disgorgement provision, beginning in 2004[276] the SEC drew on its broader disgorgement authority[277] to make the remedy a regular feature of FCPA enforcement actions.[278]

Similarly, Matthew Turk has proposed directing disgorged profits from FCPA actions to the governments of the countries in which the bribery

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269. United States v. Bryant, 655 F.3d 232 (3d Cir. 2011).

270. United States v. Cummings, 189 F. Supp. 2d 67 (S.D.N.Y. 2002).

271. United States v. Lisa, 152 Fed. Appx. 85 (2d Cir. 2005).

272. *See* SERAP, http://serap-nigeria.org/ (last visited Apr. 21, 2014).

273. *See* Alexander W. Sierck, *African NGO Asks For Distribution Of FCPA Recoveries*, THE FCPA BLOG (Mar. 16, 2012, 3:18 AM), http://www.fcpablog.com/blog/2012/3/16/african-ngo-asks-for-distribution-of-fcpa-recoveries.html (link to the letter from Alexander Sierck to Robert S. Khuzami, Dir. of the SEC Enforcement Division included in blog post).

274. *See* Matthew C. Turk, *A Political Economy Approach to Reforming the Foreign Corrupt Practices Act*, 33 NW. J. INT'L L. & BUS. 325 (2013).

275. RESTATEMENT (THIRD) OF RESTITUTION § I (1937) ("Unjust Enrichment"). *See also* Turk, *supra* note 274, at 14–16.

276. *See* SEC v. ABB Ltd., No. 1:04-cv-01141 (D.D.C. 2004).

277. For a discussion of the SEC's disgorgement authority and its uneasy relationship to the FCPA, see David C. Weiss, Note, *The Foreign Corrupt Practices Act, SEC Disgorgement of Profits, and the Evolving International Bribery Regime: Weighing Proportionality, Retribution, and Deterrence*, 30 MICH. J. INT'L L. 471, 478 (2009); *see also* Turk, *supra* note 274, at 12–14.

278. *See* Philip Urofsky & Danforth Newcomb, *Recent Trends and Patterns in FCPA Enforcement*, SHEARMAN & STERLING LLP (Oct. 29, 2009), http://www.shearman.com/en/news insights/publications/2009/10/recent-trends-and-patterns-in-fcpa-enforcement.

occurred.[279] Noting that FCPA disgorgement has deposited over $1 billion directly in the U.S. Treasury,[280] he suggests using those funds instead to enhance local anti-bribery enforcement to "restrict the demand-side of corruption."[281] Where the local governments are too corrupt to be trusted with these monies, Turk proposes depositing the funds with the OECD Working Group[282] to improve its efforts to monitor implementation of the OECD Convention.[283]

Although the SEC replied to the disgorgement proposal with a polite but noncommittal letter,[284] using disgorged profits in this way may at first blush seem possible under the SEC's statutory grant of disgorgement authority. The disgorgement power derives from the 1990 Penny Stock Reform Act, which amended the 1934 Securities Act.[285] This authority was then modified in 2002 by Sarbanes-Oxley[286] to provide the SEC an alternative use of the disgorged monies. Called the "Fair Fund and Disgorgement Plan," it provides that in lieu of being deposited in the U.S. Treasury, the funds may "become part of a disgorgement fund or other fund established for the benefit of the victims of such violation."[287] While the term "victim" as herein used is vague, it would at least conceptually appear to encompass a fairly broad category of persons whether U.S. or foreign, legal or natural.

279. Turk, *supra* note 274, at 45–50.

280. Paul R. Berger et al., *Do FCPA Remedies Follow FCPA Wrongs? "Disgorgement" in Internal Controls and Books Records Cases*, 3 FCPA UPDATE, Aug. 2011, at 1, 2, *available at* http://www.debevoise.com/files/Publication/9d56da80-1da1-4e29-bc27-4288643df3cc/Presentation/PublicationAttachment/ea922c2f-78d8-46ea-ad2d-69638418a04e/FCPAUpdateAugust2011.pdf.

281. Turk, *supra* note 274, at 46.

282. The Working Group gathers information concerning Member States' compliance with the convention, which involves country visits by experts from peer governments and meetings with prosecutors and civil society representatives. *OECD Working Group in International Business Transactions*, OECD (2012), http://www.oecd.org/investment/briberyininternationalbusiness/anti-bribery convention/oecdworkinggrouponbriberyininternationalbusinesstransactions.htm. *See also* Daniel K. Tarullo, *The Limits of Institutional Design: Implementing the OECD Anti-Bribery Convention*, 44 VA. J. INT'L L. 665, 679 (2004).

283. Turk, *supra* note 274, at 58–62.

284. Benjamin Kessler, *Giving Back To The Victims*, THE FCPA BLOG (May 2, 2012, 1:53 AM), http://www.fcpablog.com/blog/2012/5/2/giving-back-to-the-victims.html (link to the letter from Robert S. Khuzami to Alexander W. Sierck included in blog post) ("We appreciate your thoughtful submission, and will give appropriate consideration to your suggestions.").

285. Securities Enforcement Remedies and Penny Stock Reform Act of 1990, Pub. L. No. 101-429, §§ 202(a), 203, 104 Stat. 931 (codified at 15 U.S.C. §§ 78u-2(e), 78u-3(e) (2000)). Prior to 1990, the SEC's disgorgement authority derived from case law. *See* SEC v. Commonwealth Chem. Sec., Inc., 547 F.2d 90 (2d Cir. 1978).

286. Sarbanes-Oxley Act of 2002 ("SOX"), Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 15 U.S.C. and 18 U.S.C.).

287. Penny Stock Act, 15 USC § 7246(a).

However, the current regulations interpreting this term prohibit returning disgorged profits to the victims, and in so doing illustrate the inherent limitations of SEC disgorgement.[288] The SEC has interpreted "victim" in its regulations to refer exclusively to investors: where the original statute provides that the fund be established for "the benefit of the victims," the regulation now reads "for the benefit of the investors."[289] This approach is appropriate to securities law generally, in which the shareholders are typically the victims. But as other scholars have pointed out, investors in bribe-paying countries are not quite victimized by bribery; indeed, they typically profit from the ill-gotten gains, and are financially harmed only by the resulting enforcement action.[290] Likely for this reason, the Fair Fund has not been used in FCPA enforcement.

Although the regulation could in principle be amended to define victims more broadly, the regulation's wording is merely reflective of the SEC's broader mission, which is to "protect investors."[291] As the Supreme Court has recently emphasized, the SEC's statutory authority extends only to U.S. markets and its investors.[292] The principle that the securities laws should aim to improve the social conditions of the citizens in developing countries would have collateral implications for a great many areas of securities law; in effect, it would require redefining and reorganizing an agency. For this reason the disgorgement remedy, much like the victims rights strategy, is ill-suited to anti-bribery law.

For a fully viable third option we can look to another area of federal law enforcement, environmental law, in which the proceeds of corporate enforcement actions are regularly used to compensate victims. As part of the settlement of an enforcement action with the EPA, violators may voluntarily agree to perform a project to benefit the environment.[293] The cost of the project is then used to reduce the monetary penalty that would otherwise apply; the amount of penalty mitigation is based on the cost of

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288. *See* Turk, *supra* note 274, at 16.

289. 17 C.F.R. § 201.1100 (2006).

290. *See, e.g.*, David C. Weiss, Note, *The Foreign Corrupt Practices Act, SEC Disgorgement of Profits, and the Evolving International Bribery Regime: Weighing Proportionality, Retribution, and Deterrence*, 30 MICH. J. INT'L L. 471, 478 (2009); Turk, *supra* note 274, at 18.

291. *See generally The Investor's Advocate: How the SEC Protects Investors, Maintains Market Integrity, and Facilitates Capital Formation*, U.S. SEC. & EXCH. COMM'N, http://www.sec.gov (follow "About Us" link) (last visited Aug. 21, 2014).

292. *See* Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869 (2010).

293. *See Supplemental Environmental Projects (SEP) Policy*, EPA.GOV (Oct. 4, 2010), http://www.epa.gov/region2/p2/sep.htm.

the project and several other factors.[294] These projects are neither required nor prohibited by federal statute; they are solely the creatures of prosecutorial discretion. Neither do the victims go to court to compel this form of restitution; it is a voluntary agreement between the enforcement agencies, the defendant, and the organizations that will carry out the environmental project and thus receive the funds. In civil enforcement, these projects are called Supplemental Environmental Projects ("SEPs"), and on the criminal side, they are known as supplemental sentences or simply as community service.[295]

This approach to settling federal enforcement actions recently reached its zenith in the case against BP for the Gulf of Mexico spill. Resulting in the single largest criminal resolution in U.S. history, with a $4.0 billion criminal recovery,[296] the resolution is structured so that more than half of this recovery will fund SEPs to compensate those communities and ecosystems most directly harmed by the spill. As the government's own press release explained, approximately $2.4 billion of the $4.0 billion criminal recovery is dedicated to acquiring, restoring, preserving and conserving—in consultation with appropriate state and other resource managers—the marine and coastal environments, ecosystems and bird and wildlife habitat in the Gulf of Mexico and bordering states harmed by the *Deepwater Horizon* oil spill. This portion of the criminal recovery will also be directed to significant barrier island restoration and/or river diversion off the coast of Louisiana to further benefit and improve coastal wetlands affected by the oil spill. An additional $350 million will be used to fund improved oil spill prevention and response efforts in the Gulf through research, development, education and training.[297] The money is going primarily to the National Fish and Wildlife Foundation that, contrary to its misleading name, is actually an independent, non-profit

294. These factors include: how effectively it benefited the public or the environment, whether it was innovative, what (if any) input exists from the affected community, and whether issues of environmental justice were relevant in a given case. *Id.*

295. Kris Dighe, *Organizational Community Service in Environmental Crimes Cases*, 60 U.S. ATTY'S BULL., July 2012, at 100, *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usab6004.pdf.

296. Kiley Kroh, *Breaking Down the BP Settlement: Where Will the Money Go?*, THINKPROGRESS.ORG (Nov. 16, 2012, 9:19 AM), http://thinkprogress.org/climate/2012/11/16/120282/breaking-down-the-bp-settlement-where-will-the-money-go/.

297. *See* Press Release, Dep't of Justice, BP Exploration and Production Inc. Agrees to Plead Guilty to Felony Manslaughter, Environmental Crimes and Obstruction of Congress Surrounding Deepwater Horizon Incident (Nov. 15, 2012), http://www.justice.gov/opa/pr/2012/November/12-ag-1369.html.

conservation group.[298] An additional $350 million will go to the National Academy of Sciences for oil spill prevention, education, research, and training.[299] In addition to the sheer size, this criminal settlement is historic in its dedication of the majority of funds to the affected communities for environmental restoration.[300]

The environmental model could be easily adapted to the anti-bribery context to compensate victims. Supplemental sentences have historically been used for a wide array of purposes, including improving public health, preventing or reducing pollution, performing environmental restoration and protection, performing a self-assessment or audit to identify potential improvements to environmental performance, and providing training or technical support to other members of the community to improve environmental compliance. The EPA requires the project to improve, protect, or reduce risks to the environment or public health and that the project be closely connected to the violation.[301] Similarly, as part of the terms of an FCPA settlement, the DOJ and SEC could require companies to set aside a substantial portion of the criminal penalties to fund local organizations. These organizations would use the funds to restore and protect the rights of the communities in which the bribes occurred. The particular uses of the funds would depend on the nature of the bribes. Where, for example, safety regulations were circumvented in the construction of public buildings, local organizations could fund and monitor safety assessments and improvements. Where public health officials were bribed, organizations could again fund and monitor inspections and remedial measures. Where environmental regulations were violated, these organizations could function similarly to those in the BP

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298. Guilty Plea Agreement at 16, U.S. v. BP Exploration & Prod. Inc., Civ. Action No. 2:10-cv-04536 (E.D. La. 2010), *available at* http://www.justice.gov/iso/opa/resources/43320121115143613990027.pdf.

299. *Id.*

300. Kroh, *supra* note 296. Additional forms of restitution are anticipated. In June 2012, Congress took the unusual step of passing the RESTORE Act, which requires eighty percent of civil fines under the Clean Water Act to be used for community restoration in the Gulf States. While the Clean Water Act civil settlement has not yet been reached, Attorney General Eric Holder announced that the DOJ will seek the maximum penalty, which could be as high as $21 billion. Kroh, *supra* note 296. Additionally, beyond the $4 billion criminal recovery, an additional "criminal fine" of $1.25 billion will be allocated to Oil Spill Liability Trust Fund and North American Wetlands Conservation Fund pursuant to specific statutory sections. Criminal Guilty Plea, *supra* note 298, at 4.

301. *Supplemental Environmental Project (SEPs) Library*, EPA.GOV (May 9, 2014), http://www.epa.gov/region1/enforcement/sep/index.html. The EPA also requires that the SEP be voluntary; it cannot have been committed to or started before the EPA identified the violation; the EPA may not have any role in managing the SEP or its funding; the specific SEP must be memorialized in a signed agreement; and the SEP may not increase any federal agency's resources to perform activities that are already legally required of those agencies. *Id.*

Gulf of Mexico settlement and fund environmental restoration and training for prevention. All such measures would plainly help to improve the conditions of those communities that were damaged by systemic corporate bribery and, in doing so, enable the FCPA to achieve its purpose of promoting and protecting rights.

Indeed, there actually exists a little-known precedent in FCPA history for using monies collected from enforcement actions to fund local organizations in the host country. The enforcement action of 2002 that heralded the beginning of the modern enforcement era concerned James Giffen, a U.S. attorney who bribed officials in Kazakhstan on behalf of U.S. oil companies. In settling the case, 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.[302] That fund now finances a Kazakh NGO called the BOTA Foundation, whose purpose is to "improve the lives of children, youth and their families suffering from poverty in Kazakhstan through investment in their health, education and social welfare."[303]

BOTA has three specific programs funded by the recovered bribes: a conditional cash transfer program, which gives funds directly to eligible poor families to increase access to health, education, and social welfare services; a social services program, with makes grants to local and international NGOs to promote early childhood development, special needs services, and benefits to orphans and other severely disadvantaged children; and a tuition assistance program, which provides college and vocational education scholarships.[304] The fund's board of trustees includes several Kazakhstani academics and professionals, and government representatives from the U.S. and Switzerland; it does not include any Kazakhstani government officials. The Giffen case is slightly different from what this Article proposes: BOTA is funded with recovered bribes, not with criminal penalties. Still, it may be understood as setting an important, if underappreciated, precedent: the recognition that bribery's victims should, and can, be compensated through funding community organizations.

While this Part has focused on the compensation of victims in developing countries, some have proposed compensating a second group

302. Michael Steen, *Kazakh "Oil Bribe" Millions to Go to Poor Children*, REUTERS (May 4, 2007, 7:16 AM), http://www.reuters.com/article/2007/05/04/idUSL04489030.

303. *See* THE BOTA FOUND., http://www.bota.kz/en/index.php/pages/index/1 (last visited Aug. 21, 2014).

304. *Id.*

of victims: compliant companies who lose business to bribe-payors from foreign jurisdictions. The environmental model could perhaps make some progress in this regard by funding local watchdog organizations who might conduct the kind of investigative reporting that exposed Wal-Mart, and expose the bribe paying of other companies. Such exposure works, however, only when the company's home jurisdiction will enforce its extraterritorial bribery prohibitions. And at present, few do. A more effective long-term strategy would require some kind of legal mechanism, stronger than most foreign jurisdictions' anti-bribery enforcement regimes, to hold foreign companies liable.

A Democratic Congressman from Colorado has introduced a provocative bill[305] in multiple congressional sessions that would create a private right of action under the FCPA. It grants the right to persons who are already subject to FCPA jurisdiction and proposes that these actions be brought only against persons who are not subject to FCPA jurisdiction. The bill states that only "foreign concerns" (a term that does not appear in the FCPA) may be liable, and defines a foreign concern as "any person other than" those subject to FCPA jurisdiction.[306] The plaintiff would have to prove essentially three elements: (1) that the foreign person made a payment otherwise proscribed under the FCPA; (2) that the payment "prevented the plaintiff from obtaining or retaining business for or with any person; and (3) that the payment "assisted the foreign concern in obtaining or retaining business."[307] Damages would be three times either the value of the business that the defendant gained, by virtue of the bribe, or the value of the business that the plaintiff lost due to the bribe.[308]

Whatever political opposition the bill may be encountering (it has never made it out of committee),[309] it suffers from a more fundamental problem. It could not meaningfully address the business community's basic objection to FCPA enforcement: the absence of a level playing

305. Foreign Business Bribery Prohibition Act of 2011, H.R. 3531, 112th Cong. (2011). *See also* Foreign Business Bribery Prohibition Act of 2009, H.R. 2152, 111th Cong. (2009); Foreign Business Bribery prohibition Act of 2008, H.R. 6188, 110th Cong. (2008).

306. H.R. 3531, *supra* note 305, § 2.

307. *Id.*

308. *Id.*

309. *See H.R. 3531 Bill Summary & Status*, THE LIBR. OF CONGRESS, http://thomas.loc.gov/cgi-bin/bdquery/z?d112:HR03531:@@@X (last visited Aug. 21, 2014); *H.R. 2152 Bill Summary & Status*, THE LIBR. OF CONGRESS, http://thomas.loc.gov/cgi-bin/bdquery/z?d111:HR02152:@@@X (last visited Aug. 21, 2014); *H.R. 6188 Bill Summary & Status*, THE LIBR. OF CONGRESS, http://thomas.loc.gov/cgi-bin/bdquery/z?d110:HR06188:@@@X (last visited Aug. 21, 2014).

field.[310] Private enforcement in U.S. courts, initiated by companies that could prove loss, and brought against only those foreign companies with sufficient ties to establish personal jurisdiction here, could never suffice to create an effective global anti-bribery enforcement regime. It could never neutralize the black knights. This problem could only be remedied by developing a mechanism for pressuring other capital-exporting nations to enforce their own laws. But that problem has arisen before, and we have begun developing ways to solve it.

C. Pursuing Global Enforcement by Following the Precedent of Intellectual Property

The most effective remedy to the black knight problem is precisely the remedy we sought to an analogous problem in intellectual property: an amendment to the World Trade Organization agreements. This Article proposes an anti-bribery amendment that would function exactly as the Trade Related Aspects of Intellectual Property agreement ("TRIPS") functions now. We should begin with a caveat: this reform is quite plainly easier said than done. In the foreseeable future, the realistic chances of enacting the amendment I describe below are very nearly zero. But at the conceptual level, the idea has merit; as this Part will show, the parallels between intellectual property and anti-bribery law are striking. Intellectual Property and anti-bribery law have followed parallel historical trajectories, bringing anti-bribery to precisely the place now that IP was in the 1980s just prior to ratification of the WTO. Specifically, the current state of global anti-bribery enforcement, in which companies from non-enforcing countries are able to exploit the vulnerabilities of companies from IP-enforcing nations, is precisely the problem that gave rise to TRIPS.

The failures of the current U.S. approach to solving the black knight problem illustrate all too well why we must look elsewhere. The OECD Anti-Bribery Convention of 1997[311] obligates members to enforce FCPA-type laws. Though it has made only incremental progress,[312] criticizing the organization on these grounds is short-sighted; little steps are to be expected from a multinational organization. Rather, the OECD Convention suffers from two inherent problems that time is unlikely to

310. *See, e.g.*, *Regulations: Restoring Balance*, USCHAMBER.COM, http://www.uschamber.com/regulations (last visited Aug. 21, 2014).

311. OECD Convention, *supra* note 144.

312. *OECD Progress Report*, OECD.ORG (May 18, 2012), http://www.oecd.org/tax/harmfultaxpractices/43606256.pdf.

resolve. First, though OECD membership did at one time encompass all the major capital-exporters—the United States, the western European nations, and Japan, among others—this is no longer true. The recent rise of China, India, and the emerging economies generally renders the OECD worldview obsolete; many such countries, including China and India, are not members, and are not going to be. The OECD, then, is powerless to neutralize the black knights. But even if it could—even if the OECD were a worldwide organization that included all major capital-exporters—the convention would still suffer from a second, and probably fatal, flaw: it lacks a dispute mechanism. That is, compliant nations have no means of holding noncompliant nations accountable. Anti-bribery law thus cannot begin to become effective without two components: (1) enactment within an international organization that includes all major capital exporters; and (2) an effective interstate complaint procedure.

While another existing convention can solve the membership problem, it cannot solve the dispute mechanism problem. The U.N.'s Convention Against Corruption ("UNCAC")[313] now has 160 parties, including all the major capital exporters, and specifically includes an international bribery prohibition.[314] Though enacted ten years ago, it has had minimal impact on deterring international corporate bribery. Its standards are notoriously vague: contrary to the FCPA and OECD Convention which specifically define the prohibited conduct, UNCAC merely requires that each state "adopt such legislative and other measures as may be necessary" to stop bribery.[315] This vagueness is likely the result of seeking consensus among 160 parties in a convention that defines not just bribery (as the FCPA and OECD do) but all manner of corrupt acts, including such difficult-to-define concepts as "trading in influence" or "abuse of functions."[316] But more fundamentally, UNCAC has no interstate complaint procedure. Even if its substantive requirements were sufficiently specific that noncompliance could be defined, imposing sanctions for noncompliance is virtually impossible.[317]

313. UNCAC, *supra* note 122.

314. *Id.*

315. *Id.* art. 15.

316. *Id.* art. 19.

317. One can imagine using the International Court of Justice as a dispute resolution mechanism for UNCAC. Because the ICJ requires both parties to a dispute to consent to the forum's jurisdiction, nations could either consent ad hoc or UNCAC could be amended to establish compulsory jurisdiction in the ICJ. But until UNCAC defines the prohibited conduct with sufficient specificity that noncompliance could ever be identified, ICJ jurisdiction would do little good. The International Criminal Court might eventually be used to prosecute grand corruption, but it would likely require a showing that the corruption constituted a "crime against humanity," a standard that few, if any, acts of

But history has already taught us how to address the problem through the development of intellectual property law. The U.S. intellectual property regime emerged in the late eighteenth and mid nineteenth centuries: the Patent Act[318] and the Copyright Act[319] were enacted in 1790, and the first federal trademark law[320] came in 1870. These federal statutes were largely designed to afford domestic protections to U.S. persons for violations occurring within U.S. territory. They were gradually revised and expanded, and resources were increasingly devoted to their enforcement through the nineteenth century. But as the Industrial Revolution led to more worldwide economic and technological growth, competitor firms proliferated. Seeking to protect U.S. firms from overseas violations that were beyond the scope of existing domestic law, the U.S. became part of the movement that would result in the ratification of the first major international intellectual property convention: the Paris Convention for the Protection of Industrial Property, enacted in 1883.[321] The Convention created minimum substantive and procedural standards for the protection of various IP rights in patents, trademarks, trade names, and trade secrets.[322] The Convention also created an organization of member nations called the Paris Union, which would meet periodically to discuss compliance with and amendments to the Convention. The Convention would spawn myriad other regional conventions to supplement its coverage, creating an overlapping network of international conventions designed to bring rival nations within a common IP legal regime.[323]

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corruption could satisfy. *See, e.g.*, Mara Theophila, Note, "*Moral Monsters" Under the Bed: Holding Corporations Accountable for Violations of the Alien Tort Statute After* Kiobel v. Royal Dutch Petroleum Co., 79 FORDHAM L. REV. 2859 (2011).

318. Patent Act of 1790, 1 Stat. 109 (1790).

319. Copyright Act of 1790, 1 Stat. 124 (1790).

320. Trademark Act of 1870, 16 Stat. 198 (1870).

321. Paris Convention for the Protection of Industrial Property of 1883, Mar. 20, 1883, 25 Stat. 1372, 828 U.N.T.S. 305 [hereinafter "Paris Convention"]. The U.S. was not among the original eleven signatories, but joined the Paris Convention four years later, in 1887. *See* L. Kamran Bilir et al., *Do Treaties Encourage Technology Transfer? Evidence from the Paris Convention* 1, 4 (Working Paper, July 22, 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1893052.

322. These included patents, trademarks, trade names, and trade secrets. *See* Paris Convention, *supra* note 321, arts. 4–11. A separate convention, the Berne Convention, would cover copyrights. The Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 331 U.N.T.S. 217 [hereinafter "Berne Convention"]. Though enacted in 1886, the U.S. would not join the Berne Convention until 1989. Deborah Ross, Comment, *The United States Joins the Berne Convention: New Obligations for Authors' Moral Rights?*, 68 N.C. L. REV. 363, 363–65 (1990).

323. *See* Madrid Agreement Concerning the International Registration of Marks, Apr. 14, 1891, 828 U.N.T.S. 389 (revised at Brussels on Dec. 14, 1900, at Washington on June 2, 1911, at The Hague on Nov. 6, 1925, at London on June 2, 1934, at Nice on June 15, 1957, and at Stockholm on July 14, 1967, and amended on Oct. 2, 1979); Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks, June 15, 1957, S. EXEC. DOC. E.,

Despite the existence of the Paris Union, the Paris Convention created no transnational enforcement mechanism; it called on member nations to develop and implement their own domestic statutory protections.[324] A decade of experience would demonstrate the inadequacy of this approach.[325] Finding that local enforcement was uneven and unreliable, the developed countries concluded that they could no longer rely on domestic enforcement, even when supposedly required by international convention. Accordingly, they sought to create a supplemental international enforcement mechanism by which nations could be held accountable for their failure to uphold convention obligations. This concern became sufficiently pronounced in the early 1980s that the United States placed IP on the agenda for the Uruguay Round of trade negotiations.[326] The link between international trade and IP was not immediately obvious at that time; one scholar noted that it "calls for explanation" given that IP is nowhere mentioned in the WTO's founding document, the GATT of 1947.[327] Still, a strong argument for the link between IP and trade, and aggressive lobbying efforts, eventually produced the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), which entered into effect in 1995 along with the other WTO agreements.

The substantive IP protections required by TRIPS are substantially similar to those of the predecessor Paris Convention; TRIPS calls for only slightly heightened protections.[328] Moreover, TRIPS' minimum standards do not require absolute uniformity across jurisdictions; for example, TRIPS allows the U.S. to continue using a first-to-invent criterion for priority in patent applications when the rest of the world uses a first-to-file system.[329] But TRIPS' most significant contribution to worldwide IP protection does not lie in the substantive standards. Rather, the contribution is two-fold. First, it requires all WTO members to meet minimum enforcement obligations. As one scholar noted, "it is [no longer]

96-1, 1154 U.N.T.S. 89 (1979); World Intellectual Property Organization [WIPO] Copyright Treaty, Dec. 20, 1996, S. TREATY DOC. NO. 105-17, 36 I.L.M 65 (1997).

324. Paris Convention, *supra* note 321, art. 1.

325. *See, e.g.*, Gustavo Bravo, *From Paris Convention to TRIPs: A Brief History*, 12 J. CONTEMP. ISSUES 445 (2001).

326. MITSUO MATSUSHITA ET AL., THE WORLD TRADE ORGANIZATION: LAW, PRACTICE, AND POLICY 697 (2d ed. 2006) [hereinafter MATSUSHITA].

327. *See id.* at 696. For a critical view of the link between IP and trade, see R. Michael Gadbaw, *Intellectual Property and International Trade: Merger or Marriage of Convenience?*, 22 VAND. J. TRANSNAT'L L. 223 (1989).

328. MATSUSHITA, *supra* note 326, at 698.

329. *Id.* at 704. The United States has recently adopted the first to file system. *See* Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011) (to be codified at 35 U.S.C. § 257).

enough to enact laws protecting IP by minimum standards; WTO member states must enforce their laws" according to TRIPS' requirements.[330] But even that, standing alone, would be rather insignificant absent TRIPS' second important contribution: the availability of the WTO dispute resolution process to states who wish to bring actions against other states for failure to uphold protection obligations.[331]

This system, what one scholar calls "arguably the most important international tribunal,"[332] functions much like an international court: jurisdiction is compulsory, disputes are resolved through application of settled rules of law, findings are appealable, decisions are binding on the parties, and non-compliance with settlements is sanctionable.[333] TRIPS' dispute resolution methods thus "put significant teeth" in national IP enforcement.[334] The U.S. has brought multiple actions against China in particular.[335] More generally, the procedure has become a mechanism in which WTO members, particularly the United States, have pressured China to more effectively enforce IP protections through imposing heightened criminal penalties, more aggressive civil and administrative enforcement, more equal treatment among domestic and foreign rights holders, etc.[336] Though historically China was slow to respond to WTO pressures,[337] commentators have noted a general upward trend in Chinese IP protections.[338]

And today, IP rights are increasingly regarded as international human rights. Article 27 of the 1948 Universal Declaration of Human Rights states, "Everyone has the right to the protection of the moral and material

330. AARON FELLMETH, THE LAW OF INTERNATIONAL BUSINESS TRANSACTIONS 45 (2d ed. 2009).

331. MATSUSHITA, *supra* note 326, at 734.

332. *Id.* at 104.

333. *Id.*

334. Bravo, *supra* note 325, at 5.

335. *See, e.g.*, Request for Consultations by the United States, China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights, WT/DS362/1 (Apr. 16, 2007); Request for Consultations by the United States, China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products, WT/DS363/1 (Apr. 16, 2007).

336. *See, e.g.*, Konstantina K. Athanasakou, *China IPR Enforcement: Hard as Steel or Soft as Tofu? Bringing the Question to the WTO Under TRIPS*, 39 GEO. J. INT'L L. 217 (2007).

337. Christopher Duncan, *Out of Conformity: China's Capacity to Implement World Trade Organization Dispute Settlement Body Decisions After Accession*, 18 AM. U. INT'L L. REV. 399, 423 (2002) (explaining that China's failure to comply with the laws of the WTO may make dispute resolution impossible).

338. *See, e.g.*, Peter K. Yu, *The Rise And Decline of the Intellectual Property Powers*, 34 CAMPBELL L. REV. 525 (2012); Natalie P. Stoianoff, *The Influence of the WTO Over China's Intellectual Property Regime*, 34 SYDNEY L. REV. 65 (2012).

interests resulting from any scientific, literary or artistic production of which he is the author."[339] Similarly, the 1966 International Covenant on Economic, Social and Cultural Rights provides that,

> The States Parties to the present Covenant recognize the right of everyone: (a) To take part in cultural life; (b) To enjoy the benefits of scientific progress and its applications; (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.[340]

United States anti-bribery law has followed a similar trajectory and should continue to follow it. At the time of enactment in 1977, the U.S. was not particularly concerned about rival industrialized nations; the United States still enjoyed substantial economic hegemony, and thus Congress unilaterally enacted a bribery prohibition without much regard for whether other countries would do so.[341] But as competitors emerged in other countries, the United States recognized that it was losing business to companies whose countries did not enforce bribery prohibitions. Just as the United States participated in the creation of the Paris Convention and the Paris Group, the United States lobbied the developed countries through the OECD to implement and enforce similar laws.[342] These laws were, by design, to be enforced as domestic law by national governments,[343] just as IP laws were under the Paris Convention. The OECD convention created no international enforcement mechanism. Unsurprisingly, the empirical data would show that the OECD Convention has failed to level the proverbial playing field; many OECD nations fail to honor their obligations under the Anti-Bribery Convention and many other capital exporters are not parties to the convention. Anti-bribery law is thus now where IP once was: the need for global enforcement is plain, and experience has taught[344] that this will not be achieved without an interstate complaint procedure.

A TRIPS-like anti-bribery provision could establish standards of protection that are high, but that take into account differences between

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339. UDHR, *supra* note 113, art. 27.

340. International Covenant on Economic, Social and Cultural Rights, art. 15, Dec. 16, 1966, 993 U.N.T.S. 3. *See also* Lea Shaver, *The Right to Science and Culture*, 2010 WIS. L. REV. 121; Peter K. Yu, *Reconceptualizing Intellectual Property Interests in a Human Rights Framework*, 40 U.C. DAVIS L. REV. 1039 (2007).

341. Spalding, *Unwitting Sanctions*, *supra* note 17, at 355–62.

342. *Id.*; Spalding, *Four Unchartered Corners*, *supra* note 18, at 662.

343. OECD Convention, *supra* note 144, art. 4, cmt. paras. 25–26.

344. *See OECD Progress Report*, *supra* note 312.

countries on such fundamental legal issues as corporate criminal liability or the use of deferred prosecution agreements. It could also establish benchmarks of effective enforcement, as TRIPS does. But most importantly, it could subject the bribery provisions to the dispute settlement provisions, as TRIPS did. In doing so, it would create the first forum in which all capital exporters could bring complaints against other nations for failure to enforce extraterritorial bribery prohibitions. Creating an anti-bribery annex to the WTO agreements thus has unique potential to neutralize black knights.

Moreover, anti-bribery law is substantially immune from the principal objection to TRIPS specifically and the global IP regime generally. While many argue that TRIPS benefits wealthy countries at the expense of developing countries, particularly in relation to pharmaceuticals,[345] no such push back exists in anti-bribery law. Though developing countries fail to honor obligations by failing to enforce their anti-bribery statutes, they generally do not object to the international conventions at the level of principle. The dichotomy between the interests of wealthy nations and developing nations that now plagues IP law would, in the anti-bribery context, completely collapse.

And we have long forgotten that a progression of this sort—starting with a U.S. statute, and then ultimately incorporating extraterritorial bribery prohibitions into the world trade regime to achieve global enforcement—was actually envisioned in the earliest days of U.S. deliberations. In 1975, two years before ultimate enactment of the FCPA, a resolution was introduced in the U.S. Senate calling for supplementing any U.S. statute with a multilateral agreement of some kind. The resolution stated that

> the [President's] Special Representative for Trade Negotiations . . . and appropriate officials of the Departments of State, Commerce, the Treasury, . . . and Justice . . . initiate at once negotiations . . . with the intent of developing . . . specific trading obligations among governments, together with suitable procedures for the settlement of disputes, which would result in elimination of [bribery] on an international, multilateral basis, including suitable sanctions to cope with problems posed by nonparticipating nations, such codes and written obligations to become part of the international system of

345. MATSUSHITA, *supra* note 326, at 708.

> rules and obligations within the framework of the General Agreement on Tariffs and Trade.[346]

The General Agreement on Tariffs and Trade ("GATT"), of course, is the precursor to the WTO. The resolution passed by a vote of 93–0. More specifically, President Ford's Assistant Secretary of Commerce for Domestic and International Business, Travis Reed, was even more prescient. He proposed, specifically, introducing anti-bribery laws to the world's capital exporters in two steps: first, through the OECD, which could start the process of achieving agreement among the capital exporters on the specific provisions of a global bribery provision, and once the contours of the appropriate legal regime had been worked out, it "could then be introduced into GATT."[347] But the proposal did not gain momentum in Congress, and admittedly, it would probably not gain momentum within the WTO today.

Still, the parallels are striking. We have enacted a U.S. statute and, through the OECD, refined the template and introduced the statute to many of the world's capital exporters. But just as the Ford Administration foresaw, we now need "suitable sanctions to cope with problems posed by nonparticipating nations" and "suitable procedures for the settlement of disputes."[348] The IP experience confirms our original hunch that the WTO can serve precisely this function. Moreover, the proposal would appeal to both sides of the political aisle, both here and abroad: liberals would herald the extension of our human rights regime, while conservatives would celebrate leveling the playing field. Conceptually, the idea's time has come; perhaps one day it will come practically as well.

CONCLUSION

At a recent judicial conference, Chief Justice Roberts famously disparaged legal scholarship for its alleged irrelevance to practice. He remarked, "Pick up a copy of any law review that you see, and the first article is likely to be . . . of great interest to the academic that wrote it, but [not] much help . . . to the bar."[349] But in his sympathy for the bar and

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346. S. Res. 265, 94th Cong. (1975).

347. *Protecting the Ability of the United States to Trade Abroad: Hearing Before the Subcomm. On Int'l Trade of the S. Comm. On Fin.*, 94th Cong. 35 (1975) (statement of Travis Reed, Assistant U.S. Sec'y of Commerce, Domestic & Int'l Bus. Admin.). *See also* Koehler, *supra* note 44, at 982–84.

348. *See* S. Res. 265.

349. *See* Mike Sacks, *Journal Unbound*, GEO. L.J. ONLINE, http://georgetownlawjournal.org/ipsa-loquitur/the-first-one/ (last visited Aug. 21, 2014); *see also* Lee Petherbridge & David L. Schwartz, *An*

bench, the Chief Justice neglected to mention a third and arguably more important category: the actors whose conduct the law seeks to govern.

Academics need not lament the contraction of the ATS; the majority of multinational corporations will scarcely notice the change at all. Rather, our efforts to construct a regime of corporate liability for overseas human rights violations are best refocused on the already-sound footing of anti-bribery law. Reframed as an issue of human rights, anti-bribery can become that which Congress first expected it to be, and which the ATS might have been: an effective instrument for ensuring that multinational companies comply with, and promote, democratic values across the developing world.

Empirical Assessment Of The Supreme Court's Use Of Legal Scholarship, 106 NW. U. L. REV. 995, 996 (2012).