

2014

The Problem of Deterring Extraterritorial White-Collar Crime

Andrew B. Spalding

University of Richmond, aspaldin@richmond.edu

Follow this and additional works at: <http://scholarship.richmond.edu/law-faculty-publications>



Part of the [Criminal Law Commons](#), and the [International Law Commons](#)

Recommended Citation

Andrew Spalding, *The Problem of Deterring Extraterritorial White-Collar Crime*, 17 Chap. L. Rev. 355 (2014)

This Article is brought to you for free and open access by the School of Law at UR Scholarship Repository. It has been accepted for inclusion in Law Faculty Publications by an authorized administrator of UR Scholarship Repository. For more information, please contact scholarshiprepository@richmond.edu.

The Problem of Detering Extraterritorial White-Collar Crime

Andrew Spalding*

INTRODUCTION

Recent reports of egregious labor practices in China and Bangladesh have called public attention to the potential harms of foreign direct investment (FDI) in developing countries. The best, or at least most obvious, tool for reducing destructive overseas business practices would seem to be the extraterritorial application of white-collar criminal law.¹ The “holy grail” of contemporary criminal law is deterrence,² and the deterrence literature is largely shaped by the paradigm of law and economics. Prominent within that literature is Polinsky and Shavell’s “enforcement authority,” which seeks to maximize social utility through the efficient deterrence of crime.³ Guided by the principles of law and economics, the enforcement authority wields four enforcement tools: enforcement expenditures, the level of the fine, the length of imprisonment, and the standard for imposing liability.⁴ By manipulating these variables, it can presumably achieve the optimal combination of minimizing crime while also minimizing public expense.⁵

But this essay argues that, in international business law specifically, that enforcement authority will tend to fail. The traditional methods of criminal deterrence, when applied rigorously and in good faith, will ultimately create the very conditions in which extraterritorial white-collar crime proliferates. As the enforcement authority utilizes its tools to

* Associate Professor, the University of Richmond School of Law. I would like to thank the many colleagues at UR and beyond who provided feedback on this draft, but in particular Jordan Barry, Chris Buccafusco, and Jim Gibson. I would also like to thank my excellent research assistant, Amanda Cottingham.

¹ See, e.g., Jodie Gummow, *In Bangladesh, Workers Escalate Demands for Better Working Conditions*, TRUTHOUT (May 26, 2013, 9:52), <http://www.truth-out.org/news/item/16594-in-bangladesh-workers-escalate-demands-for-better-working-conditions>.

² Patrick J. Keenan, *The New Deterrence: Crime and Policy in the Age of Globalization*, 91 IOWA L. REV. 505, 515 (2006).

³ A. Mitchell Polinsky & Steven Shavell, *The Economic Theory of Public Enforcement of Law*, 38 J. ECON. LITERATURE 45, 72 (2000).

⁴ *Id.* at 49.

⁵ See *id.* at 70.

pursue the optimally low level of such crime, unique legal and economic conditions will too often produce an increase in overall rates of criminality. Deterrence's goal—namely, the reduction in crime—can only be achieved by utilizing tools and theories that are not part of the contemporary deterrence logic.

Section I briefly describes the law and economics approach to deterrence, and explains why scholars have not been particularly concerned with whether deterrence could lead to an increase, rather than a decrease, in crime. Section II then explains how international business, particularly foreign direct investment in developing countries, creates a set of conditions in which this possibility arises. It constructs a model, using bribery prohibitions as an example, which illustrates that beyond a given level of enforcement, heightened enforcement will produce a net increase in crime in the host country. Section III explores the possibility that corporate social responsibility (CSR) may be able to pick up where law and economics leaves off. That is, though crime reduction ultimately proves beyond the reach of the law and economics enforcement authority, it may be within the reach of socially responsible corporations. But inducing these corporations to more than mere compliance requires a reexamination of the basic assumptions on the relationship between CSR and globalization.

I. THE LOGIC OF DETERRENCE

This section briefly discusses both the theoretical and empirical scholarship on how deterrence works. It then shows how little attention deterrence scholars have paid to the problem of overdeterrence.

A. The Downside of Deterrence's Upside

Within the law and economics scholarship, the watershed work on public law enforcement was Polinsky and Shavell's *The Economic Theory of the Public Enforcement of Law*.⁶ They explain that to the law and economics way of thinking, "social welfare generally is presumed to equal the sum of individuals' expected utilities."⁷ An individual's expected utility essentially depends on four variables: whether she commits a harmful act, whether she is sanctioned (by fine, imprisonment, or both), whether she is a victim of someone else's harmful act, and on her tax payment

⁶ See generally *id.*

⁷ *Id.* at 48.

(which will reflect the costs of law enforcement, less any fine revenue collected).⁸

The individual thus wears two hats in the utility calculation: as potential wrongdoer, and as potential victim. The potential victim's two variables—whether she is a victim, and the extent of her taxes—are of course closely interconnected. Recognizing her potential victimization, she pays taxes to prevent it. The purpose of paying taxes, then, is to prevent the disutility of victimization. The paradigm thus assumes that we pay taxes to increase our individual utility; were there no threat of victimization, the individual would have no reason to pay taxes. There would be no utility in it; not faced with the threatened disutility of falling victim, her utility would not be maximized by paying taxes to finance public criminal law enforcement. The potential victims are taxpayers; the taxpayers are potential victims.

The “enforcement authority’s problem” then is to maximize social welfare by finding the most efficient combination of the four key enforcement variables mentioned above: enforcement expenditures, the level of the fine, the length of imprisonment, and the standard for imposing liability.⁹ The disutility of crime is weighed against the cost of prevention, and the aim is to reduce crime with maximal cost-efficiency. The enforcement authority should expend only so much on enforcement as is necessary to reduce the disutility for the taxpayer.

Following Beccaria’s admonition that “[i]t is better to prevent crimes than to punish them,”¹⁰ law and economics seeks to deter crime by ensuring that the cost of punishment to a potential wrongdoer exceeds the rewards.¹¹ The core assumption of deterrence is that potential wrongdoers will decide against the commission of a criminal act based on the fear of sanctions or punishment.¹² It assumes that the potential (and perhaps hypothetical) wrongdoer calculates the utility of crime based on the benefits and costs of the criminal act as well as the benefits and costs of abstaining.¹³ The attributes of punishment that can be manipulated to maintain the proper cost-benefit ratio are its certainty, severity, and celerity (or swiftness).¹⁴ If set

⁸ *Id.*

⁹ *Id.* at 49.

¹⁰ CESARE BECCARIA, ON CRIMES AND PUNISHMENTS 93 (Henry Paolucci trans., 6th prtg. 1977) (1764).

¹¹ GEORGE B. VOLD, THOMAS J. BERNARD & JEFFREY B. SNIPES, THEORETICAL CRIMINOLOGY 196 (5th ed. 2002).

¹² Raymond Paternoster, *How Much Do We Really Know About Criminal Deterrence?*, 100 J. CRIM. L. & CRIMINOLOGY 765, 766 (2010).

¹³ *Id.*

¹⁴ *Id.* at 783.

appropriately, the potential violator will succumb to deterrence because a rational choice would never result in the commission of a crime; the cost would prove too high in comparison to the perceived benefit.¹⁵ Thus, “[p]unishment is said to have a deterrent effect when the fear or actual imposition of punishment leads to conformity.”¹⁶

This core theory has given rise to a number of hypotheses that empiricists continue to test. Questions remain concerning to what extent an increase in the objective costs of punishment to a potential wrongdoer, particularly length of sentence, will decrease the incidence of crime; to what extent increasing enforcement resources will increase certainty and celerity; whether objective increases in certainty, severity, or celerity will produce a proportional increase in the subjective perceptions of those attributes among wrongdoers and therefore exert a downward push on crime; etc.¹⁷

But note that these are questions of degree. While we do not know whether deterrence “works very well,”¹⁸ we know it works. The empirical evidence indeed demonstrates that deterrence measures succeed—however imperfectly—in reducing crime.¹⁹ Actors subject to the jurisdiction of a law that penalizes a given form of conduct with the requisite degree of certainty, severity, and celerity will engage in less of that conduct. We know this, and we might call it the upside of deterrence.

But notice the corollary. If we know that actors subject to a criminal prohibition will engage in less of that conduct, we also know that actors not so subject will engage in more of it. Applied to white-collar enforcement, companies subject to the criminal prohibition on a particular form of profitable but socially undesirable conduct will engage in less of that conduct than companies that are not so subject; companies not subject to that prohibition will engage, relatively speaking, in more of that conduct. This is the downside of deterrence’s upside. To clarify, what I am here calling the downside is not a consequence of its upside; it is merely a logical corollary that will prove important in the analysis below. And in international business, governed by the extraterritorial application of criminal laws, where the law’s

¹⁵ See VOLD ET AL., *supra* note 11, at 196.

¹⁶ TERANCE D. MIETHE & HONG LU, PUNISHMENT: A COMPARATIVE HISTORICAL PERSPECTIVE 20 (2005). Deterrence need not be complete; partial deterrence is still successful. *Id.* at 21.

¹⁷ See Paternoster, *supra* note 12, at 787–818.

¹⁸ *Id.* at 766; see also DAVID M. KENNEDY, DETERRENCE AND CRIME PREVENTION: RECONSIDERING THE PROSPECT OF SANCTION 9 (2009).

¹⁹ KENNEDY, *supra* note 18, at 10–11.

stated object is to deter overseas crime, the downside proves to be a tricky problem.

B. The Nonissue of Criminal Overdeterrence

Despite the robust theoretical and empirical deterrence literature, scholars have given little attention to the issue of criminal overdeterrence. In civil law, by contrast, the cost of overdeterrence is well recognized:²⁰ if punishment for causing a car accident were \$1 million, people would likely cease driving.²¹ But for the kinds of intentional acts generally proscribed by criminal law, the risk of discouraging socially productive behavior, or of encouraging constructive behavior, is negligible. Because the goal is to achieve effective deterrence by setting punishment at a sufficiently high level to dissuade potential offenders, the “temptation to impose increasingly harsher penalties is strong.”²² The optimal level of intentional (as opposed to negligent) criminal conduct, generally speaking, is therefore zero.

But scholars have, perhaps somewhat indirectly, addressed the problem of overdeterrence in two ways. These concern the risk that deterring a particular crime might increase the incidence of other crimes. The first is the problem of marginal deterrence: setting equally high penalties for crimes of unequal severity will tend to encourage the more severe crime. As George Stigler famously put it, “If the thief has his hand cut off for taking five dollars, he had just as well take \$5,000.”²³ Where the overall level of criminality might be understood as the number of crimes committed multiplied by their severity, disproportionate penalties for relatively mild criminal acts will remove the disincentive to engage in more serious crimes and thus increase overall levels of criminality.

The second is based on Neal Katyal’s research on substitution. Katyal held that the public enforcement agency must consider how penalizing a given crime may increase the appeal of alternative, or substitute, crimes. An increase in the

²⁰ See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 213–17 (8th ed. 2011) (describing the theory of optimal tort damages).

²¹ John Bronsteen, Christopher Buccafusco & Jonathan Masur, *Happiness and Punishment*, 76 U. CHI. L. REV. 1037, 1056 n.100 (2009).

²² *Id.* at 1055–56. The overdeterrence problem can arise with negligence crimes; negligent vehicular homicide would raise the same overdeterrence problems as the civil example above, such that the optimal level of such homicides may be greater than zero. *Id.* at 1056 (stating in the civil tort context “the possibility of overdeterrence is a persistent problem”); see also POSNER, *supra* note 20.

²³ George J. Stigler, *The Optimum Enforcement of Laws*, 78 J. POL. ECON. 526, 527 (1970).

“price” of one crime may cause potential wrongdoers to substitute criminal act X with criminal act Y or Z.²⁴ Accordingly, though enforcing the prohibition on X may well deter X, it may also increase the incidence of Y or Z.²⁵ For both of these problems, the effort to deter a given crime has produced the collateral harm of an increase in another form of crime.

But for these costs, scholars have not seemed particularly concerned about the collateral economic harm of deterring criminal behavior. But contemporary international white-collar enforcement may present new challenges to the logic of deterrence. Despite deterrence’s relatively long history, originating in the eighteenth-century works of Montesquieu,²⁶ Beccaria,²⁷ and Bentham,²⁸ the concept fell out of fashion and was largely neglected²⁹ until the seminal work of Gary Becker in the 1960s.³⁰ And owing largely to Cold War ideological divisions, international business—and particularly the flow of capital from developed to developing countries—would not increase significantly until after the collapse of communism. As will be shown below, this new economic order raises significant theoretical and practical problems for deterrence.

II. THE CRIMOGENICS OF EXTRATERRITORIAL WHITE-COLLAR ENFORCEMENT

Extraterritorial conduct of any sort raises formidable law enforcement challenges: evidence is difficult to collect, foreign enforcement authorities may not be cooperative or well resourced, and cultural sensitivities must be navigated. But this article argues that the challenges of extraterritorial white-collar

²⁴ Neal Kumar Katyal, *Deterrence’s Difficulty*, 95 MICH. L. REV. 2385, 2387 (1997).

²⁵ The enforcement authority’s inclination to inflict an increasingly severe punishment may be further restrained in two ways. Bronsteen et al., *supra* note 21, at 1056. First, the enforcement costs must be no greater than is necessary to achieve the optimal level of deterrence. *Id.* These costs would take two forms. *Id.* Most obvious are the costs of “detecting, trying, and imprisoning a criminal,” which are of course substantial. *Id.* Under the logic of deterrence they cannot become excessively so, lest the taxpayers’ disutility exceeds the risk of victimization. *Id.* But additionally, society incurs the opportunity cost of removing potentially productive individuals from society through imprisonment, a factor that is (from a narrowly economic perspective) especially pronounced in white-collar crime. *Id.* In addition to these social costs, utilitarianism would value the welfare (though not the rights) of the defendant; he need not suffer any greater a punishment than is necessary for deterrence purposes. *Id.* at 1056–57.

²⁶ BARON DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* (Thomas Nugent trans., Hafner Publ’g Co. 1949) (1748).

²⁷ See BECCARIA, *supra* note 10, at 58.

²⁸ JEREMY BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* (J. H. Burns & H. L. A. Hart eds., 1996) (1789).

²⁹ Paternoster, *supra* note 12, at 772–73.

³⁰ See, e.g., Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968).

deterrence run far deeper. By definition, many or most actors committing crimes in foreign jurisdictions are not subject to the same set of disincentives: companies seeking to extract Nigeria's oil will hail from the United States, the EU, Russia, China, and elsewhere, and these countries will have substantially different white-collar crime regimes in place. The United States, for example, may be able to deter socially destructive behavior among U.S. companies and other companies subject to U.S. jurisdiction, but it cannot readily alter the behavior of those companies that lie beyond its jurisdiction. To the extent that a country wishes to reduce criminal conduct in overseas locations where only a portion of all actors is subject to its jurisdiction, this becomes problematic.

Of course, it may well be true that in certain areas of law the aim is not to reduce the overall levels of a given sort of extraterritorial crime. We may wish only to deter the conduct among our own citizens, perhaps untroubled by the impact our own deterrence efforts may have on overall levels of criminality in those foreign locations. But other areas of law, such as anti-bribery law, prohibit the overseas conduct categorically, without regard to whether the conduct has any harmful impact whatsoever on U.S. markets or persons.

This section shows just how problematic that goal will prove to be. It develops a model that illustrates how, given current and foreseeable future legal and economic conditions, extraterritorial deterrence has pronounced crimogenic³¹ tendencies. That is, in attempting to reduce crime overseas, wielding the tools of deterrence will often create the conditions in which the conduct we seek to deter actually proliferates.

A. Three Unique Conditions of International Business

Foreign direct investment, particularly in developing countries, has three inherent characteristics that distinguish it from the domestic conduct that deterrence scholarship generally assumes. In combination, they create a kind of perfect storm in which deterrence will often prove self-defeating.

The first I will call "selective criminalization." A given form of extraterritorial conduct may well be criminalized by a particular home jurisdiction: think of express statutory prohibitions on overseas bribery or monopolistic conduct in the

³¹ For a discussion of crimogenics in deterrence, see Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L.J. 949, 985-89 (2003); see also KENNEDY, *supra* note 18, at 54-72.

United States, and the dedication of substantial resources to their enforcement. But other countries may fall into either of two alternative categories: those that do not enforce their prohibitions, and those that have not enacted such prohibitions. In other words, among all actors in a given foreign jurisdiction, the conduct is only selectively criminalized: the criminal prohibition applies to some of the companies pursuing Nigerian oil, but not to others. The United States may wish to deter bribery there, but lacks jurisdiction over many of the actors.

The second characteristic I will call the “discretionary investment forum.” A typical U.S.-based company will be doing business in the United States. The enforcement authority thus need not worry whether that company will choose to continue doing business there (unless, of course, a given criminal prohibition threatens to drive a company out of business altogether, but this is rare and probably confined to highly dubious business models). But overseas investment forums are inherently discretionary: a U.S.-based company may choose to focus its efforts in the United States, or to enter overseas markets, and if the latter, to focus on the developed or developing world, and to invest in particular countries. These countries will vary in their legal, economic, and cultural environments, potentially creating varying levels of risk that a U.S.-based company will engage in conduct that its home jurisdiction criminalizes. Accordingly, the enforcement authority must consider whether its companies will do business in these jurisdictions at all. When the enforcement authority uses the tools of deterrence to raise the costs of a particular behavior, the costs may rise to a level where, in certain contexts, the risk becomes too great. Companies may then use their discretion not to invest in particular projects, sectors, or countries. The effort to deter crime has thus deterred investment.

Should the enforcement authority care? The question goes to the very heart of the law and economics methodology. Richard Posner has characterized law as “a system for maximizing the wealth of society.”³² The aim of enforcement is thus to increase wealth, for individual persons and for society generally. The deterrence of investment in foreign countries has implications for both. Companies may forego relatively efficient investment opportunities for safer, but less efficient (and profitable) opportunities. This, in turn, impacts the wealth of both the capital-exporting and the capital-importing nation: the exporter’s GDP is negatively impacted by the diminished profits of its

³² See POSNER, *supra* note 20, at 32.

companies; and the importer's GDP is negatively impacted by the loss of foreign direct investment. If deterrence is understood as one of many mechanisms for increasing social wealth, deterring investment in particular discretionary investment forums is problematic. This becomes especially true in developing countries where the need to maximize wealth is most pressing.

The third characteristic I will call "investor substitution." Assume, for purposes of this theory, that the companies from diverse jurisdictions are interchangeable—that companies from the United States, Germany, and China are equally capable of providing the given good or service. This is of course not true in all industries; highly technologically sophisticated sectors, for example, will tend to favor companies from more developed countries. But the gap is narrowing as developing countries like China progress, and the gap does not exist at all for many or most industries. Further assume that the host country's need for FDI is constant, such that if companies originating from one jurisdiction are disinclined to do business in the manner expected by the host country, that host country will seek the investment from other jurisdictions. Given these assumptions, quasi-criminalization and the discretionary investment forum will result in investor substitution. Companies from a country that enforces a given criminal prohibition—again, think of the United States enforcing a bribery prohibition—may find the risk (say, of paying bribes in Nigeria) too high. Those companies may choose not to invest in countries like Nigeria (as ample empirical evidence demonstrates).³³ The host country, which remains in need of the FDI, will seek it from companies that are from jurisdictions that do not enforce the prohibition. Because these companies can provide roughly the same good or service—in other words, the substitution costs to the host country are negligible—they will become substitute foreign investors.

This analysis is related to, but significantly different from, the previous work on substitution. That body of scholarship, as noted above, has focused on a given actor substituting criminal acts Y and Z for criminal act X. It assumed a given set of actors, choosing among alternative forms of criminality. The principle of investor substitution is quite different. It assumes alternative actors are all deciding whether to engage in the same form of criminality (or, to be clear, conduct that one jurisdiction deems criminal, though others do not). It is a variation on the

³³ For a summary of the empirical literature, see Andrew Brady Spalding, *Corruption, Corporations, and the New Human Right*, 89 WASH. L. REV. (forthcoming Jan. 2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2232670.

substitution thesis that applies uniquely to the realm of extraterritorial enforcement.

B. The Net Impact on Crime: An Illustration

The impact of investor substitution on the net levels of crime in the host country will depend on the level of enforcement. This section illustrates how a relatively low level of enforcement can reduce overall crime, but increases in enforcement will, ironically, increase levels of criminality. This model uses anti-bribery law to illustrate this dynamic.

This paper does not assume the existence of a perfectly rational enforcement authority. Rather than exploring what a hypothetical authority should do, it explores the implications of what actual governments would do or have done. It posits a number of conditions that closely resemble the actual world of anti-bribery enforcement, and which would likely be typical of other areas of extraterritorial white-collar criminal enforcement as well. Such an enforcement authority is, predictably, economically subrational in several important respects.

First, the enforcement authority assumes that the optimal level of bribery is zero, and does not engage in sophisticated arguments about whether some amount of bribery may actually be efficient. This assumption holds true both for bribery among companies subject to its jurisdiction, and for overall levels of bribery in the host countries as well. Alternatively, one might assume that the enforcement authority is guided by a deontological argument—that bribery is inherently wrong—rather than an assumption about the relationship between bribery and economic efficiency. Either way, the authority is determined to reduce bribery as far as possible.

Second, and relatedly, the agencies of the enforcement authority that enforce the bribery prohibition will actually take measures to deter bribery without regard for their impact on economic efficiency. Whatever they may have assumed about the relationship between bribery and efficiency, the statute charges the agencies with reducing bribery and makes no mention of its economic implications.

Third, the enforcement authority is unwilling or unable to impose a combination of enforcement expenditures and level of penalty that would immediately reduce bribery to zero. It is faced with limited enforcement resources, uncertain political support, and imperfect empirical knowledge about the effects of enforcement on crime. Similarly, it likely subscribes to notions of fairness that will prevent it from imposing the exorbitant

penalties that could deter bribery where the probability of detection was more limited. Thus constrained, the enforcement authority experiments with varying levels of enforcement over time (which is precisely what has occurred in the United States).³⁴ Accordingly, the illustration below posits a recognizably subrational enforcement authority, and uses law and economics principles to trace out the implications of that authority's enforcement decisions.

Assume, then, a developing country (the "host country") that solicits foreign direct investment in its infrastructure sector. In this country and sector, bribery is quite common. Further assume that companies from two jurisdictions—Jurisdiction A and Jurisdiction B—have historically invested in this sector.³⁵ All firms competing in the host country's infrastructure sector are from one of these jurisdictions; no companies from jurisdictions other than A or B are investing there.

The host country will regularly issue Requests For Proposals (RFPs) and companies will submit bids in an effort to win contracts. Each contract involves a variety of transactions in which bribes would typically be paid: some would be paid during the bidding process (preparing and submitting the bid, then winning the contract) and others would be paid in the course of performing the contract (visas, permits, inspections, etc.). Further assume that the number of transactions per contract is fixed, resulting in a fixed number of total transactions. For purposes of this argument, assume that 100% of all business transactions in the host country government have involved bribes.

At a time that we shall call Time 1, neither Jurisdiction A nor Jurisdiction B is enforcing an extraterritorial bribery prohibition. Firms from both A and B therefore pay bribes freely. But Jurisdiction A firms are more efficient than Jurisdiction B firms, such that A firms in Time 1 win 60% of the contracts and B firms win 40%. The chart below captures these numbers.

³⁴ *Id.* at 7–10.

³⁵ I use "jurisdiction" rather than "country" because often the jurisdiction of a given country will extend to companies from other countries as well. For example, certain foreign companies are subject to the jurisdiction of the U.S. extraterritorial anti-bribery statute, such that even though they do not reside in the United States, they are nevertheless "from" the U.S. jurisdiction. See U.S. DEPARTMENT OF JUSTICE & U.S. SECURITIES AND EXCHANGE COMMISSION, FCPA: A RESOURCE GUIDE TO THE FOREIGN CORRUPT PRACTICES ACT 11 (2012), available at <http://www.justice.gov/criminal/fraud/fcpa/guide.pdf>.

Time	Enforcement Level	% Market Share for Firms from Jurisdiction A	% Bribes that A Firms Pay in Their Transactions	Overall Rate of Bribery in Host Country
T1	None	60	100	100

Firms from Jurisdiction A win 60% of the contracts, but pay bribes in 100% of the transactions. Jurisdiction B firms thus have a 40% market share, and likewise bribe 100% of the time. The overall rate of bribery in the infrastructure sector of the host country is therefore 100% in Time 1.

However, at Time 2, Jurisdiction A announces that it will begin enforcing an extraterritorial criminal bribery prohibition. The enforcement agencies are, again, subrational actors, so they are unable to implement an enforcement regime that would reduce bribery to zero: they cannot dedicate the resources necessary to raise the probability of detection to the requisite level, and fairness principles do not allow them to impose exorbitant penalties that would compensate for the low level of detection. Constrained as they are by limited resources and by fairness, they commence what we will call a low level of enforcement. Jurisdiction B does not follow suit and does not implement any kind of extraterritorial bribery prohibition, so B firms continue to bribe freely.

The host country issues a new set of RFPs and awards all available contracts to firms from Jurisdictions A and B. Jurisdiction A firms now become what we will call reluctant bribe payers. They do not stop paying bribes altogether, but they begin searching for ways to avoid paying bribes where possible while remaining present in the sector and profitable. While they may have previously paid a small bribe to expedite a visa approval, they are now willing to wait; instead of paying a bribe to send their goods immediately through customs, their ships wait in line for days in the harbor. Similarly, the government of Jurisdiction A begins working on behalf of its companies to reduce the demand for bribery in the host country (as the U.S. and UK governments do today).

The reluctant bribe payers (companies from Jurisdiction A) recognize that avoiding bribes will often reduce their efficiency—waiting in the harbor for customs approval is not without cost to the company. But they are willing to absorb these costs to reduce the risk of penalty for violating the prohibition. Although the risk of penalty is high enough to deter a certain amount of bribery, it

is not high enough to completely stop paying bribes. For reluctant bribe payers, the benefits of continuing to invest in the host country remain high enough that the company can pay some bribes and accept the risk that it will be caught and penalized for violating the bribery prohibition.

In the course of continuing to do business in the host country, the reluctant bribe payer will therefore encounter three kinds of transactions. The first is where the risk of detection is sufficiently high (or the firm is sufficiently principled) that it refuses to pay the bribe but can still find ways to complete the transaction. These may entail increased costs for the firm (such as waiting in line at port) but owing to the firm's efficiency (or the less than perfectly competitive market conditions) the firm can absorb these costs while remaining profitable. Alternatively, the firm may seek the diplomatic assistance of the governments (in the United States, these would be the Departments of Commerce or State). This is the kind of conduct that anti-bribery advocates seek to incentivize and may generally assume occurs. However, the firm will encounter a second kind of bribe, in which it will likewise refuse to pay but cannot complete the transaction without it. The firm must therefore knowingly forego the transaction; the best example would be a lost bid in a RFP. For the third kind of bribe, the risk of detection may be sufficiently low, or the costs of foregoing the transaction are sufficiently high (the company really needs this particular bid, or cannot afford to wait three days in port) that the firm will pay the bribe and accept the risk of detection.³⁶

Given the three types of bribes the firm will encounter and Jurisdiction A's new but still low-level of enforcement, assume that A firms reduce their bribery by half. They are now willing to pay bribes in 50% of all transactions. Assume further that as a result, the percentage of contracts they will be able to win also drops by half, from 60% of all contracts to 30% of all contracts. Investor substitution occurs, and B firms win the extra 30% of the contracts. Now A firms have 30% of the market and B firms have 70%. Owing to the downside of deterrence's upside, B firms

³⁶ The ability of companies from Jurisdiction A to absorb a degree of lost profits but remain competitive assumes that the market is not what economists would consider perfectly competitive. Were it so, the companies would have no margin to absorb the losses because competitors would have already been selling at the lower cost. But foreign direct investment is not perfectly competitive, in at least two respects. First, often a sort of oligopoly exists where only select companies from select countries are positioned to compete. Second, some companies might have a competitive advantage by virtue of their access to capital, technological, or various forms of government support. Accordingly, this illustration assumes that Jurisdiction A firms are operating at a level of profitability that permits them to absorb limited losses to comply with the statute.

continue to bribe in 100% of all their transactions, and therefore will bribe on the extra 30% of the contracts they will win. But because A firms were paying bribes on those contracts in Time 1, investor substitution has not resulted in a net increase in bribery in the host country.

Rather, A's low level of enforcement has thus succeeded in two respects. Of the 30% of the contracts that A firms win, they will only pay bribes in 50% of these transactions. For half of this 30%, or 15%, no bribes are being paid; this portion of the host country's infrastructure sector is now clean. Jurisdiction A's enforcement has thus reduced bribery among its own firms by 50%, and has reduced net bribery levels in the host country by 15%.

Time	Enforcement Level	% Market Share for Firms from Jurisdiction A	% Bribes that A Firms Pay in Their Transactions	Overall Rate of Bribery in Host Country
T1	None	60	100	100
T2	Low	30	50	85

Again, overall levels of bribery have gone down from 100% to 85% because A firms have a 30% market share and are not paying bribes on half of the related transactions. This is the outcome that anti-bribery advocates take for granted, and for those who accept the normative premise that federal law should deter overseas bribery, it is the reason to continue enforcement.

But now assume a subsequent point in time, called Time 3. The enforcement authorities in Jurisdiction A, perhaps encouraged from the successes of Time 2, have decided to ramp up enforcement through the dedication of new resources. We will call this mid-level enforcement, and it significantly increases the likelihood of detecting violations. In Time 3, the host country issues a new set of RFPs. The other assumptions still hold: the total number of transactions is again fixed, companies from Jurisdictions A and B will again compete, and companies from Jurisdiction B still bribe without fear of punishment.

Companies from Jurisdiction A now engage in a new cost-benefit analysis. They conclude that because the risk of detection and therefore penalty is higher, they must pay even fewer bribes than they did in Time 2. Say that mid-level

enforcement induces A firms to reduce their bribery percentage from 50% to 25% of all transactions.

The mid-level enforcement regime has thus succeeded in reducing bribery among companies subject to its jurisdiction. But consider the impact that investor substitution will now have on the change in overall bribery levels from Time 2 to Time 3. Although A firms won 60% of all contracts when bribing 100% of the time, they can now win only one-fourth of those contracts.³⁷ They now have only a 15% market share, down from 30% in Time 2. The 15% market share that A firms have lost since Time 2 will now go to B firms, which continue to bribe 100% of the time. In other words, 15% of the transactions have shifted from reluctant bribe payers to free bribe payers. Jurisdiction A firms remain engaged in only 15% of all transactions in the host country's infrastructure sector, and they will pay bribes in one-fourth of that 15%. Accordingly, A firms are bribe-free in 11% of all transactions. Because all other transactions are paid with bribes, the overall bribery level in the host country is now at 89%.

Time	Enforcement Level	% Market Share for Firms from Jurisdiction A	% Bribes that A Firms Pay in Their Transactions	Overall Rate of Bribery in Host Country
T1	None	60	100	100
T2	Low	30	50	85
T3	Mid	15	25	89

From Time 2, overall bribery has increased by 4%, and the increase is entirely due to Jurisdiction A's increased enforcement effort.

Consider a further period in time, Time 4, in which Jurisdiction A has finally resolved to dedicate the enforcement resources necessary to achieve what it deems the optimal rate of bribery among its firms—0%. And suppose it succeeds, such that now A firms pay absolutely no bribes. Further assume that all other conditions remain the same, and the host country issues a new set of RFPs. Jurisdiction A firms can no longer win contracts

³⁷ This exercise assumes that the percentage of contracts it can win will drop precisely in the same amount as the percentage of bribes it can pay. In practice, the relationship between these two figures would be more complicated.

in this host country's infrastructure sector. Jurisdiction B firms now win 100% of the contracts, engage in 100% of the transactions, and pay bribes 100% of the time. While the rate of bribery among A firms is now 0%, the overall rate of bribery in the host country is 100%.

Time	Enforcement Level	% Market Share for Firms from Jurisdiction A	% Bribes that A Firms Pay in Their Transactions	Overall Rate of Bribery in Host Country
T1	None	60	100	100
T2	Low	30	50	85
T3	Mid	15	25	89
T4	High	0	0	100

Notice the pattern. At Time 2, its efforts to deter bribery were effective in reducing the overall level of bribery in the host country. The success was due to raising the risk of detection and penalty to the point that its companies would make an effort to bribe less, but could still do business. Companies from Jurisdiction A indeed lost business as a result of the decision to enforce the bribery prohibition. But in Time 1, companies from Jurisdiction A were bribing as freely as companies from Jurisdiction B, so losing business to companies from Jurisdiction B at Time 2 did not result in an increase in bribery for the host country. The enforcement authority from Jurisdiction A thus continues to believe that increasing enforcement will decrease bribery. But at Time 3, the second increase in enforcement has reduced bribery only among companies subject to A's jurisdiction. Those companies are indeed bribing less. But owing to investor substitution, the impact on overall levels of bribery in the host country is a net increase. And we saw at Time 4 that raising penalty risks further can produce a scenario in which the rates of bribery in the host country return to 100%, a level not seen since before the enforcement effort began. In sum, after Time 1, the overall rate of bribery in the host country correlates inversely with Jurisdiction A's enforcement. Likewise, it correlates inversely with the percentage of bribes that A firms are paying. As Jurisdiction A attempts, and succeeds, in decreasing bribery among its own companies, it increases overall bribery in the developing country.

This illustration is of course artificially simplified. In reality, a number of additional variables would influence the net impact of increased enforcement: the number of transactions, the number of agencies or persons soliciting bribes, changes in the level of penalty, changes in the effectiveness of the reluctant bribe payer's tools for avoiding bribes, and perhaps most importantly, a decrease in the percentage of transactions in developing countries that require bribes. Developing a model that considers each of these variables is a project for another day. But this thought experiment nevertheless illustrates limitations inherent in the effort to deter extraterritorial white-collar crime, given current global economic and legal conditions.

C. Deterrence's Double Disutility

Though the enforcement authority's aim is to maximize utility, extraterritorial white-collar deterrence will tend to produce two distinct forms of disutility.

The first is, quite simply, that it often will not work. As explained above, overseas business environments will often lead to an increase, rather than a decrease, in the conduct we seek to deter. This will be true as long as capital-exporting jurisdictions vary in their enactment and enforcement of criminal prohibitions. The answer, one might think, is to tinker with the variables available to the enforcement authority: enforcement expenditures, fine levels, the length of imprisonment, and the standard for imposing liability. The problem, however, is that once into Time 2, decreasing the cost of the penalty through any of these four variables will necessarily decrease the disincentive to engage in the act: reducing enforcement expenditures, fines, or prison terms, or raising the standard for imposing liability, will decrease the costs of crime and increase its frequency.

In Times 2 and 3, the enforcement authority is trapped. By not increasing the risk of detection, it tolerates a measure of criminality among persons subject to its jurisdiction. But by raising the risk of detection, it produces the concurrent decrease in criminality among its companies, and an increase in that same behavior in the host country among all actors. These are the Scylla and Charybdis of extraterritorial white-collar criminal enforcement. The enforcement authority must choose between the harm of knowingly tolerating preventable criminality among its own companies, and knowingly increasing levels of criminality in vulnerable developing countries. It cannot avoid both.

But even if the first problem were resolved, and overseas deterrence efforts were to effectively reduce crime, the law and economics enforcement authority would be left with a second

problem. Consider again the assumption behind the economic theory of public enforcement: the taxpayer is the potential victim, and she pays taxes to prevent her victimization. That works in domestic enforcement, where all potential victims are taxpayers and all taxpayers are potential victims. But what if the victims are not taxpayers, and the taxpayers are not victims? What if the victims lie beyond the jurisdiction that is enforcing the criminal prohibition, and are therefore not paying the taxes that fund enforcement? Again using the anti-bribery example, we devote substantial public resources to protecting those overseas victims through the DOJ, SEC, FBI, offices in Commerce and State, and the federal judiciary. And various economic benefits might very well accrue to U.S. taxpayers, including the improvement of overseas markets and the resulting potential for economic and political alliances. But stakeholders to anti-bribery enforcement generally agree that the principal victims of extraterritorial bribery are the citizens of the overseas governments. And they are not paying for enforcement. That is, Congress enacted a statute in which U.S. taxpayers would pay to protect non-taxpayers from the harms of bribery. To the utility-maximizing taxpayer typically associated with law and economics, this is the second disutility of deterrence.

The enforcement authority thus seeks the Golden Mean or, if one prefers, the Goldilocks theory, of enforcement: to enforce its prohibition only to the point that it deters overall levels of bribery, and not further. The law and economics enforcement authority is trapped in this dilemma, unable to achieve what it considers the optimal level of criminality among its own actors without raising levels of the same conduct in the host country.

To the extent that the extraterritorial prohibition seeks both to deter criminality among the jurisdiction's own actors and to reduce overall levels of crime, the traditional mechanisms of deterrence may not be the most effective tools available. That is, the means typically employed by deterrence advocates may not be best suited to achieve deterrence's goals. Rather, the achievement of deterrence goals may require using non-deterrence, or extra-deterrence, means.

As the above illustration shows, extraterritorial crime reduction requires reaching two sets of actors who lie beyond the reach of the enforcement authority. The first is the host country: to the extent that a capital-importing country can enforce its own prohibitions (on bribery, for instance) no investor substitution can occur. All companies investing in that country would (in theory) be subject to the same risks and costs, and would engage in crime at roughly similar levels. If the host country sought to

reduce a given form of conduct to zero, it could do so, and differences among the capital-exporting jurisdictions would become irrelevant. But a developing country, almost by definition, is ill-equipped to do so; its state is not yet sufficiently resourced to deter the conduct of powerful foreign firms. This is thus a long-term project. Accordingly, the capital-exporting jurisdiction seeking to deter destructive conduct in foreign countries can also seek to influence the behavior of competing capital-exporting jurisdictions that do not enforce comparable prohibitions (the B Jurisdictions). The problem, of course, is that the enforcing jurisdictions (the A Jurisdictions) generally have no authority over either the capital-importing or capital-exporting governments.

III. RETHINKING CORPORATE SOCIAL RESPONSIBILITY

The challenge of extraterritorial crime reduction is to promote better overseas conduct using tools other than, or in addition to, the coercive power of the state. The above illustration shows how mere compliance by firms subject to an enforcing jurisdiction will tend to create an environment in which those firms cannot compete: eventually, high levels of enforcement combined with investor substitution will chase them out of the market. From the company's own standpoint, then, compliance proves self-defeating. But where the risk of detection is sufficiently high, noncompliance is not the remedy; this too will prove self-defeating. The remedy lies in doing that which law does not, and perhaps could not, require: firms subject to such extraterritorial prohibitions must seek to change the behavior of competitor firms, and push for reforms in capital-importing governments.

Enter corporate social responsibility, which generally encourages firms to engage in socially beneficial conduct beyond the minimal requirements of compliance.³⁸ This is especially true in the face of globalization, where "the capacity of the state to regulate economic behavior and to set the conditions for market exchange is in decline."³⁹ CSR scholars have argued that globalization requires corporations to "go beyond what is

³⁸ Given the mind-boggling array of proffered definitions of CSR, this article attempts none. For a sample, see Doreen McBarnet, *Corporate Social Responsibility Beyond Law, Through Law, for Law: The New Corporate Accountability*, in *THE NEW CORPORATE ACCOUNTABILITY: CORPORATE SOCIAL RESPONSIBILITY AND THE LAW* 9, 9 (Doreen McBarnet et al. eds., 2007).

³⁹ Andreas Georg Scherer & Guido Palazzo, *Globalization and Corporate Social Responsibility*, in *THE OXFORD HANDBOOK OF CORPORATE SOCIAL RESPONSIBILITY* 413, 426 (Andrew Crane et al. eds., 2008).

required by law, when the legal system is imperfect or legal rules are incomplete.”⁴⁰

But the CSR literature “has only begun to discuss the consequences of globalization,”⁴¹ and has yet to tackle the difficult problems of extraterritorial deterrence given the reality of selective criminalization and investor substitution. While some scholars have suggested that “creative compliance” is the “most intractable” of “obstacles to effective legal control of business,”⁴² the above deterrence analysis shows that the problem of corporate misbehavior is far greater than merely ensuring that firms obey the law to which they are subject. Jurisdiction A may draft a perfect statute, utterly devoid of loopholes and sufficiently expansive to include all conceivable forms of socially destructive behavior, and yet still fail to deter. Indeed, it may actually cause an increase in the proscribed conduct. CSR, accordingly, must do more than encourage firms to fully comply with the law in both its letter and “spirit.” It must provide firms with a paradigm that induces them to systematically work toward altering the conduct of actors other than themselves. It is an other-regarding form of CSR that focuses not on the victims, but on potential wrongdoers whose home jurisdictions are unwilling or unable to deter destructive behavior. It must further persuade firms that the socially responsible thing is closely aligned with their interests and motivations.

The existing literature on CSR and globalization has not provided this paradigm. That literature has generally envisioned any or all of three forms of socially responsible corporate conduct with respect to developing countries. The first appeals to the firm’s profit motive. It argues that various forms of socially beneficial conduct, while not immediately profitable, will tend to prove profitable in the long term. Indeed, it may have become “conventional wisdom for management texts and CSR advocates” to claim that considering “a broad range of stakeholders is in a firm’s best long-term interests.”⁴³ This is sometimes called the “business case” for CSR, holding that companies can “do well by

⁴⁰ *Id.* at 414.

⁴¹ *Id.* at 422.

⁴² See McBarnet, *supra* note 38, at 48.

⁴³ David L. Levy & Rami Kaplan, *Corporate Social Responsibility and Theories of Global Governance: Strategic Contestation in Global Issue Arenas*, in THE OXFORD HANDBOOK OF CORPORATE SOCIAL RESPONSIBILITY 433, 435 (Andrew Crane et al. eds., 2008) (citing ANNE T. LAWRENCE & JAMES WEBER, BUSINESS AND SOCIETY: STAKEHOLDERS, ETHICS, PUBLIC POLICY 21 (13th ed. 2004)).

doing good.”⁴⁴ The business case hypothesis has been subject to rigorous empirical tests over the years, but the results have proven unpersuasive.⁴⁵ Some have thus concluded that “a solid business case cannot be built by depending solely on locating an irrefutably established causal connection” between CSR and financial performance.⁴⁶ The link is simply too remote and tenuous.

Accordingly, other forms of CSR in the globalization context appeal to other corporate motives and modes of operation. The second form of CSR is philanthropy, whereby the firm functions as a charitable donor. In developing countries, CSR frequently takes the form of investment in education, health, the environment, or other community services.⁴⁷ While a firm may well have mixed motives in its charitable undertakings, this form of CSR seeks to move beyond the short-term profit motive in encouraging socially responsible behavior.

Yet a third form of CSR frames the corporation not as a self-interested profit seeker but as a citizen, as a responsible contributing member of the polity. It holds that particularly in developing countries, where the host state is less effective and the regime of transnational rules is “fragile and incomplete,” firms have a “political responsibility to contribute to the development and proper working of global governance.”⁴⁸ These scholars argue that corporations must become “politicized” through an “enlarged understanding of responsibility” to “solve political problems in cooperation with state actors and civil society actors.”⁴⁹ They should adopt more “cosmopolitan or higher-order interests.”⁵⁰ These scholars envision CSR as part of a process in which “political solutions for societal challenges are no longer limited to the political system but have become

⁴⁴ Elizabeth C. Kurucz, Barry A. Colbert & David Wheeler, *The Business Case for Corporate Social Responsibility*, in THE OXFORD HANDBOOK OF CORPORATE SOCIAL RESPONSIBILITY 83, 84 (Andrew Crane et al. eds., 2008).

⁴⁵ See, e.g., Philip L. Cochran & Robert A. Wood, *Corporate Social Responsibility and Financial Performance*, 27 ACAD. OF MGMT. J. 42, 42–56 (1984); Samuel B. Graves & Sandra A. Waddock, *Institutional Owners and Corporate Social Performance*, 37 ACAD. OF MGMT. J. 1034, 1042–44 (1994); James E. Mattingly & Shawn L. Berman, *Measurement of Corporate Social Action: Discovering Taxonomy in the Kinder Lydenburg Domini Ratings Data*, 45 BUS. & SOC’Y 20, 40–42 (2006).

⁴⁶ Kurucz et al., *supra* note 44, at 85.

⁴⁷ Wayne Visser, *Corporate Social Responsibility in Developing Countries*, in THE OXFORD HANDBOOK OF CORPORATE SOCIAL RESPONSIBILITY 473, 493 (Andrew Crane et al. eds., 2008).

⁴⁸ Scherer & Palazzo, *supra* note 39, at 414.

⁴⁹ *Id.* at 426.

⁵⁰ *Id.* at 427 (citing Hildy Teegan, Jonathan P. Doh & Sushil Vachani, *The Importance of Nongovernmental Organizations (NGOs) in Global Governance and Value*, 35 J. OF INT’L BUS. STUD. 463, 471 (2004)).

embedded in decentralized processes that include non-state actors such as NGOs and corporations.”⁵¹ Ultimately, by this view, corporations must be understood as both “economic and political actors.”⁵²

Note the relationship here between economic and political action. This model expressly makes a distinction between the conventional economic motives of a multinational corporation, and the “higher-order” political motives. This form of CSR asks firms to transcend profit seeking in the name of citizenship. It posits a sharp dichotomy between the firm’s short-term economic interests and society’s longer-term interests.⁵³

Notably, so too does the charity model rest on this distinction. It calls upon firms to build social infrastructure through donations that, with the possible exception of tax benefits, are generally a chink to the bottom line. Finally, notice that even the so-called business case concedes the tension between foreseeable profits and socially responsible conduct. It has historically built its case not on foreseeable profits, but on long-term profit, and asked (or hoped) that the empiricists could prove the connection. This empirical proof was sought, of course, because the connection between CSR and profit was not immediately apparent. Like the charity and political actor models, the business case asks the firm to set aside short-term interests in the name of a longer-term—and, it seems, elusive—financial benefit.

But this distinction—between short-term economic interests and long-term social interests—is precisely the reason that so many doubt whether CSR can ever do much work. To the extent that corporations are asked to suspend or compromise their pursuit of profits, we wonder whether CSR’s impact will expand beyond the fringes. CSR’s prospects would indeed be far greater in a set of legal and economic conditions that made the connection between socially beneficial conduct and immediate profits more apparent.

Those circumstances now exist in the arena of foreign direct investment in developing countries. The above analysis has shown that only up to a point will developed countries’ efforts to reduce overall levels of extraterritorial crime actually work. Given the unique conditions of selective criminality and investor substitution, strict compliance with an ever-increasing

⁵¹ *Id.* at 427.

⁵² *Id.*

⁵³ See Cynthia A. Williams, *Corporate Social Responsibility in an Era of Economic Globalization*, 35 U.C. DAVIS L. REV. 705, 707 (2002).

enforcement effort poses an immediate threat to the profitability of companies from enforcing jurisdictions. Companies from non-enforcing jurisdictions will eventually chase them out of the market. Companies will see—and indeed, in the bribery space they increasingly report⁵⁴—that enforcement and compliance significantly compromise their profitability.

In this space arises the need for a new kind of CSR. Like the third model above, it would call on corporations to work toward political reforms in the countries in which they do business. It would indeed ask them to assume the role of a responsible citizen, and help to ensure that not just they, but others as well, are subject to meaningful laws that are effectively enforced. It would help to create the conditions that give rise to a broad-based culture of compliance. But in acting as citizen, this form of CSR would not ask the corporation to suspend its pursuit of profit, even of foreseeable and relatively short-term profit. It would not ask firms to alternately wear either of two hats—one as profit-seeker, the other as responsible citizen. It would collapse the dichotomies that are so pervasive in CSR literature—between private and public, between profit and charity, between the demands of business and the aspirations of politics.

Corporations might engage in any number of such activities in developing countries. They might finance studies on the causes of particular forms of criminal conduct and develop innovative solutions. They might lobby for reforms in the host country that would increase, rather than decrease, enforcement. So too might they lobby their own jurisdiction to use the levers of international diplomacy to force other capital-exporting jurisdictions to enforce their extraterritorial prohibitions. All of these can be justified by a CSR model that recognizes corporations as responsible citizens. And all can be justified by an appeal to immediate profitability. A compliant U.S.-based multinational corporation doing business in Nigeria does not need a host of empirical studies to understand that if Nigeria enforced its own domestic bribery prohibitions, or China enforced its extraterritorial prohibition, the U.S. company would become more profitable.

CSR is typically understood as a critique, either explicit or implicit, of neoclassical economics. It has sought to move beyond the Friedmansque view of the firm, which has “one and only one social responsibility of business—to use its resources and engage

⁵⁴ See Spalding, *supra* note 33, at 10–15.

in activities designed to increase its profits so long as it stays within the rules of the game.”⁵⁵ So too has the bulk of CSR literature asked firms to move beyond the motives typically attributed to the *homo economicus* of law and economics. Though it may well remain true that business engagement with social issues is “generally attributed to two broad motivations, financial and political-institutional,”⁵⁶ these need not be mutually exclusive. To the extent that the CSR literature can collapse this dichotomy, it will do far more to command the attention of the corporations whose voluntary conduct the advocates wish to direct. And contemporary international business, where companies from diverse jurisdictions are competing in developing countries for business, now provides the catalyst.

CONCLUSION

The above model has shown how efforts to decrease overseas bribery may very well have the opposite result and increase levels of criminality. It has used bribery precisely because it is perhaps the best example today of U.S. law pursuing overseas deterrence. But the model would apply to any area of law in which overall deterrence was the policy goal but where global legal and economic conditions give rise to investor substitution. Though the U.S. Supreme Court has recently taken measures to restrict the extraterritorial application of federal law governing corporate conduct,⁵⁷ the trajectory of increasing globalization would suggest that efforts to regulate extraterritorial business conduct will tend to expand rather than retract. Should this happen, regulators and advocates alike will increasingly contend with these unique conditions.

Ultimately, the deterrence theory of law and economics identifies a problem that it cannot solve. It must hand off the problem to another literature, with a different set of assumptions and goals, in the hopes that it may fashion a new remedy. CSR may very well be that literature. This essay calls upon it to move beyond the dichotomies that have simultaneously made CSR scholarship seem so inspiring to some and yet so futile to others. Indeed, applied to contemporary international business, CSR’s

⁵⁵ MILTON FRIEDMAN, CAPITALISM AND FREEDOM 133 (1962).

⁵⁶ Levy & Kaplan, *supra* note 43, at 435.

⁵⁷ See *Morrison v. Nat’l Australia Bank Ltd.*, 130 S. Ct. 2869, 2887–88 (2010) (restricting the application of Rule 10b-5 to domestic transactions); *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013) (restricting the application of the Alien Tort Statute to conduct that “touch[es] and concern[s] the territory of the United States . . . with sufficient force.”).

goal may very well be to collapse the dichotomy between law and economics and CSR itself.