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The Myth of Anti-Bribery Laws as Transnational Intrusion

Philip M. Nichols*

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Introduction

On August 17, 1999, an earthquake centered in Izmit, Turkey killed over 40,000 people. Most of the people killed were buried in *kaçak* buildings—"contraband" buildings whose builders had bribed their way around Turkey's building codes.[1] A Turkish columnist concluded that "[c]orruption kills people, not earthquakes."[2]

Four years earlier, in Seoul, South Korea, the Sampoong department store collapsed, killing over three hundred and injuring over nine hundred people.[3] As with the *kaçak* buildings, the builders of the Sampoong department store paid bribes rather than meeting local building codes.[4] The

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1. *See* Metin Munir, *'Corruption Kills People, Not Earthquakes,'* FIN. TIMES, Aug. 19, 1999, at 2.

2. *Id.* at 2 (quoting an unnamed Turkish columnist).

3. *See* John Burton, *S Korea Blames Lax Inspection*, FIN. TIMES, July 4, 1995, at 6 (discussing collapse of the Sampoong department store and connection to bribery).

4. *See* Robert Elegant, *Removing the Veils from East Asian Corruption*, INT'L HERALD TRIB., Jan. 19, 1996, at 1 (reporting that twenty people were sent to jail in connection

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Sampoong department store's collapse capped three years of disasters involving man-made constructions in Korea, in which over one thousand lives and billions of dollars were lost due to the convergence of negligence, inexperience, and corruption.[5]

The corruption that resulted in these deaths involved local businesspersons bribing local officials. Corruption, however, is no more limited by political boundaries than are business transactions, and a significant percentage of large bribes paid around the world are probably paid by persons or companies that are not local. These bribes are no less harmful because they are paid by non-local entities. Indeed, transnational bribery is as lethal as any form of bribery, and its control is a subject worthy of study by transnational scholars.

Any study of corruption must recognize two gaps. First, there is a gap between the growing number of transnational communities and critical institutions such as law formation and enforcement.[6] Relationships, particularly commercial relationships, are now formed with little regard for political borders.[7] At the same time, law continues to be generated primarily by national bodies, and its effect often stops at the border.

The second gap is in academia itself. Although much speculation, observation, and many anecdotes exist, little empirical analysis of corruption has been performed. The genesis, growth, and spread of endemic corruption, for example, remain largely unexplored. The effects of corruption, however, have received scholarly attention, and economists and sociologists agree that corruption harms societies a great deal.

Those who labor under corrupt systems agree. For the most part, people no longer tolerate corruption. Various groups have taken up tools to combat corruption, including extraterritorial anti-bribery laws that criminalize the payment of bribes to foreign government officials. Most countries in the Western Hemisphere have agreed, through the Inter-American Convention Against Corruption,[8] to criminalize transnational bribery. The members of the Organization of Economic Cooperation and Development (OECD) have also agreed, through the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions

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with the Sampoong department store collapse, including the seventy-two-year-old chairman of the store, his son, and the government official that they bribed).

5. *See* Steve Glain, *Store Collapse in Seoul Underscores Need For Drastic Reform of Building Industry*, Asian Wall St. J. Wkly., July 10, 1995, at 2.

6. *See* Oliver E. Williamson, Markets and Hierarchies: Analysis and Antitrust Implications: A Study in the Economics of Internal Organization at xi-xii (1975) (noting that markets require institutions); Neil Fligstein, *Markets as Politics: A Political-Cultural Approach to Market Institutions*, 61 Am. Soc. Rev. 656, 656 (1996) (noting that markets are inseparable from institutions).

7. *See* Stephen J. Kobrin, *The Architecture of Globalization:* State Sovereignty in a Networked Global Economy, *in* Governments, Globalization, and International Business 146, 148 (John H. Dunning ed., 1997) (stating that the world is experiencing deep economic integration); Jessica T. Mathews, *Power Shift*, Foreign Aff., Jan.-Feb. 1997, at 50, 50 (stating that globalization has lead to the creation of relationships with little regard for national boundaries).

8. Mar. 26, 1996, 35 I.L.M. 724 [hereinafter IACC].

(OECD Convention),[9] to criminalize the bribery of foreign officials. The laws implementing these agreements have been criticized by a number of scholars as unwarranted intrusions into the affairs of other countries.

This article reviews and rejects the claim that anti-bribery laws constitute an intrusion thrust upon other countries. Section I looks at the nature of transnational bribery itself. Section II briefly sketches the scope, motivation, and content of current anti-bribery legislation and initiatives. Section III discusses the arguments against extraterritorial anti-bribery laws and evaluates the underlying premises of those arguments. Sections IV and V present further criticisms of the argument that anti-bribery laws are intrusive, noting that extraterritorial regulation of business conduct is commonplace and that multiculturalism allows room for the values of all parties.

I. Bribery

Bribery is universally condemned and is criminalized by every country in the world.[10] At the edges, legal definitions of bribery may differ. Saudi Arabia, for example, holds a government official criminally liable if "he has solicited for himself or a third party, or accepted or received a promise or gift to perform any duties of his function or claims that such act falls within the scope of his duties, even where the act is lawful."[11] Australian law, on the other hand, states:

> A person who, in order to influence or affect a Commonwealth officer in the exercise of his duty or authority as a Commonwealth officer, gives or confers, or promises to give or confer, any property or benefit of any kind to or on the Commonwealth officer or any other person is guilty of [the offense of bribery].[12]

Because statutory definitions of bribery differ, the global understanding of bribery is more easily understood when bribery is discussed in general rather than legal terms.[13] Bribery involves an improper payment made in exchange for abuse or misuse of a government official's office. Joseph Nye provides an authoritative definition—"behavior which deviates from the formal duties of a public role because of private-regarding (personal, close family, private clique) pecuniary or status gains; or violates rules against the exercise of certain types of private-regarding influence."[14]

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9. Dec. 18, 1997, 37 I.L.M. 1 [hereinafter OECD Convention].

10. *See* Fritz F. Heimann, *Should Foreign Bribery Be a Crime* (Sept. 20, 1994) <http://www.transparency.de/documents/source-book/c/cvl/i9.html>.

11. Combating Bribery Law, Official Gazette No. 3414, art. 1 (July 31, 1992) (Saudi Arabia), *reprinted in Saudi Arabia: Anti-Bribery Law*, 9 ARAB L.Q. 283 (1994).

12. Crimes Act, 1914, sec. 73(3) (Austl.).

13. *See* Bryan W. Husted, *Honor Among Thieves: A Transaction-Cost Interpretation of Corruption in Third World Countries*, 4 BUS. ETHICS Q. 17, 18-19 (1994); *see also* Frank J. Sorauf, *Politics, Experience, and the First Amendment: The Case of American Campaign Finance*, 94 COLUM. L. REV. 1348, 1350 (1994) (stating that "'quid pro quo' . . . is . . . the vital element of any definition of bribery").

14. J.S. Nye, *Corruption and Political Development: A Cost-Benefit Analysis*, 61 AM. POL. SCI. REV. 417, 419 (1967). A contemporary echoed Nye's definition, defining cor-

An important corollary springs from this general concept of bribery: the behaviors that constitute improper payments and abuse or misuse of office are defined locally. For example, if a tip to a government official is allowed in a given country, then that tip is not an improper payment.[15] Similarly, if a government official legally may give preference to her relatives, then such preferential treatment does not constitute abuse of office.[16]

Bribery is morally repugnant to the major religions and schools of moral thought.[17] One should not confuse *mala in se*, however, with *mala prohibita*. Bribery is controlled because it is commercially damaging and socially corrosive. Bribery kills, and bribery destroys.

The economic and social damage caused by bribery has been explicated at great length elsewhere;[18] those discussions will not be repeated in

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rupt activity as the "misuse of authority as a result of considerations of personal gain, which need not be monetary." David H. Bayley, *The Effects of Corruption in a Developing Nation*, 19 W. POL. Q. 719, 720 (1966).

15. This example, of course, is purely hypothetical, as the author knows of no country in which tipping government officials is legal. *But see* United States v. McNeive, 536 F.2d 1245, 1250-51 (8th Cir. 1976) (holding that an officeholder who received tips that did not interfere with his discretionary duties fell outside the mail fraud statutes). For a general discussion of the distinctions among tips, bribes, gifts, and prices, see SUSAN ROSE-ACKERMAN, CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES, AND REFORM 91-110 (1999).

16. This example also is purely hypothetical. Nepotism is generally considered a basic form of corruption. *See* Robert Klitgaard, *International Cooperation Against Corruption*, FIN. & DEV., Mar. 1998, at 3, 4 (including nepotism among basic forms of corruption); Tatu Vanhanen, *Domestic Ethnic Conflict and Ethnic Nepotism: A Comparative Analysis*, 36 J. PEACE RES. 55, 56 (1999) (describing nepotism). Nepotism, like bribery, has resulted in investigation and resignation of government officials. *See* Andrew MacMullen, *Fraud, Mismanagement and Nepotism: The Committee of Independent Experts and the Fall of the European Commission 1999*, 31 CRIME, L. & SOC. CHANGE 193, 193 (1999) (describing the resignation of all members of the Commission of the European Communities after an investigation conducted by a Committee of Independent Experts that uncovered evidence of fraud, mismanagement, and nepotism).

17. *See* Philip M. Nichols, *Outlawing Transnational Bribery Through the World Trade Organization*, 28 LAW & POL'Y INT'L BUS. 305, 321-22 (1997) (citing primary sources from Buddhism, Christianity, Confucianism, Hinduism, Islam, Judaism, Sikhism, and Taoism and philosophers that condemn bribery).

18. For discussion of the economic and social damage caused by bribery, see POVERTY REDUCTION AND ECONOMIC MANAGEMENT, WORLD BANK, HELPING COUNTRIES COMBAT CORRUPTION: THE ROLE OF THE WORLD BANK 5 (1997) (discussing bribery's long-term economic costs and much greater damage to political legitimacy and fairness); Frederick M. Abbott, *Foundation-Building for Western Hemispheric Integration*, 17 NW. J. INT'L L. & BUS. 900, 914 (1996-97) (discussing the advantages of bribery to "inefficient local operators over efficient multinational operators"); Konyin Ajayi, *On the Trail of a Spectre–Destabilisation of Developing and Transitional Economies: A Case Study of Corruption in Nigeria*, 15 DICK. J. INT'L L. 545, *passim* (1997) (discussing corruption's role in the collapse of the Nigerian economy); M.S. Alam, *A Theory of Limits on Corruption and Some Applications*, 48 KYKLOS: INT'L REV. FOR SOC. SCI. 419, 431 (1995) (noting that resources are diverted and wasted to hide illicit activities); Edgardo Buscaglia & Maria Dakolias, *An Analysis of the Causes of Corruption in the Judiciary*, 30 LAW & POL'Y INT'L BUS. 95, 112 (Supp. 1999) (noting that "present corruption decreases future productivity, thereby reducing dynamic efficiency"); Maria Dakolias & Kim Thachuk, *Attacking Corruption in the Judiciary: A Critical Process in Judicial Reform*, 18 WIS. INT'L L.J. 353, 358 (2000) (discussing the effect of corruption on judiciaries); Franklin A. Gevurtz, *Commercial Bribery and the Sherman Act: The Case for Per Se Illegality*, 42 U. MIAMI L.

this short article. Briefly, bribery distorts economies by affecting the decision-making process of both producers and government officials who procure goods and services.[19] A corrupt system does not reward the producer of the best and cheapest product, but instead rewards the producer who pays the largest bribe; the rational producer, therefore, will shift resources away from quality and toward the bribe payment.[20] Bribery also affects procurement decisions, which, rather than being made on the basis of price and quality, are made on the basis of personal gain.[21]

Bribery also reduces the amount of foreign investment and economic growth in a country.[22] Empirical studies by Paolo Mauro have demon-

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REV. 365, 390 (1987) (noting the inefficiencies created when firms bribe to create monopolies); Joseph Onek, *Remarks: Roundtable on Global Corruption*, 31 LAW & POL'Y INT'L BUS. 205, 205 (1999) (noting that corruption played a major role in the collapse of Indonesia); Salim Rashid, *Public Utilities in Egalitarian LDC's: The Role of Bribery in Achieving Pareto Efficiency*, 34 KYKLOS: INT'L REV. FOR SOC. SCI. 448, 448-55 (1981) (discussing the observation in an empirical study that over time bureaucrats expected bribes and created inefficiencies to extract more and larger bribes); 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, 454 (1997) (describing the literature that finds corruption to be harmful); Francisco E. Thoumi, *Some Implications of the Growth of the Underground Economy in Columbia*, 29 J. INTERAMERICAN STUD. & WORLD AFF. 35, 44 (1987) (stating that over time an honest individual in a corrupt system adapts and becomes more dishonest); Robert Wade, *The Market for Public Office: Why the Indian State is Not Better at Development*, 13 WORLD DEV. 467, 474-80 (1985) (describing the sale of public offices by corrupt officials and the effect of corruption on a bureaucracy); *infra* notes 19-29.

19. For excellent, and longer, discussions of the distortion caused by corruption, see SUSAN ROSE-ACKERMAN, THE POLITICAL ECONOMY OF CORRUPTION—CAUSES AND CONSEQUENCES 3-4 (World Bank Viewpoint No. 74, 1996); Vito Tanzi, *Corruption, Governmental Activities, and Markets*, FIN. & DEV., Dec. 1995, at 24, 25-26.

20. *See* M. Shahid Alam, *Anatomy of Corruption:* An Approach to the Political Economy of Underdevelopment, 48 AM. J. ECON. & SOC. 441, 449-50 (1989) (noting that not only is the quality of goods disregarded, but also that producers who cheat on the quality of goods to pay larger bribes will be successful); *see also* Stanley Sporkin, *The Worldwide Banning of Schmiergeld: A Look at the Foreign Corrupt Practices Act on its Twentieth Birthday*, 18 NW. J. INT'L L. & BUS. 269, 280 (1998) (describing low quality of construction due to corruption).

21. *See* Mark B. Bader & Bill Shaw, *Amendment of the Foreign Corrupt Practices Act*, 15 N.Y.U. J. INT'L L. & POL. 627, 627 (1983) ("A fundamental tenet of a free market system is that economic transactions should be based solely upon the price and quality of a product and the service provided by the seller."); Daniel Pines, Comment, *Amending the Foreign Corrupt Practices Act to Include a Private Right of Action*, 82 CAL. L. REV. 185, 213 (1994) ("Bribery sabotages the free market system . . . .").

Corruption distorts economies in other, more subtle ways. The diversion of large sums of money into the black hole of corruption, for example, distorts relative prices. *See* Omotunde E. G. Johnson, *An Economic Analysis of Corrupt Government, With Special Application to Less Developed Countries*, 28 KYKLOS: INT'L REV. FOR SOC. SCI. 47, 55 (1975) (describing the distortion). The diversion of time and resources to maintaining the secrecy of corrupt transactions also causes distortion. *See* Andrei Shleifer & Robert W. Vishny, *Corruption*, 108 Q.J. ECON. 599, 611-15 (1993) (discussing distortion caused by secrecy).

22. A great deal of evidence suggests a positive relationship between foreign investment and economic growth. *See* Ray Barrell & Nigel Pain, *Foreign Direct Investment, Technological Change, and Economic Growth Within Europe*, 107 ECON. J. 1770, 1777-82, 1784-85 (1997) (finding that foreign direct investments play vital roles in the acceleration of technological change and economic growth in European countries); Glenn Firebaugh, *Growth Effects of Foreign and Domestic Investment*, 98 AM. J. SOC. 105, 105

strated a "negative association between corruption and investment, as well as growth, [that] is significant in both a statistical and an economic sense."[23] Similarly, Shang-Jin Wei found that corruption has a far greater negative effect on foreign investment and growth than does taxation.[24]

Bribery corrodes society. Citizens who live with corrupted bureaucracies tend to mistrust government.[25] They have good reason: honest officials tend to leave corrupted bureaucracies,[26] and those who remain often purposefully create uncertainty so that they may extract bribes.[27] Govern-

(1992) (finding a beneficial relationship between foreign investment and growth). The evidence, however, is mixed. *See* Amitava Krishna Dutt, *The Pattern of Direct Foreign Investment and Economic Growth*, 25 WORLD DEV. 1925, 1934 (1997) (finding that different patterns of foreign investment affect growth in host countries differently); Jeffrey Kentor, *The Long-Term Effects of Foreign Investment Dependence on Economic Growth, 1940-1990*, 103 AM. J. SOC. 1024, 1024-27 (1998) (describing debate between those who hold that dependence of a national economy on foreign investment promotes economic growth and those who hold that it causes underdevelopment). This article does not purport to offer a definitive statement with respect to the issue; for more discussion of economic growth, see *infra* notes 44-47 and accompanying text.

23. Paolo Mauro, *Corruption and Growth*, 110 Q.J. ECON. 681, 705 (1995); *see also* Paolo Mauro, *The Effects of Corruption on Growth, Investment, and Government Expenditure: A Cross-Country Analysis*, *in* CORRUPTION AND THE GLOBAL ECONOMY 83, 91 (Kimberly Ann Elliott ed., 1997) (finding that a measurable decrease in a country's corruption would increase its investment to gross domestic product ratio by over four percent and the annual growth in gross domestic product per capita by almost half a percent). Edgardo Campos and others find that while the negative effect is lessened if a corrupt government is predictable, there is still a negative effect. J. Edgardo Campos et al., *The Impact of Corruption on Investment: Predictability Matters*, 27 WORLD DEV. 1059, 1065 (1999).

24. *See* SHANG-JIN WEI, WHY IS CORRUPTION SO MUCH MORE TAXING THAN TAX? ARBITRARINESS KILLS 14-15 (National Bureau of Econ. Research Working Paper No. 6255, 1997); SHANG-JIN WEI, HOW TAXING IS CORRUPTION ON INTERNATIONAL INVESTORS? 24 (National Bureau of Econ. Research Working Paper No. 6030, 1997) (finding that an increase in the level of corruption decreases the amount of foreign investment).

25. *See* A.W. Cragg, *Business, Globalization, and the Logic and Ethics of Corruption*, 53 INT'L J. 643, 654 (1998) (noting that respect for law and institutions is a "casualty" of bribery); Herbert H. Werlin, *The Consequences of Corruption: The Ghanaian Experience*, 88 POL. SCI. Q. 71, 79 (1973) ("The effect of corruption is to generate an atmosphere of distrust which pervades all levels of administration.").

26. *See* Johnson, *supra* note 21, at 57 (noting that potential government employees will avoid government work for moral reasons when corruption is pervasive). Conversely, Vito Tanzi notes that "[s]ome individuals will try to get jobs not in the areas in which they might use their particular ability for productive use but in areas that provide scope for taking advantage of their special positions." Tanzi, *supra* note 19, at 26. Cragg notes that, ironically, the payment of bribes also corrupts the decision-making ability of bribe-paying companies by, among other things, creating an environment in which employees think that it is appropriate to put their own interests ahead of the company's. *See* Cragg, *supra* note 25, at 653.

27. *See* Alam, *supra* note 20, at 449 (stating that "bribery may impose costs because of the official's efforts to maximize the offer of bribes" by creating false uncertainties). In his outstanding study of the Irrigation Department of a state in southern India, Robert Wade found that officials actively created uncertainty among farmers to generate larger bribes and that the Irrigation Department, as a consequence, had lost its credibility with the farmers. *See* Robert Wade, *The System of Administrative and Political Corruption: Canal Irrigation in South India*, 18 J. DEV. STUD. 287, 314-15 (1982).

ments become unable to effect programs for the general good.[28] Ultimately, bribery "undermines the legitimacy of governments, especially democracies. Citizens may come to believe that the government is simply for sale to the highest bidder. . . . It can lead to coups by undemocratic leaders."[29]

Bribery, then, consists of the abuse or misuse of public office in exchange for personal gain; misuse or abuse of office is locally defined. Bribery is universally condemned and can cause severe economic and social damage. There is little wonder, therefore, that people attempt to control this practice through, among other methods, anti-bribery laws that criminalize transnational bribery.

II. Anti-Bribery Laws

As many have noted, numerous transnational initiatives currently attempt to curtail the harmful practice of bribery.[30] These initiatives spring from governments, nongovernmental organizations,[31] grassroots movements,[32]

28. Tanzi notes: "When civil servants appropriate, for their own use, the instruments that the government has at its disposal to influence the economy and to correct the shortcomings of the private market, they reduce the power of the state and its ability to play its intended, and presumably corrective, role." Tanzi, *supra* note 19, at 26; *see also* Manash Ranjan Gupta & Sarbajit Chaudhuri, *Formal Credit, Corruption and the Informal Credit Market in Agriculture: A Theoretical Analysis*, 64 ECONOMICA 331 (1997) (connecting the bribe rate for farmers to receive loans from public officials to the informal interest rates set by loansharks).

29. Susan Rose-Ackerman, *The Political Economy of Corruption*, *in* CORRUPTION AND THE GLOBAL ECONOMY, *supra* note 23, at 31, 45 (citations omitted); *see also* Nancy Zucker Boswell, *Combating Corruption: Focus on Latin America*, 3 SW. J.L. & TRADE AM. 179, 180 (1996) (stating that bribery undermines democracy); John Brademas & Fritz Heimann, *Tackling International Corruption: No Longer Taboo*, 77 FOREIGN AFF., Sept.-Oct. 1998, at 17, 18 (describing damage done by bribery scandals to governments in Brazil, Colombia, Ecuador, India, Indonesia, Italy, Japan, Mexico, NATO, Pakistan, South Korea, Venezuela, and Zaire).

30. *See generally* Barbara Crutchfield George & Kathleen Lacey, *A Coalition of Industrialized Nations, Developing Nations, Multilaterial Development Banks, and Non-Governmental Organizations: A Pivotal Complement to Current Anti-Corruption Initiatives*, 33 CORNELL INT'L L.J. 547 (2000).

31. The International Chamber of Commerce, for example, is a nongovernmental "association of internationally-oriented enterprises and their national organizations" that works to "'promote international commerce worldwide.'" W. LAURENCE CRAIG ET AL., INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION 25 (2d ed. 1990). Founded in 1919, the International Chamber of Commerce has over 7000 members. *See id.* In 1996, the International Chamber of Commerce adopted the Rules of Conduct to Combat Extortion and Bribery, which prohibits the offer or acceptance of any bribe or kickback, requires companies to control payments by their agents, and requires recordkeeping sufficient to prevent the hiding of illicit payments or secret funds. *See* International Chamber of Com., *Extortion and Bribery in International Business Transactions*, arts. 1 ("No one may, directly or indirectly, demand or accept a bribe."), 2 ("No enterprise may, directly or indirectly, offer or give a bribe and any demands for such a bribe must be rejected."), 4 (imposing financial recording and auditing requirements on enterprises) (visited Sept. 24, 2000) <http://www.iccwbo.org/home/statements_rules/rules/1999/briberydoc99.asp>. Although the Chamber urged its members to adopt these rules, they are intended as a voluntary code of corporate conduct and are not intended to be adopted in any formal way by any government. *See id.*

and intergovernmental organizations[33] and span the globe,[34] discrete regions,[35] countries,[36] and even cities.[37] Indeed, it "is difficult to think of a significant international organisation not looking at corruption."[38]

These initiatives utilize a number of tools to combat corruption.[39] The most often utilized, and even more frequently supported,[40] tool is the

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32. *See, e.g.*, Community Info. and Epidemiological Tech., *CIET International: Building the Community Voice into Planning* (visited Sept. 28, 2000) <http://www.ciet.org>.

> CIET is an international group of non-profit, non-governmental organizations, academic institutes, charities, foundations and trusts dedicated to building the community voice into planning and good governance. CIET is also an international group of professionals from a variety of disciplines, including epidemiology, medicine, law, planning, communications and other social sciences, who bring scientific research methods to community level. By involving people at the community level in information gathering and analysis, CIET helps them to participate, in an increasingly informed way, in decisions that affect their lives.

Id.

33. The Customs Co-Operation Council of the World Customs Organization, for example, adopted the Arusha Declaration, which acknowledges that "corruption can destroy the efficient functioning of any society and diminish the ability of the Customs to accomplish its mission." World Customs Organization, *Arusha Declaration* (July 7, 1993) <http://www.wcoomd.org/hrds/Arusha4e.pdf>. The Declaration sets forth a "Customs integrity programme" that suggests, inter alia, that Customs adopt simple procedures, move staff frequently, and employ external audits. *See id.* paras. 2, 4, 6.

34. *See infra* notes 42-43 and accompanying text (discussing the efforts of the United Nations).

35. *See* Charles Manga Fombad, *Curbing Corruption in Africa: Some Lessons from Botswana's Experience*, 160 INT'L SOC. SCI. J. 241, 241-42 (1999) (describing many movements to decrease corruption in Africa); Global Coalition for Afr., *Corruption* (Feb. 26, 1999) <http://www.gca-cma.org/ecorrup.htm> (describing the anti-corruption framework of the Global Coalition for Africa).

36. *See* OFFICE OF THE PRIME MINISTER, KOREA'S ANTI-CORRUPTION PROGRAMS 15-26 (1999) (describing South Korea's country-wide anti-corruption program).

37. *See* Goh Kun, Mayor of Seoul, A Systematic Approach to Anti-Corruption: The Case of the Seoul Metropolitan Government, Address at the 9th International Anti-Corruption Conference (Oct. 14, 1999) (transcript available in <http://www.metro.seoul.kr/eng/smg/mayor/speech/speech_durban.html>) (describing the anti-corruption program of Seoul, South Korea).

38. Martin Wolf, *Corruption in the Spotlight*, FIN. TIMES, Sept. 16, 1997, at 23; *see* Alan Doig, *Dealing with Corruption: The Next Steps*, 29 CRIME, L. & SOC. CHANGE 99, 100 (1998) ("International agencies and donors governments have all issued statements or policies on corruption.").

39. *See* Robert S. Leiken, *Controlling the Global Corruption Epidemic*, FOREIGN POL'Y, Dec. 1996, at 55, 68 (suggesting "[d]eregulation, decentralization, and the simplification of government procedures—fortified by transparent bidding systems, the rotation of offices, and modern information-management systems" and "market reforms that dissolve state monopolies and trim the discretionary power of officials"). Actual programs describe more specific measures. The anti-corruption program in Seoul, South Korea, for example, includes deregulation, means of reporting corruption, streamlined online applications, joint inspections with citizens, a citizen ombudsman, and a "zero tolerance" policy toward corruption. Kun, *supra* note 37 (describing the program).

40. On February 24, 1999, Vice President Al Gore convened a forum of international leaders to discuss corruption. *See* FINAL CONFERENCE REPORT: A GLOBAL FORUM ON FIGHTING CORRUPTION at iii (1999) [hereinafter FINAL REPORT]. A number of leaders and scholars from emerging and developing countries expressed support for, or even demanded, the criminalization of transnational bribery by wealthier countries. *See* FINAL REPORT, *supra*, at 19 (statement of Jorge Fernando Quiroga Ramirez, Vice President of Bolivia) ("[I]t [is] important that countries not tolerate abroad what they would not tolerate at

criminalization of transnational bribery.[41] This section examines some of the multinational regimes for the criminalization of transnational bribery, the reasons for the creation of these regimes, and the definitions of bribery in implementing legislation.

A. Multilateral Initiatives

At the broadest level, several international bodies have taken up the issue of corruption and bribery. The United Nations adopted in 1996 a Declaration against Corruption and Bribery in International Commercial Transactions,[42] which calls upon members of the United Nations to criminalize transnational bribery.[43] The President of the World Bank has stated that no issue is more important to his organization than corruption,[44] and the Bank has published procurement guidelines, banned bribe-giving contractors from further work on Bank-funded projects, and threatened to cancel

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home."), 19 (statement of Carlos Rukhauf, Vice President of Argentina) (supporting the OECD Convention), 22 (statement of Jaime David Fernandez Mirabel, Vice President of the Dominican Republic) (asking "all Western Hemisphere countries that had not done so to ratify the Inter-American Convention Against Corruption"), 35 (statement of Luis Alfonso Davila, President of Congress, Venezuela) (stating that the fight against corruption requires the will of neighboring countries), 60 (statement of Vasyl Durdynets, Director of the National Bureau of Investigation of Ukraine) ("Ukraine supports enhanced international cooperation to jointly seek ways and legal frameworks to act against corruption . . . ."), 73 (statement of Dr. Anton Bebler, Professor of Sociology at the University of Ljubljana, Slovenia) (recommending movement toward "[c]ompleting and strengthening the regime of international conventions against corruption"); OFFICE OF THE PRIME MINISTER, *supra* note 36, at 11 (listing as a task for Korea the strengthening of ties with international organizations and other countries "for the purpose of combating corruption both domestically and globally"); Global Coalition for Afr., *supra* note 35 (welcoming the actions of the OECD and the International Chamber of Commerce, but asking that donor countries "do more to investigate corrupt practices and punish those engaged in them"); Festus Mogae, President of the Republic of Botswana, Corruption and the North-South Dilemma, Opening Remarks at the 9th International Anti-Corruption Conference (Oct. 11, 1999) (transcript available in <http://www.transparency.de/iacc/9th_papers/day1/plenary/d1pl_tmbeki.html>) (condemning "voluntary and weaker codes of conduct" and demanding criminalization of transnational bribery).

41. *See* Cragg, *supra* note 25, at 659 (stating that "the criminalization of corruption within national boundaries must be extended to include international business transactions"); Leiken, *supra* note 39, at 71 (stating that "the solution to transnational bribery lies not in a futile attempt to repeal the Foreign Corrupt Practices Act but in universalizing it").

42. G.A. Res. 51/191, U.N. GAOR, 51st Sess., Annex, Agenda Item 12, U.N. Doc. A/RES/51/191 (1996) [hereinafter *U.N. Declaration*]. In 1998, the United Nations renewed the call for members to implement the Declaration's provisions. *See Action Against Corruption and Bribery in International Commercial Transactions*, G.A. Res. 53/176, U.N. GAOR, 53d Sess., 91st plen. mtg. ¶ 4, U.N. Doc. A/RES/53/176 (1998). These resolutions build on a 1976 resolution condemning transnational bribery and requesting unilateral and multilateral action. *See U.N. Declaration*, *supra*, at 1; *Action Against Corruption and Bribery in International Commercial Transactions*, *supra*, at 1.

43. *See U.N. Declaration*, *supra* note 42, ¶ 2.

44. Statement of James Wolfensohn, President of the World Bank, Address at the 9th International Anti-Corruption Conference (Oct. 11, 1999) (transcript available in <http://www.transparency.de/iacc/9th_iacc/papers/day1/plenary/d1pl_jwolfensohn.html>).

loans to bribe-soliciting countries.[45] The International Monetary Fund instructs its advisors to take a proactive role in dealing with corruption and will take action, including withdrawal of Fund support, in the event of corruption.[46] Even the World Trade Organization has established a Working Group on Transparency in Government Procurement (Working Group).[47] At the global level, therefore, criminalization of transnational bribery is a suggested, but not required part of a comprehensive attack on corruption.

At the regional level, however, criminalization of transnational bribery *is* required by at least two organizations. The Organization of American States promulgated in 1996 a treaty that requires its members to take certain actions with respect to transnational bribery, including criminalizing

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45. *See* Helmut Sohmen, *Critical Importance of Controlling Corruption*, 33 INT'L LAW. 863, 865 (1999) (discussing activity of the World Bank). Section 1.15 of the *Guidelines for Procurement Under IBRD Loans and IDA Credits* states that any firm that offers or gives or receives or solicits a bribe will be ineligible for Bank-financed contracts; at least forty firms have been declared ineligible. *See* World Bank, *Listing of Debarred Firms* (last modified Feb. 29, 2000) <http://www.worldbank.org/html/opr/procure/debarr.html> (stating relevant guidelines and providing a current list of ineligible firms). Section 1.25 of the *Guidelines for the Selection and Employment of Consultants under IBRD Loans and IDA Credits* states that any consultant that offers or gives or receives or solicits a bribe may be ineligible for future Bank-funded work; at least six consultant firms have been declared ineligible. *See id.* (providing a current list of ineligible consultants).

46. *See* INTERNATIONAL MONETARY FUND, GOOD GOVERNANCE: THE IMF'S ROLE 2 (1997) (describing the Fund's more proactive role and stating that the Fund will not support corrupt governments); *see also* Sohmen, *supra* note 45, at 866 (stating that the Fund now limits its involvement in countries where corruption negatively affects domestic economic growth). Section 1.2.2 of the Fund's *Code of Good Practices on Fiscal Transparency–Declaration of Principles* states that "[t]axes, duties, fees, and charges should have an explicit legal basis," while section 1.2.3 states that "[e]thical standards of behavior for public servants should be clear and well-publicized." International Monetary Fund, *Code of Good Practices on Fiscal Transparency–Declaration of Principles* (last modified Apr. 26, 1999) <http://www.imf.org/external/np/fad/trans/code.htm>. The code, in section 4.1.1, also suggests that a "national audit body, or equivalent organization, should be appointed by the legislature, with the responsibility to provide timely reports to the legislature and public on the financial integrity of government accounts." *Id.*

47. *See* Ministerial Conference, Singapore Ministerial Declaration, WT/MIN(96)/DEC ¶ 21, at 7 (Dec. 13, 1996) (creating the Working Group). Even this level of commitment is surprising, given the dogged insistence by some members that corruption is not an appropriate issue. *See* Nichols, *supra* note 17, at 364-77 (discussing objections made by developing countries and emerging and mature economies). *See generally* Philip M. Nichols, *Corruption in the World Trade Organization: Discerning the Limits of the World Trade Organization's Authority*, 28 N.Y.U. J. INT'L L. & POL. 711 (1996) (exploring the authority of the World Trade Organization to deal with the issue of corruption). The ambivalence of the members is reflected in a report of the Working Group, expressing the membership's commitment to combating corruption and bribery, but also discussing some members' views that the World Trade Organization's role should be limited to transparency in government procurement without explicit mention of fighting corruption and bribery. *See* Working Group, *Report (1999) to the General Council*, WT/WGTGP/3 ¶¶ 111-15, at 36-37 (Oct. 12, 1999). The Working Group is considering *Draft Text for an Agreement on Transparency in Government Procurement*, which consolidates four different drafts circulated by Hungary, South Korea, Singapore, and the United States. *See* General Council, *Preparation for the 1999 Ministerial Conference: The WTO's Contribution to Transparency in Government Procurement: Communication from Hungary, Korea, Singapore and the United States*, WT/GC/W/385, WT/WGTGP/W/27, Annex, at 3-9 (Nov. 9, 1999).

bribery of foreign officials.[48] The treaty further requires signatories to allow extradition of bribe givers[49] and bribe-taking officials and contains a pledge that signatories will not invoke bank secrecy laws to impede investigations into corruption.[50] The treaty also requires signatories to criminalize a government official's possession or acquisition of assets that the official "cannot reasonably explain in relation to his lawful earnings during the performance of his functions."[51] Twenty-six members of the Organization have signed the treaty.[52] The European Union has also agreed upon a treaty that requires its members to criminalize transnational bribery.[53] This treaty, however, is far less extensive than the Organization of American States' treaty in that it only requires members to criminalize bribery involving officials of European Union countries.[54]

The most far-reaching international effort is the treaty among the twenty-nine OECD members and five non-members[55] requiring those

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48. *See* IACC, *supra* note 8, arts. V-VI, 35 I.L.M. at 729; *see also* Lucinda A. Low et al., *The Inter-American Convention Against Corruption: A Comparison With the United States Foreign Corrupt Practices Act*, 38 VA. J. INT'L L. 243, 247-249 (1998) (discussing the requirement); Rex J. Zedalis, *Internationalizing Prohibitions on Foreign Corrupt Practices:* The OAS Convention and the OECD Revised Recommendation, 31 J. WORLD TRADE No. 6, Dec. 1997, at 45, 52-55 (discussing the treaty).

49. *See* IACC, *supra* note 8, art. XIII, 35 I.L.M. at 731 (dealing with extradition). The extradition provision is particularly important in Latin America, which has a strong tradition of providing asylum to government officials from other countries. *See* Ranee K. L. Panjabi, *Terror at the Emperor's Birthday Party: An Analysis of the Hostage-Taking Incident at the Japanese Embassy in Lima, Peru*, 16 DICK. J. INT'L L. 1, 64 (1997) (noting that the idea of asylum is strongest in Latin America). Indeed, a study concluded several decades ago found that leaders seeking asylum in Latin American countries were never extradited. *See* Otto Kirchheimer, *Asylum*, 53 AM. POL. SCI. REV. 985, 1001-05 (1959).

50. *See* IACC, *supra* note 8, art. XVI, 35 I.L.M. at 732 (dealing with bank secrecy laws); Low et al., *supra* note 48, at 254 (remarking that the bank secrecy provision is "potentially very important").

51. *See* IACC, *supra* note 8, art. IX, 35 I.L.M. at 730 (dealing with illicit enrichment). Illicit enrichment provisions exist in other anti-corruption legislation. *See, e.g.*, C.I.S. Part II (1989), Prevention of Corruption Act, ¶ 11, 9 Sept. 1988 (India).

52. The Convention has been signed by Argentina, the Bahamas, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, the Dominican Republic, Ecuador, El Salvador, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Trinidad and Tobago, the United States, Uruguay, and Venezuela. *See* Department of Legal Cooperation and Info., Organization of Am. States, *B-58: Inter-American Convention Against Corruption* (last modified Oct. 8, 2000) <http://www.oas.org/juridico/english/sigs/b-58.html>.

53. *See* Convention on the Fight Against Corruption Involving Officials of the European Union Communities or Officials of Member States of the European Union, 1997 O.J. (C 195) 2-11; David A. Gantz, *Globalizing Sanctions Against Foreign Bribery: The Emergence of a New International Legal Consensus*, 18 NW. J. INT'L L. & BUS. 457, 472-73 (1998) (discussing the European Union's convention).

54. *See* Gantz, *supra* note 53, at 472. For most members of the European Union, therefore, this convention is superceded by the OECD Convention. *See infra* notes 55-59 and accompanying text.

55. The twenty-nine members are Australia, Austria, Belgium, Canada, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States. *See* Ayesha Qayyum, *New Anti-Bribery Treaty Analyzed*, INT'L COM. LITIG., Mar. 1998, at

countries to criminalize transnational bribery.[56] Penalties for the transnational bribes must be proportionate to the penalties for domestic bribery.[57] Signatories are required to assist one another in the investigation of bribery and to allow extradition of bribe givers.[58] Unlike the United Nations' Declaration and Organization of American States' Convention—important in their own rights, the OECD Convention has caused tangible change in the world's legal terrain. At least twenty-three countries to date have passed legislation criminalizing transnational bribery: Australia, Austria, Belgium, Bulgaria, Canada, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Japan, Korea, Mexico, Norway, the Slovak Republic, Spain, Sweden, Switzerland, the United Kingdom, and the United States.[59] Legislation is pending in most of the remaining eleven countries.

At one time, the United States was the only country that controlled the corrupt activities of its residents outside its borders.[60] Now, virtually all

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27, 27. The non-members are Argentina, Brazil, Bulgaria, Chile, and the Slovak Republic. *See id.*

56. *See* OECD Convention, *supra* note 9, art. 1, ¶ 1, 37 I.L.M. at 4. Stanley Arkin criticizes the OECD Convention for its failure to include prohibitions on bribing political parties, for not requiring amendment of tax laws so bribes are not deductible, and for not imposing accounting provisions that would mitigate the ability of companies to hide bribe payments. *See* Stanley S. Arkin, *Bribery of Foreign Officials: Leveling the Playing Field*, N.Y. L.J., Feb. 19, 1998, at 3, 4.

57. *See* OECD Convention, *supra* note 9, art. 3, ¶ 2, 37 I.L.M. at 5. Germany's implementing legislation provides a vigorous example of this requirement. *See* Gesetz zu dem Übereinkommen über die Bestechung ausländischer Amtsträger im internationalen Geschäftsverkehr [Act on Combating Bribery of Foreign Public Officials in International Business Transactions] (Internationalenbestechunggesetz), art. 2, sec. 1, v. 10.9.1998 (BGBl. II S.2327) (F.R.G.); WORKING GROUP ON BRIBERY IN INT'L BUSINESS TRANSACTIONS, OECD, GERMANY: REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997 RECOMMENDATION 7 (2000) (comparing German law applied to domestic bribery and bribery of foreign public officials and finding that Germany incorporates the transnational bribes into the same domestic-bribery penalty scheme). Similarly, Norway implemented the OECD Convention by adding a paragraph to its existing anti-bribery law: "The term public servant in the first paragraph also includes foreign public servants and servants of public international organisations." WORKING GROUP ON BRIBERY IN INT'L BUSINESS TRANSACTIONS, OECD, NORWAY: REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997 RECOMMENDATION 1 (2000) (citing NOR. PENAL CODE § 128 (1999)).

58. *See* OECD Convention, *supra* note 9, arts. 9 (dealing with mutual legal assistance), 10 (extradition), 37 I.L.M. at 6; *see also* Dominic Bencivenga, *Anti-Bribery Pact: 34 Nations Agree to Prosecute Business Payoffs*, N.Y. L.J., Jan. 15, 1998, at 5, 5 (characterizing these provisions as "critical").

59. *See* Anti-Corruption Unit, OECD, *Implementation of OECD Convention on Combating Bribery of Foreign Public Officials* (last modified Sept. 22, 2000) <http://www.oecd.org/daf/nocorruption/annex2.htm>. The United States amended the Foreign Corrupt Practices Act to conform to the requirements of the OECD Convention. *See* International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302.

60. *See* Joseph H. Guttentag, *An Overview of International Tax Issues*, 50 U. MIAMI L. REV. 445, 446-47 (1996) ("United States remains the only country in the world that criminalizes bribery of foreign government officials."). Technically, Sweden also had a law that criminalized certain forms of transnational bribery by its citizens and residents. *See* Michael Bogdan, *International Trade and the New Swedish Provisions on Corruption*, 27 AM. J. COMP. L. 665 *passim* (1979) (discussing SWED. PENAL CODE, SFS § 103 (1997)). This law was weak almost to the point of nonexistence. The employer of the bribed official had to report the bribe to the Swedish government with the intention that the

major trading countries and providers of cross-border direct investment regulate the actions of their residents and citizens in other countries. Before discussing the two major types of implementing legislation, the reasons for this change must be briefly examined.

B. Why Countries Are Adopting Anti-Bribery Laws

The United States enacted its anti-bribery law following a period of intense political turmoil that included revelations of corruption at high levels.[61] The corruption-related turmoil faced by the United States twenty-five years ago, however, pales in comparison to that experienced by many European and Latin American countries, as well as Japan in the last ten years.[62]

In 1998, Japanese officials initiated corruption investigations after revelations that Recruit Company, a publisher of popular magazines for job seekers, had sold shares of a subsidiary to government officials shortly before the subsidiary went public.[63] In 1992, the revelation that political "godfather" Kanemaru Shin purchased ¥3.4 billion worth of "discount bonds" using political donations added a great deal of impetus to the investigations because Shin led the Liberal Democratic Party, which had governed Japan for thirty-eight years.[64] Ultimately, Japan voted the Liberal Democratic Party out of power, ended the practice of representing a constituency with multiple seats, and reapportioned the seats in the Diet.[65]

In Italy, the *mani polite*—"clean hands"—investigation has changed Italy's perception of itself.[66] Over three thousand government officials have been investigated, revealing a system of bribery that not only ties high-level officials to large businesses, but also reaches into every level and department of the Italian government.[67] As did Japan, Italy not only voted

Swedish government prosecute the Swedish bribe-payer. *See id.* at 673. Also, the law only applied to bribes paid to public officials in countries that prohibited its residents from bribing Swedish officials—at the time, only the United States. *See* David R. Slade, Comment, *Foreign Corrupt Payments: Enforcing a Multilateral Agreement*, 22 HARV. INT'L L.J. 117, 122 n.22 (1981) (noting that the laws of the foreign country "must be perfectly reciprocal" with Sweden's law).

61. *See* Beverley Earle, *Bribery and Corruption in Eastern Europe, the Baltic States, and the Commonwealth of Independent States: What Is To Be Done?*, 33 CORNELL INT'L L.J. 483 (2000) (sketching briefly the history behind the Foreign Corrupt Practices Act); Alejandro Posadas, *Combating Corruption Under International Law*, 10 DUKE J. COMP. & INT'L L. 345, 348-59 (2000) (discussing in detail the conditions that led to the enactment of the Foreign Corrupt Practices Act).

62. *See* FINAL REPORT, *supra* note 40, at 117 (statement of Guy de Vel, Director of Legal Affairs of the Council of Europe) ("In the 1990's, countries in all parts of Europe and the world were shaken by huge corruption scandals.").

63. *See* Fakutsa Masumi, *Political Reform's Path of No Return*, 41 JAPAN Q., July-Sept. 1994, at 254, 255 (describing the investigation).

64. *See id.* at 255-56.

65. *See id.* at 256-57.

66. *See* Daniel Williams, *Italian Scandals Spread from Politics to Academia: Investigators Focus on Universities and Public Bureaucracy in Ongoing War on Corruption*, WASH. POST, Nov. 18, 1995, at A24 ("The scandals seem to be leading to a kind of national nervous breakdown. . . . Exposure is translating into paralysis.").

67. *See generally* Hilary Partridge, *Can the Leopard Change its Spots? Sleaze in Italy*, 48 PARLIAMENTARY AFF. 711 (1995) (describing the extent of Italian corruption).

out the party in power, but also changed the structure of its government and ended the practice of representing a constituency with multiple seats.[68]

Other nations are not immune to corruption. In France and Great Britain, judicial investigations have revealed a close relationship—usually cemented through payment of bribes or large illegal contributions to political parties—between executives of multinational businesses and high-level French and British government officials.[69] As this article is being written, Germany is in the throes of a corruption scandal that has thrust Germans into an identity crisis and has humiliated the architect of German reunification.[70]

At the same time as Western Europe has suffered through debilitating corruption scandals, it has gained access to a newly opened Central and Eastern Europe. As the Swiss scholar Mark Pieth points out, "Suddenly corruption abroad no longer happened on a remote continent, far away from home."[71] Not only was the degradation of vital markets more apparent,[72] but it also was difficult for Europeans to avoid a sense of responsibility for that degradation.[73] The convergence of these many factors led to the promulgation of the OECD Convention and the resultant implementing legislation.[74]

The events in Latin America have been even more dramatic. Much of the region has shed military rule and embraced open and democratic institutions. At the same time, corruption has annihilated civil institutions in many countries in the region. Venezuela, which participants and observers

68. *See* Martin Clark, *'Post-Fascist' Italy*, 66 POL. Q. 238, 238-40 (1995) (describing the results of the investigation and stating that the "Italian parliamentary elections of March 1994 marked, to all appearances, the collapse of the 'first republic', or at least of nearly all the parties that had ruled Italy since 1945"). Multiple seat districts lead to fiercer and more expensive elections and, thus, increased the temptation of corruption.

69. *See* Christophe Fay, *Political Sleaze in France: Forms and Issues*, 48 PARLIAMENTARY AFF. 663 (1995); F.F. Ridley, *Feet of Clay: Threat to the Temples of Democracy*, 48 PARLIAMENTARY AFF. 617 (1995); Trevor Smith, *Political Sleaze in Britain: Causes, Concerns and Cures*, 48 PARLIAMENTARY AFF. 551 (1995).

70. *See The End for Kohl's Heir-Apparent*, ECONOMIST, Feb. 19, 2000, at 51, 51-52; Matthew Karnitschni, *Oh, What A Tangled Web*, BUS. WK., Feb. 14, 2000, at 58, 58-59 (discussing the investigation and noting that the revelations "are rocking Germany's political Establishment to its core" and that the "architect of German unification has seen his legacy stained by revelations that he ran a secret slush fund").

71. Mark Pieth, *International Efforts to Combat Corruption*, *in* THE FOREIGN CORRUPT PRACTICES ACT: HOW TO COMPLY UNDER THE NEW AMENDMENTS AND THE OECD CONVENTION E-1, E-1 (American Bar Ass'n et al. eds., 1999).

72. *See id.* at E-1.

73. *See* FINAL REPORT, *supra* note 40, at 114 (statement of Prof. Mark Pieth, University of Basel, Switzerland) (noting that Europeans became cognizant of the degradation of vital markets); Pieth, *supra* note 71, at E-1 ("Europeans had to realize that they themselves also were the actors and the theatre in the world of bribery.").

74. *See* Brademas & Heimann, *supra* note 29, at 17-18 (attributing the OECD Convention's creation to a "convergence of several political and economic pressures"). Despite the posturing of some U.S. politicians, to attribute the OECD Convention to U.S. pressure bespeaks little understanding of the degree of European assurance with respect to the United States or the depth of the corruption scandals in Europe.

credit with leading the Organization of American States to adopt an anti-bribery treaty, has been particularly affected by corruption scandals, leading some to question whether civil society can be restored. Corruption scandals have also severely affected Ecuador, Brazil, and Colombia.

The convergence of economic and political currents in these two regions resulted in treaties that require signatories to criminalize transnational bribery. These countries must enact legislation that conforms to the treaties' terms. Two possible means of defining bribery are available for use in implementing legislation.

C. Definitions of Bribery in Anti-Bribery Laws

The fact that bribery must be defined locally creates two options for countries adopting anti-bribery laws. They either can define a set of actions and draw a line that their citizens and residents may not cross anywhere in the world, or they can prohibit their citizens and residents from acting in ways prohibited by the local laws for wherever the individual travels. Countries have utilized both in domestic legislation criminalizing transnational bribery. Both options have advantages, and both are permissible under international law.

1. *Bright Line Rules*

The United States' Foreign Corrupt Practices Act[75] exemplifies a law that defines behavior and prohibits specified persons from engaging in that behavior anyplace in the world. The Foreign Corrupt Practices Act prohibits U.S. citizens or residents, U.S. corporations and other U.S. business entities, or any officer, director, employee, agent, or stockholder acting on their behalf[76] from paying or promising to pay anything of value to any foreign official or political party for the purpose of improperly influencing an act, omission, or decision of that official that relates to obtaining or retaining business or directing business to another person.[77] Canadian

75. 15 U.S.C. §§ 78dd-1(a), -2(a) (Supp. 1999).

76. *See* 15 U.S.C. §§ 78dd-1(a), -2(a). The statute refers to these specified entities as "domestic concerns." *See* David A. Gantz, *A Post-Uruguay Round Introduction to International Trade Law in the United States*, 12 ARIZ. J. INT'L & COMP. L. 1, 178 (1995) (explicating "domestic concerns").

77. *See* 15 U.S.C. §§ 78dd-1(a), -2(a). Numerous books and articles explicate the Foreign Corrupt Practices Act. *See, e.g.*, DON ZARIN, DOING BUSINESS UNDER THE FOREIGN CORRUPT PRACTICES ACT (Practising Law Inst. ed., 1995 & Supp. 1999). There are three affirmative defenses to this law. If the payment is a legitimate expense in promoting or showing a product, it is not illegal; this exception would include, for example, paying for an official's flight to a trade show or providing demonstration units. *See* 15 U.S.C. § 78dd-1(c)(2). Payments made to facilitate nondiscretionary acts, such as processing a form or releasing goods for shipment, are not illegal. *See* 15 U.S.C. § 78dd-1(b). "This so-called 'grease payment' or 'facilitating payment' exception in effect permits U.S. companies to make modest payments to low-ranking government officials, to speed up or secure the performance of something that the party is already entitled to obtain." ZARIN, *supra*, at 5-1. Finally, if the payment is "lawful under the written laws and regulations" of the host country, it is not illegal under the Foreign Corrupt Practices Act. 15 U.S.C. § 78dd-1(c)(1); *see* ZARIN, *supra*, at 5-9 (noting that the defense has never been used because every country outlaws bribery). The author of this article has criticized the

law draws a similar line, prohibiting the conferral of a benefit on a foreign government official as consideration for the performance of an official act or to induce the official to influence acts or decisions of the foreign state in connection with obtaining or retaining business.[78]

These laws draw a bright line, beyond which persons subject to that law may not go. While this bright line may not be subtle or nuanced enough for some, it accrues at least two sets of advantages. One set pertains to the citizens and residents bound by the rule, and the other set relates to the nature of corruption.

For the businesses bound by the rule, a bright line is easier to manage

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final defense's language as unworkable because it seems to require an affirmative statement in the host country's laws that the payment is legal, while most laws only state what is illegal. *See* Philip M. Nichols, *Regulating Transnational Bribery in Times of Globalization and Fragmentation*, 24 YALE J. INT'L L. 257, 287-88 (1999). That criticism carries less weight when evaluating the value of drawing a bright line definition of bribery.

The effect of the Foreign Corrupt Practices Act on U.S. business practices abroad is difficult to quantify, yet virtually every party concerned believes that the Act has significantly shaped the behavior of U.S. companies. Comparing two different studies, one on managers' attitudes and the other on managers' performance, might provide insight. In a survey of 2219 business managers, published in 1988, slightly more than half responded that bribing a foreign official was sometimes or always acceptable, as opposed to never acceptable. *See* Justin G. Longenecker et al., *The Ethical Issue of International Bribery: A Study of Attitudes Among U.S. Business Professionals*, 7 J. BUS. ETHICS 341, 343 (1988) (noting 32.5% responding sometimes acceptable and 18.6% responding always acceptable). However, in a separate survey on business managers' attitudes toward the Foreign Corrupt Practices Act, only 4.1% responded that they had paid a bribe. *See* JYOTI N. PRASAD, IMPACT OF THE FOREIGN CORRUPT PRACTICES ACT OF 1977 ON U.S. EXPORT 142 (1993) (remarking 15 out of 336 respondents admitted to paying bribes).

Three possible arguments that the Foreign Corrupt Practices Act has had little effect do not actually address the Act's effect. The fact that bribery still exists, *see* Steven R. Salbu, *Bribery in the Global Market: A Critical Analysis of the Foreign Corrupt Practices Act*, 54 WASH. & LEE L. REV. 229, 236-38 (1997), tells little about the Act because the rest of the world has not criminalized transnational bribery until now. The fact that the United States scores near the middle of Transparency International's Bribe Payers Index, *see* David Hess & Thomas W. Dunfee, *Fighting Corruption: A Principled Approach: The C^2 Principles (Combating Corruption)*, 33 CORNELL INT'L L.J. 593 (2000), tells little because there is no control for the behavior of U.S. companies without the Act. The fact that U.S. companies are still investigated, *see* Salbu, *supra*, at 236-38, tells very little because most laws are violated to some degree. At the least, many U.S. companies are inhibited by the Foreign Corrupt Practices Act from engaging in corrupt practices. *See, e.g.*, PRASAD, *supra*, at 121 (reporting 44.6% of business managers surveyed as responding that the Act is a "very important" or "extremely important" factor affecting U.S. trade).

78. *See* Corruption of Foreign Public Officials Act, ch. 34, § 3(1), 1997-1998 S.C. 1, 2 (Can.).

> Every person commits an offence who, in order to obtain or retain an advantage in the course of business, directly or indirectly gives, offers or agrees to give or offer a loan, reward, advantage or benefit of any kind to a foreign public official or to any person for the benefit of a foreign public official
>
> (*a*) as consideration for an act or omission by the official in connection with the performance of the official's duties or functions; or
>
> (*b*) to induce the foreign official to use his or her position to influence any acts or decisions of the foreign state or public international organization for which the official performs duties or functions.

across a variety of cultures and legal regimes.[79] Companies simply draft one set of rules and distribute them to all offices, from Albania to Zimbabwe.[80] Moreover, a bright line rule provides an excuse for companies not to comply with questionable requests. Companies operating under the Foreign Corrupt Practices Act report enjoying this advantage.[81] In addition, these laws allow countries to express their repugnance for specified behavior.[82] Some countries, for example, use bright line rules to prohibit their citizens from engaging child prostitutes outside the country's physical territory.[83]

The advantages related to the nature of corruption are more difficult to quantify. First, a bright line rule can prevent the degradation of local practices by foreign businesspersons. Petty corruption—extremely corrosive on its own[84]—could lead to endemic grand corruption if exacerbated by for-

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Id.

79. *See generally* Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992) (discussing the nature and benefit of rules).

80. *See* Brademas & Heimann, *supra* note 29, at 22 (predicting that companies operating under the new anti-bribery laws will adopt codes of conduct); Harvey L. Pitt & Karl A. Groskaufmanis, *Minimizing Corporate Civil and Criminal Liability: A Second Look at Corporate Codes of Conduct*, 78 GEO. L.J. 1559, 1582-87 (1990) (discussing the use of corporate codes to facilitate compliance with laws criminalizing transnational bribery)

81. James Kinnear, former President and Chief Executive Officer of Texaco, argues that the Foreign Corrupt Practices Act *allows* U.S. companies to behave more ethically because it provides an unassailable justification for turning down bribe requests. *See* James W. Kinnear, *The Ethics of International Business: Foreign Policy and Economic Sanctions*, 61 VITAL SPEECHES 561, 562 (1995) ("In my experience the Foreign Corrupt Practices Act has not been a hindrance, but a help.").

82. The importance of the relationship between law and societal values cannot be overemphasized. As Oliver Wendell Holmes noted, "The first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community, whether right or wrong." O.W. HOLMES, JR., THE COMMON LAW 41 (1881); *see* Gerard Brennan, *Law in Search of a Principle*, 9 J. CONTEMP. HEALTH L. & POL'Y 259, 259 (1993) ("If the law is at odds with the value of society, the law falls into disrepute and loses the force it needs to ensure conformity with its precepts."); Robert S. Summers, *On Identifying and Restructuring a General Legal Theory—Some Thoughts Prompted by Professor Moore's Critique*, 69 CORNELL L. REV. 1014, 1024 (1984) ("[M]ost forms of law are inevitably dependent to some extent for their context and justification on social facts and values external to law.").

83. *See* Paul Michell, *Domestic Rights and International Responsibilities: Extradition Under the Canadian Charter*, 23 YALE J. INT'L L. 141, 220 n.371 (1998) (stating that Canada amended its Criminal Code to prosecute Canadians for engaging child prostitutes while abroad); Margaret A. Healy, Note, *Prosecuting Child Sex Tourists at Home: Do Laws in Sweden, Australia, and the United States Safeguard the Rights of Children as Mandated by International Law?*, 18 FORDHAM INT'L L.J. 1852, 1888-89 (1995) (noting that Sweden, Australia, and the United States have laws that allow the prosecution of extraterritorial sexual contact with minors). Two things make the comparison to extraterritorial child prostitution laws particularly apt. First, lax local law enforcement allows foreign actors to engage in conduct that is only nominally illegal in the host country. *See* Healy, *supra*, at 1870-71. Second, eliminating sexual predation of children may require international coordination, not a simple increase in local efforts. *See* RON O'GRADY, THE CHILD AND THE TOURIST: THE STORY BEHIND THE ESCALATION OF CHILD PROSTITUTION IN ASIA 129 (1992).

84. The World Bank notes:

> A small side payment for a government service may seem a minor offense, but it is not the only cost—corruption can have far-reaching externalities. Unchecked,

eign money.[85] Endemic corruption can begin with the degradation of even a common, noncorrupt practice.[86] Particularly in countries with weak enforcement mechanisms, a bright line rule delineates conduct beyond which actors may not go; foreign actors cannot degrade local practice.[87] Second, a bright line law forms an important baseline for nonlegal controls, such as corporate codes and industry standards.[88] Third, the international regimes can serve as models for local anti-bribery laws.[89]

2. Local Law

The second type of law simply requires obeisance to local bribery laws. Hungarian and Icelandic law provide examples of legislation requiring citizens and residents to simply obey local bribery laws. Hungarian law punishes an actor who "gives or promises the favour so that the foreign official person violates his official duty, exceeds his competence or otherwise abuses his official position."[90] Icelandic law prosecutes an act punishable

> the creeping accumulation of seemingly minor infractions can slowly erode political legitimacy to the point where even noncorrupt officials and members of the public see little point in playing by the rules.

WORLD BANK, WORLD DEVELOPMENT REPORT 1997: THE STATE IN A CHANGING WORLD 102 (1997).

85. Of the enabling laws reviewed by the author, only the United States creates an exception for petty corruption. Those persons who have endured the degradation of petty corruption despise it. In a survey of seven hundred people in Kazakhstan, sixty-six percent found that small bribes paid to traffic police were harmful to Kazakhstan. *See* PHILIP M. NICHOLS, INDIGENOUS PERCEPTIONS OF CORRUPTION IN KAZAKHSTAN 66 (Zicklin Center Working Paper No. 02-01-00, 2000) (describing the survey and its results). Any attempt to differentiate between petty and grand corruption should be vigorously opposed by those who wish to contain the spread of corruption and its ensuing damage.

86. *See* Cragg, *supra* note 25, at 650.

87. *See* Bernard Black & Reinier Kraakman, *A Self-Enforcing Model of Corporate Law*, 109 HARV. L. REV. 1911, 1934-37 (1996) (stating that a method of compensating for weak enforcement mechanisms is with a combination of bright line rules and strong sanctions).

88. *See* David Charny, *Nonlegal Sanctions in Commercial Relationships*, 104 HARV. L. REV. 373, 426-27 (1990) (warning against legal sanctions as an initial recourse for contract relationships because bright line rulings set a minimum level of enforcement for all future cases).

89. Korean scholar Jong Bum Kim suggests that this might occur in Korea. *See* Jong Bum Kim, *Korean Implementation of the OECD Bribery Convention: Implications for Global Efforts to Fight Corruption*, 17 UCLA PAC. BASIN L.J. 245, 264-74 (2000) (noting that the Korean implementing legislation closely resembles the OECD Convention's language and approving of the potential changes as "more powerful than [Korea's existing law] against national bribery"). Interestingly, the author of this article found that a foreign investment code transplanted into Kazakhstan had a similar effect; local businesses used the law to govern commercial relationships because it was better than existing local law. *See* Philip M. Nichols, *The Viability of Transplanted Law: Kazakhstani Reception of a Transplanted Foreign Investment Code*, 18 U. PA. J. INT'L ECON. L. 1235, 1255-70 (1997); *see also* Alan Watson, *Aspects of Reception of Law*, 44 AM. J. COMP. L. 335 (1996) (discussing factors affecting the transplant of law between countries).

90. Bünteto Törvénkönyv [BTK.] [Penal Code] tit. VII, sec. 258/B(2) (Hung.) (imposing higher penalties for violating local laws than the basic sanctions applied to the conforming provisions for the OECD Convention). Interestingly, Hungarian law also allows prosecution in Hungary of foreign officials who solicit or accept bribes. *See id.* sec. 258/D.

under Icelandic law "provided it was also punishable under the law of that state."[91] This type of law allows companies to engage in the full range of host country practices without serious worry of prosecution.[92] Although no convincing argument has been articulated that a bright line rule, such as the Foreign Corrupt Practices Act, prohibits behavior considered legal in a foreign country, such a construct could exist.[93] If it did exist, companies operating under that law could be disadvantaged in competition with local companies.[94]

III. The Attack on Anti-Bribery Laws as Intrusive

Laws that prohibit bribery of foreign officials have been criticized for a number of reasons. Since the United States' Foreign Corrupt Practices Act was for many years the only active legislation banning transnational bribery, much of the criticism focuses on the Foreign Corrupt Practices Act. This article deals only with one criticism: that these laws are unwarranted, morally imperialistic intrusions into the values and ethics of other countries that endanger good relations and comity among nations.[95]

The characterization of anti-bribery laws as dangerously intrusive errs in two important ways. First, no empirical evidence supports the conclu-

91. GENERAL PENAL CODE [GPC], Law No. 19/1940, sec. 5(2) (Ice.) (establishing a framework for applying any section of Iceland's Penal Code).

92. *See* Nichols, *supra* note 77, at 288 (noting that a change to the Foreign Corrupt Practices Act would achieve this result).

93. No argument has addressed other examples of bright line legislation, probably because these laws are relatively new.

94. It is unclear whether this disadvantage actually exists. *See infra* Part V (discussing the two-way nature of multiculturalism).

95. *See* HOUSE COMM. ON INT'L RELATIONS, 94TH CONG., THE ACTIVITIES OF AMERICAN MULTINATIONAL CORPORATIONS ABROAD: HEARINGS BEFORE THE SUBCOMM. ON INT'L ECON. POLICY OF THE HOUSE COMM. ON INT'L RELATIONS 24 (1975) (statement of Mark B. Feldman, Deputy Legal Adviser, State Department) ("It would be not only presumptuous but counterproductive to seek to impose our specific standards in countries with differing histories and cultures. Moreover, enforcement of such legislation . . . would be widely resented abroad."); HOWARD L. WEISBERG & ERIC REICHENBERG, THE PRICE OF AMBIGUITY: MORE THAN THREE YEARS UNDER THE FOREIGN CORRUPT PRACTICES ACT 21-26 (1981) (stating that the United States is attempting to impose its moral values on other cultures); Steven R. Salbu, *The Foreign Corrupt Practices Act as a Threat to Global Harmony*, 20 MICH. J. INT'L L. 419, 433 (1999) [hereinafter Salbu, *Global Harmony*] ("The FCPA and other such extraterritorial legislation are unnecessarily harsh and intrusive treatments for bribery."); Steven R. Salbu, *Extraterritorial Restriction of Bribery: A Premature Evocation of the Normative Global Village*, 24 YALE J. INT'L L. 223, 252 (1999) [hereinafter Salbu, *Premature Evocation*] (describing moral imperialism as an "ineluctable reality" of the Foreign Corrupt Practices Act); Salbu, *supra* note 77, at 279 n.323 ("[T]he FCPA's macro-level invasiveness can be characterized as moral imperialism."); Geoffrey Gamble & Theodore F. Killheffer, *The Enemies of United States' Trade Competitiveness: A Lawyer's Perspective*, 6 DEL. LAW. No. 3, Winter 1988, at 7, 12; Charles Gustafson, Dean of the International & Graduate Programs at Georgetown University Law Center, Moderator's Introduction to Panel Three of the 1998 OAS Symposium (Oct. 16, 1998), *in* Symposium, *Transcript: The Role of Legal Institutions in the Economic Development of the Americas*, 30 LAW & POL'Y INT'L BUS. 171, 197-98 (Supp. 1999) (stating that during the Congressional hearings on the Foreign Corrupt Practices Act, representatives of multinational corporations warned that it might be perceived as moral imperialism).

sion that anti-bribery laws seriously offend host countries. Second, using anecdotal evidence of the extraterritorial application of antitrust laws is unsound and misleading.

A. Empirical Evidence Does Not Support Claims of Intrusiveness

Those who oppose anti-bribery laws warn darkly that the anger generated by such intrusion poses a threat to global harmony. These doomsayers cast forward in time; they would do well to look back. The Foreign Corrupt Practices Act has been in effect for over twenty years. Scores of investigations have proceeded pursuant to the Act, and sixteen cases involving a dozen countries have been prosecuted.[96] In those twenty years, not one meaningful diplomatic rift can be attributed to enforcement of the Act. Moreover, the one empirical evaluation of government responses to the Foreign Corrupt Practices Act undermines the assertion that the criminalization of transnational bribery is intrusive. In a study of Middle East governments, Katherine Gillespie found minimal negative reaction to the Foreign Corrupt Practices Act.[97]

An answer to the lack of empirical support might be that anger over intrusion is not a historical fact, but instead a possible outcome.[98] This argument strains both credibility and logic. Setting aside the credibility of a claim that one nation may go to war because foreign citizens are not allowed to bribe its officials, the argument does not in fact comport with the logic of international affairs. Political entities around the world deal with one another on "multiple issues that are not arranged in a clear or consistent hierarchy."[99] Singling out one issue, and claiming that that one issue will cause war, is inconsistent with the world as it actually operates.[100]

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96. *See* William F. Pendergast, *Foreign Corrupt Practices Act: An Overview of Almost Twenty Years of Foreign Bribery Prosecutions*, 7 INT'L Q. 187, 192-204 (1995) (summarizing the prosecutions).

97. *See* Kate Gillespie, *Middle East Response to the U.S. Foreign Corrupt Practices Act*, 39 CAL. MGMT. REV. No. 4, Summer 1987, at 9, 28.

98. *See* Salbu, *Global Harmony*, *supra* note 95, at 443 (stating that the criminalization of transnational bribery "has the *potential* to fuel backlash and create an atmosphere of conflict, acts of retributive terrorism, and even war" (emphasis added) (footnote omitted)).

99. ROBERT O. KEOHANE & JOSEPH S. NYE, POWER AND INTERDEPENDENCE: WORLD POLITICS IN TRANSITION 25 (1977).

100. *See* MURRAY WEIDENBAUM, SMALL WARS, BIG DEFENSE: PAYING FOR THE MILITARY AFTER THE COLD WAR 195 (1992) ("[I]t has become clear that decisions affecting war, peace, and the host of in-between positions cannot be made in isolation from domestic and international political, economic, and social factors."); Benedict Kingsbury, *The Concept of Compliance as a Function of Competing Conceptions of International Law*, 19 MICH. J. INT'L L. 345, 356 (1998) (noting the importance of the concept of complex interdependence); Larry Kramer, *Return of the Renvoi*, 66 N.Y.U. L. REV. 979, 1026 (1991) ("If states have numerous interrelated interests, tacit or express cooperation is necessary on a wide range of issues.").

B. Comparison to Other Types of Law is Inappropriate

The most extensive argument to date claiming that anti-bribery laws constitute an extraterritorial intrusion that will be resented by host countries appears in a recent issue of the *Michigan Journal of International Law.*[101] The article represents the most thorough and carefully articulated argument of anti-bribery laws as international intrusion and, thus, merits both respect and scrutiny. A close review of the argument, however, reveals an undifferentiated reliance on authorities and, ultimately, finds little indictment of anti-bribery laws.

The article relies on thirteen sources in its discussion of the dangers of extraterritorial legislation.[102] Of those thirteen, none discuss anti-bribery laws, and few support their own claims empirically. Three of the thirteen sources are newspaper or magazine stories commenting on foreign resentment of U.S. economic superiority.[103] Setting aside the anecdotal nature of these references, it is difficult to draw a connection between U.S. economic strength and the intrusiveness of anti-bribery laws—laws that Bulgaria, the Czech Republic, Japan, Korea, Mexico, and the Slovak Republic, among others, stand ready to apply to conduct that occurs outside their borders.[104]

Of the ten scholarly sources (five of which are student notes),[105] seven deal with extraterritorial application of U.S. antitrust law.[106] Including

101. *See* Salbu, *Global Harmony, supra* note 95.

102. *See id.* at 433 n.76, 438 n.104, 440 nn.116-17, 441 n.125, 442 nn.128-29 & 131-32, 443 nn.137-39 & 444 n.140.

103. *See id.* at 441 & nn.125-27 (citing Eric Alterman, *We Are the World*, NATION, Mar. 9, 1998, at 4 (discussing "resentment [of] . . . U.S.-directed demands that nations like Indonesia and South Korea open up their societies to U.S.-style capitalism")), 442 & nn.129 (citing David Ivanovich, *To Canada, Free Trade Isn't Trouble-Free*, HOUS. CHRON., Nov. 7, 1997, at 1C, 8C (discussing concern of a Canadian steel representative that Canadian culture will be swallowed by the U.S. culture)); & 132-33 (citing Kawachi Takashi, *A New Backlash Against American Influence*, JAPAN ECHO, Apr. 1998, at 44, 45 ("Those who feel victimized by post-cold-war trends regard economic globalization as a campaign to impose Western values . . . .")).

104. *See supra* note 59 and accompanying text (listing countries that have enacted anti-bribery laws that criminalize bribery of foreign government officials).

105. No general disrespect for notes is intended, but students generally do not have the research budget or the time to conduct extensive empirical research. The author of this article has vigorously defended student-driven scholarly work on other occasions. *See* Phil Nichols, Note, *A Student Defense of Student Edited Journals: In Response to Professor Roger Cramton*, 1987 DUKE L.J. 1122.

106. *See* Salbu, *Global Harmony, supra* note 95, at 433 & n.76 (citing Penny Zagalis, Note, Hartford Fire Insurance Company v. California*: Reassessing the Application of the McCarran-Ferguson Act to Foreign Reinsurers*, 27 CORNELL INT'L L.J. 241, 267 n.192 (1994) (discussing British legislation blocking U.S. antitrust laws)), 438 n.104 (citing Barry E. Hawk, *International Antitrust Policy and the 1982 Acts: The Continuing Need for Reassessment*, 51 FORDHAM L. REV. 201, 237-39 (1982) (discussing reactions to extraterritorial application of U.S. antitrust laws)), 440 nn.116-17 (citing Douglas Michael Ely, Note, *The* Noerr-Pennington *Doctrine and the Petitioning of Foreign Governments*, 84 COLUM. L. REV. 1343, 1357 & nn.71-72 (1984) (discussing reaction of foreign governments to being involved in U.S. antitrust litigation); Note, *Extraterritorial Application of the Export Administration Act of 1979 Under International and American Law*, 81 MICH. L. REV. 1308, 1318 n.58 (1983) (discussing blocking legislation aimed at extraterritorial

one source mentioned as dealing with antitrust, the remaining sources discuss the imposition of U.S. labor standards on foreign companies,[107] the prosecution of Canadian companies under the Helms-Burton Act,[108] and export controls imposed by the United States on foreign companies for security purposes.[109]

Comparison of anti-bribery laws to these other extraterritorial laws is wrong and misleading. The comparison is wrong because each law relies on a different justification for extending jurisdiction. There are five accepted principles for exerting jurisdiction: territoriality, nationality, passive personality, protective personality, and universality.[110] The application of anti-bribery laws is based on nationality—which holds that a country has jurisdiction over its citizens regardless whether they are located within its borders.[111] Prohibiting citizens from hiring child prostitutes while outside their home country is another example of a law based on the nationality principle.[112] Use of the nationality principle elicits very

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application of U.S. antitrust law)), 442 n.128 (citing Gary E. Dyal, Comment, *The Canada-United States Memorandum of Understanding Regarding Application of National Antitrust Law: New Guidelines for Resolution of Multinational Antitrust Enforcement Disputes*, 6 Nw. J. INT'L L. & BUS. 1065, 1065 (1984-85) (discussing reaction to extraterritorial application of U.S. antitrust law)), 443 & n.138 (citing Michael Goldsmith & Vicki Rinne, *Civil RICO, Foreign Defendants, and "ET"*, 73 MINN. L. REV. 1023, 1027 n.21 (1989) (discussing reaction to U.S. antitrust law)), 444 n.140 (citing Robert D. Shank, Note, *The Justice Department's Recent Antitrust Enforcement Policy: Toward a "Positive Comity" Solution to International Competition Problems?*, 29 VAND. J. TRANSNAT'L L. 155, 160 n.18 (1996) (stating that the United States is the "most aggressive nation" in pursuing extraterritorial application of antitrust law)). It is interesting that four of these seven sources date back to the early 1980s.

107. *See id.* at 443 nn.137 & 139 (citing Mark E. Zelek, Book Review, 14 COMP. LAB. L.J. 514, 516-17 (1993) (discussing reaction to imposition of U.S. labor standards on non-U.S. companies); James M. Zimmerman, *International Dimensions of US Fair Employment Laws: Protection or Interference?*, 131 INT'L LABOUR REV. 217, 230 (1992) (discussing U.S. labor laws)).

108. *See id.* at 442 & n.131 (citing Peter L. Fitzgerald, *Pierre Goes Online: Blacklisting and Secondary Boycotts in U.S. Trade Policy*, 31 VAND. J. TRANSNAT'L L. 1, 60-62 (1998) (discussing blacklisting of Canadian companies under the Helms-Burton Act)). The Helms-Burton Act, Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, Pub. L. No. 104-114, 110 Stat. 785, prohibits companies that have used certain assets in Cuba from doing business in the United States; the law clearly violates several international obligations of the United States. *See generally* Luisette Gierbolini, *The Helms-Burton Act: Inconsistency with International Law and Irrationality at Their Maximum*, 6 J. TRANSNAT'L L. & POL'Y 289, 313-15 (1997) (discussing violations). The United States and European Union have entered into an agreement that mitigates the impact of the Helms-Burton Act. *See* Stefaan Smis & Kim Van der Borght, *The EU-U.S. Compromise on the Helms-Burton and D'Amato Acts*, 93 AM. J. INT'L L. 227, 228 (1999) (discussing the agreement).

109. *See* Salbu, *Global Harmony*, *supra* note 95, at 443 n.138 (citing Goldsmith & Rinne, *supra* note 106, at 1027 nn.19-20 (discussing concerns of companies with respect to U.S. export control laws)).

110. *See* OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 250-73 (1991) (discussing various types of jurisdiction); Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 787-88 (1988) (same).

111. *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 303 (3d ed. 1979) (discussing the nationality principle); SCHACHTER, *supra* note 110, at 254 (same).

112. *See supra* note 83 and accompanying text (discussing laws).

little international reaction;[113] few are concerned, for example, that a citizen of Singapore cannot defraud a fellow citizen while across the strait in Malaysia or that a French citizen cannot reveal state secrets while across the channel in Britain.

In contrast, extraterritorial application of antitrust law is not based on any of the traditional principles; it is based instead on the effects principle[114]—which holds that a country may extend jurisdiction over acts that occur outside its borders, but are intended to have a significant negative effect within its borders.[115] The effects principle, unlike the nationality principle, is very controversial.[116] Indeed, it is not difficult to identify the source of anger and possible[117] feeling of intrusion generated by the antitrust laws, labor laws, export control laws, and Helms-Burton: they encompass controls on the behavior of non-citizens and non-residents while they are outside the territory of the controlling country. Taking the earlier examples, it would raise greater concern if a citizen of Singapore with no

113. *See* BROWNLIE, *supra* note 111, at 303 (noting acceptance of the nationality principle as a means of asserting jurisdiction); Lea Brilmayer & Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 HARV. L. REV. 1217, 1241 (1992) ("It is also fairly well established that a state may regulate its residents, even when they are acting outside of the state."); Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909, 965-70 (1991) (detailing the U.S. Supreme Court's approval of the nationality principle); Stephan Wilske & Teresa Schiller, *International Jurisdiction in Cyberspace: Which States May Regulate the Internet?*, 50 FED. COMM. L.J. 117, 131 (1997) (noting that the use of the nationality principle is "noncontroversial"). Furthermore, international and domestic tribunals have applied and upheld the nationality principle. *See, e.g.*, S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 18-24 (Sept. 7) (applying the nationality principle); *In re* Di Lisi, 7 Ann. Dig. 193 (Italy Cass. 1934) (affirming conviction of Italian national for acts committed outside of Italy and basing jurisdiction on the nationality principle); X v. Public Prosecutor, 19 I.L.R. 226 (Neth. Hof 1952) (convicting Dutch national for acts committed outside of the Netherlands and basing jurisdiction on the nationality principle); United States v. Thomas, 893 F.2d 1066, 1068-69 (9th Cir. 1990) (approving extension of jurisdiction to acts outside of the United States based on nationality principle). In short, the validity under international law of extraterritorial anti-bribery laws applied to domestic citizens while abroad is beyond question.

114. *See* Joel Davidow, *Extraterritorial Application of U.S. Antitrust Law in a Changing World*, 8 LAW & POL'Y INT'L BUS. 895, 903-08 (1976) (discussing the application of the effects test to the extraterritorial use of antitrust law); Katherine Van Wezel Stone, *Labor and the Global Economy: Four Approaches to Transnational Labor Regulation*, 16 MICH. J. INT'L L. 987, 1013 (1995) (noting that the extraterritorial application of antitrust law is based on the effects test).

115. *See* Wilske & Schiller, *supra* note 113, at 132-33 (describing the effects test).

116. *See id.* at 132.

117. One must be careful about the conclusions drawn by the article under scrutiny. The article, for example, characterizes one citation as "noting 'unmitigated hostility' to U.S. law applied abroad," Salbu, *Global Harmony*, *supra* note 95, at 433 n.76, when in fact the cited author simply reports a Federal District Court's supposition that Britain holds "unmitigated hostility" toward U.S. antitrust law, Zagalis, *supra* note 106, at 267 n.192. Similarly, the article under scrutiny states that a book review "not[es] 'the imposition of extraterritorial standards may be viewed by foreign countries as uninvited interference,' which historically has 'resulted in retaliation and embarrassing diplomatic protest in the foreign public policy arena,'" Salbu, *Global Harmony*, *supra* note 95, at 443 n.137, when in fact the book review refers to frustration with the uneven application of U.S. labor standards outside the United States, Zelek, *supra* note 107, at 517.

relationship to Denmark could not defraud a fellow citizen because of Danish law or if a French citizen with no relationship to Bolivia could not reveal state secrets because the Bolivian government forbids such conduct.

Comparison of antitrust and anti-bribery laws, therefore, constitutes a false analogy. Arguing that extraterritorial application of antitrust laws engenders anger and therefore the enforcement of anti-bribery laws will also engender anger makes no more sense than arguing that because a person does not like apples she will not like oranges. Antitrust laws and anti-bribery laws are fundamentally different.

This analysis is not meant as an indictment of the research or scholarship of the particular article's author. Indeed, at the most general level it *can* be said that "[p]otential host country resentment of extraterritiorially applied legislation is hardly debatable."[118] At a more specific level, however, it is *entirely* debatable whether the control of specific behavior outside a country's borders will be considered intrusive. While the argument that anti-bribery laws are intrusive has been made, the case supporting that proposition has not. Attempts to support the proposition through reference to entirely different types of laws must be rejected because they bring few real insights to the debate.

IV. Extraterritorial Regulation Actually is Unremarkable

The prior discussion of the nationality principle for extraterritorial jurisdiction suggests that regulation of citizens outside a country's borders might occur on a regular basis. This is in fact the case; the extraterritorial regulation of business behavior is unremarkable both in a legal and an ethical sense.

A. Extraterritorial Regulation is Unremarkable from a Legal Perspective

The validity of extraterritorial laws regulating domestic businesses has been discussed elsewhere;[119] there is little question that these laws are appropriate under international law.[120] Those who characterize the criminalization of transnational bribery as intrusive, however, treat anti-bribery laws as unique. This treatment belies reality—much business conduct is regulated beyond a country's border. Regulations concerning matters such as accounting requirements, exchange controls, securities regulations, banking regulations, anti-boycott laws, export controls, secrecy laws, social welfare laws, business form, corporate governance, and taxes apply to a business with little regard for political borders.[121] Most,

118. Salbu, *Global Harmony*, *supra* note 95, at 433.

119. *See, e.g.*, Nichols, *supra* note 77, at 290-92; Nichols, *supra* note 17, at 367-70.

120. *See supra* notes 111-13 and accompanying text.

121. *See* Daniela Levarda, Note, *A Comparative Study of U.S. and British Approaches to Discovery Conflicts: Achieving a Uniform System of Extraterritorial Discovery*, 18 FORDHAM INT'L L.J. 1340, 1381 (1995) (discussing extraterritorial discovery); Matthew W. Sawchak, Note, *The Department of Defense's Role in Free-World Export Licensing Under the Export Administration Act*, 1988 DUKE L.J. 785, 807 (discussing extraterritorial application of export control laws); Seymour J. Rubin, Book Review, 78 AM. J. INT'L L. 700,

although not all, of these regulations are entirely uncontroversial.[122] It would be disingenuous of those who focus on bribery to suggest that other regulated extraterritorial-business behaviors are less connected to a culture; these practices, and business in general, are deeply intertwined with culture.[123]

Judicial inquiry into citizens' activities abroad is also commonplace. It would be impossible to list all the cases involving judicial scrutiny of citizens' acts while abroad; any first year law student, however, can point to cases such as *Batsakis v. Demotsis*.[124] Indeed, from their existence to their enforcement, there simply is nothing remarkable about anti-bribery laws.

B. Anti-Bribery Laws are Unremarkable from an Ethical Perspective

Giving effect to norms generated by communities other than nations—communities such as international organizations or transnational business partnerships—is also unremarkable. Integrative social contracts theory provides special insights into community-generated norms. As explicated by Thomas Donaldson and Thomas Dunfee, integrative social contracts theory is a widely explored analytical tool in the field of business ethics.[125] Integrative social contracts theory is based on the tradition of social con-

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700-03 (1984) (discussing the various laws affecting multinational businesses); Martin Flumenbaum & Brad S. Karp, *Second Circuit Review: Trademark Infringement; Attorney Work-Product*, N.Y. L.J., Mar. 25, 1998, at 3, 4 ("With the advent of the Internet and with companies broadly thrusting their '[trademarks]' into cyberspace, Lanham Act extraterritorial jurisdiction will be required to adapt.").

122. The anti-boycott laws, for example, which require U.S. companies to ignore the Arab boycott of Israel and require European companies to ignore the U.S. boycott of Cuba, are somewhat controversial; those controversies are not necessarily centered on intrusiveness.

123. *See* Al Bhimani, *Modern Cost Management: Putting the Organization Before the Technique*, 36 INT'L J. PRODUCTION ECON. 29, 29, 31-34 (1994) (noting numerous studies that indicate that accounting practices are shaped by broad "behavioural, political, institutional and socio-cultural factors"); Fligstein, *supra* note 6, at 656 (stating that markets and culture are inseparable); W. Richard Scott, *The Organization of Environments: Network, Cultural, and Historical Elements*, *in* JOHN W. MEYER & W. RICHARD SCOTT, ORGANIZATIONAL ENVIRONMENTS: RITUAL AND RATIONALITY 155, 155-75 (1983) (discussing business as a cultural artifact).

124. 226 S.W.2d 673 (Tex. Civ. App. 1949) (upholding an agreement executed by a U.S. citizen while in Greece).

125. *See* THOMAS DONALDSON & THOMAS DUNFEE, TIES THAT BIND: A SOCIAL CONTRACTS APPROACH TO BUSINESS ETHICS 18-19 (1999); *see also* Jeffrey Nesteruk, *The Moral Dynamics of Law in Business*, 34 AM. BUS. L.J. 133, 134-35 (1996) ("Virtue ethics and social contract theory . . . are increasingly influencing our understanding of ethical issues in business."); Robert Phillips, Stakeholder Theory, Social Contracts, and A Principle of Fairness 1 (1997) (unpublished manuscript, on file with author) ("Prominent among the myriad proposed models of business ethics are stakeholder theory and social contract theory. The latter has, in fact, been suggested as a normative grounding for the former."). For a clear explanation of integrative social contracts theory, see DAVID J. FRITZSCHE, BUSINESS ETHICS: A GLOBAL AND MANAGERIAL PERSPECTIVE 43-47 (1997); Timothy L. Fort, *Goldilocks and Business Ethics: A Paradigm That Fits "Just Right"*, 23 J. CORP. L. 245, 252-56 (1998). For an interesting application of integrative social contracts theory to the legal infrastructure of an emerging economy, see Sheila M. Puffer & Daniel J. McCarthy, *Business Ethics in a Transforming Economy: Applying the Integrative Social Contracts Theory to Russia*, 18 U. PA. J. INT'L ECON. L. 1281 (1997).

tract theorists, such as Locke and Rousseau,[126] but radically extends those theories by integrating two distinct types of social contracts.[127]

The first type is a hypothetical macrosocial contract among all members of society that contains all the economic rules to which members would agree.[128] Obviously, there will not be a great number of rules; members would agree, therefore, that within the hypothetical macrosocial contract exists a moral free space. Inside that moral free space, economic communities are free to enter into the second type of social contract—explicit contracts that provide more detailed rules concerning ethical behavior in economic life.[129] These microsocial contracts are bounded only by hypernorms—"principles so fundamental to human existence that they serve as a guide in evaluating lower level moral norms"[130]—and a requirement that individual members consent to the contract.[131]

The concept of economic communities is critical to a theory that "allows for moral diversity among various cultures while maintaining certain universal norms."[132] Dunfee defines communities as "all coherent groupings of people capable of generating ethical norms . . . includ[ing] a corporation, a department or other sub-group within a corporation, a social club, an industry association, a faculty senate, a church or syna-

126. *See* Michael Keeley, *Continuing the Social Contract Tradition*, 5 Bus. Ethics Q. 241, 244-46 (1995) (stating that Donaldson and Dunfee's work extends the work of the Sophists and Locke to modern organizations); *see also* Alan Strudler, *Moral Complexity in the Law of Nondisclosure*, 45 UCLA L. Rev. 337, 363 n.86 (1997) (stating that integrative social contracts theory melds communitarian and social contract ideas).

127. *See* Thomas Donaldson & Thomas W. Dunfee, *Toward a Unified Conception of Business Ethics: Integrative Social Contracts Theory*, 19 Acad. Mgmt. Rev. 252, 254 (1994) (explaining the appellation).

128. *See* Thomas Donaldson & Thomas W. Dunfee, *Integrative Social Contracts Theory: A Communitarian Conception of Economic Ethics*, 11 Econ. & Phil. 85, 93 (1995) (explaining the hypothetical macrosocial contract).

129. *See* Donaldson & Dunfee, *supra* note 128, at 94-95 (discussing microsocial contracts); Donaldson & Dunfee, *supra* note 127, at 260-62 (discussing moral free space); David Hess, *Social Reporting: A Reflexive Law Approach to Corporate Social Responsiveness*, 25 J. Corp. L. 41, 56 (1999) ("Due to the artificial nature of business, [members of the business community] are free to shape the 'rules' of the economic game.").

130. Donaldson & Dunfee, *supra* note 127, at 265; *see also* Thomas W. Dunfee, *The Role of Ethics in International Business*, *in* Business Ethics: Japan and the Global Economy 63, 69 (Thomas W. Dunfee & Yukimasa Nagayasu eds., 1993) ("Hypernorms are defined as norms so fundamental to human existence that they will be reflected in a convergence of religious, political and philosophical thought. Hypernorms thus represent core or fundamental values common to many cultures."). The proscription of bribery is considered a hypernorm. *See* Thomas W. Dunfee et al., *Social Contracts and Marketing Ethics*, 63 J. Marketing, July 1999, at 14, 24 (discussing the universal condemnation of bribery).

131. *See* Donaldson & Dunfee, *supra* note 128, at 98. Consent can be indicated by, among other things, not taking advantage of an opportunity to exit. *See id.* at 99-100.

132. Fritzsche, *supra* note 125, at 43. Interestingly, Donaldson and Dunfee use the OECD Convention, *see supra* notes 9, 55-59 and accompanying text, as an example of a microsocial contract among a "broader and more global" community that, therefore, would have more weight than the norms of individual OECD members. Donaldson & Dunfee, *supra* note 125, at 187.

gogue, a city government, an association of trial lawyers and so on."[133] Two aspects of communities are critical. First, communities constitute themselves voluntarily.[134] Community must be defined flexibly,[135] but business relationships are explicitly recognized as communities.[136] Second, communities are not defined or limited by political or cultural borders. In other words, countries have no claim to superiority over transnational communities with respect to the generation of norms.

Transnational communities may in fact have a claim to superiority over countries. For the norms generated by a community to be considered authentic, a majority of the community must consent to those norms and the members of the community must have the right to exit the community.[137] Transnational business relationships, almost by definition, embody these qualities. Not all countries, on the other hand, satisfy these requirements.[138]

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133. Dunfee, *supra* note 130, at 68 ("Thus defined, communities are groups that determine their own membership and apply their own preferred forms of rationality.").

134. *See* Donaldson & Dunfee, *supra* note 127, at 273 (defining "*community* as a *self-defined, self-circumscribed group of people who interact in the context of shared tasks, values or goals*").

135. *See* DONALDSON & DUNFEE, *supra* note 125, at 98 ("This open-ended definition is intended to allow for a great variety in the way in which people form relationships capable of generating authentic ethical norms.").

136. *See id.* at 39 (noting that communities "evolve out of the marketplace as individuals interact and form various types of relationships"), 41 (noting that "a community can derive from an express contractual commitment"), 101 (noting that communities can form "around certain types of recurring transactions").

137. *See* Donaldson & Dunfee, *supra* note 127, at 262-63 (describing the authenticity of norms).

138. Indeed, an interesting aspect of the position against anti-bribery laws is that it argues for cultural sensitivity, while speaking in terms of nations. *Compare* Salbu, *Global Harmony*, *supra* note 95, at 447 (noting the cultural diversity of the world) *with* Salbu, *Premature Evocation*, *supra* note 95, at 231 (stating that nations are the primary unit of analysis). However, states rarely coincide with or always represent one culture. The military government of Burma, which forcibly suppresses a democratic government voted for by eighty percent of the electorate, can hardly be said to represent Burmese culture. *See* Janelle M. Diller, *Constitutional Reform in a Repressive State: The Case of Burma*, 33 ASIAN SURV. 393, 393-96 (1993) (discussing Burma's history). The People's Republic of China, where Uighur and Tibetan cultures are being destroyed by Han Chinese, may not constitute a viable representative of the cultural values for all the communities in China. *See* Azat Akimbek, *The Making of a Nationalist*, INDEX ON CENSORSHIP No. 2, Mar. 1998, at 173, 173-74 (discussing conditions in Uighurstan); Guangqiu Xu, *The United States and the Tibet Issue*, 37 ASIAN SURV. 1062, 1062 (1997) (discussing conditions in Tibet and noting that "[t]he Tibetans have a distinct religion, language, and culture and have never been assimilated culturally by the Han"). The national borders in Central Asia were drawn by Stalin for political expediency and do not reflect the underlying cultures. *See* Stephen Blank, *Soviet Reconquest of Central Asia*, *in* CENTRAL ASIA: ITS STRATEGIC IMPORTANCE AND FUTURE PROSPECTS 39, 55 (Hafeez Malik ed., 1994) (noting that the borders drawn by Stalin did not make cultural sense); Paul A. Goble, *Stalin Draws the Borders*, CENT. ASIA MONITOR No. 2, 1995, at 12, 13-14 (stating that Stalin drew the borders in Central Asia to maintain his power). Indeed, the concept of nations is a Western idea that is not always relevant to Eastern cultures. *See* Victor Ya. Porkhomovsky, *Historical Origins of Interethnic Conflicts in Central Asia and Transcaucasia*, *in* CENTRAL ASIA AND TRANSCAUCASIA: ETHNICITY AND CONFLICT 1, 16 (Vitaly V. Naumkin ed., 1994) (noting that "the 'eastern way' of formation of the state system differs from the European one").

V. Multiculturalism is a Two-Way Street

The cultural sensitivity that anti-bribery laws purportedly violate originates from a particularly simplistic image of cultural interaction. This view can be illustrated by the old adage: "When in Rome, do as the Romans do." Such a simplistic view is neither necessary nor useful when evaluating the intrusiveness of anti-bribery laws. A more refined version is more useful: "When in Rome, do as much of what the Romans do as you can." It would be ludicrous, for example, to declare cultural insensitivity if a Hebrew visiting ancient Rome refused to worship the pantheon of Roman gods[139] or if a Zoroastrian from Persia refused to participate in a bacchanalian orgy.[140] Values, mores, strictures, and rules travel with a person.[141] To demand that a person give up his or her values and rules at a political border is just as culturally insensitive as demanding that a host country change its norms.[142]

Politeness and sensitivity are appropriate and make good business sense.[143] Cultural fluency, however, is more important than cultural sensitivity in a business context.[144] Cultural fluency is the ability to encode and

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139. *See* KEITH HOPKINS, A WORLD FULL OF GODS: PAGANS, JEWS AND CHRISTIANS IN THE ROMAN EMPIRE 7-45 (1999) (discussing the situation of monotheistic Jews in ancient Rome).

140. *Compare* P.G. Walsh, *Making a Drama Out of a Crisis: Livy on the Bacchanalia*, 43 GREECE & ROME 188, 188-89 (1996) (describing the orgy on which a play was based) *with* S.A. Nigosian, *Zoroastrian Perception of Ascetic Culture*, 34 J. ASIAN & AFR. STUD. 4, 7-8 (1999) (describing Zoroastrian purity).

141. The continued consumption of home country food provides a striking example. *See* Sudha Raj et al., *Dietary Habits of Asian Indians in Relation to Length of Residence in the United States*, 99 J. AM. DIETETIC ASS'N 1106 (1999) (finding that even after ten years in the United States, Asian Indians will continue to eat many traditional Indian foods). Meals are a critical aspect of culture. *See generally* FOOD AND CULTURE: A READER (Carole Counihan & Penny Van Esterik eds., 1997).

142. The field of social work, whose practitioners frequently interact with people from different cultures, explicitly recognizes this aspect of cultural sensitivity. *See* Miriam Potocky, *Multicultural Social Work in the United States: A Review and Critique*, 40 INT'L SOC. WORK 315, 324-25 (1997) (advocating cultural sensitivity when working with persons from other cultures). Scholars in the field of social work recognize that the definitions and indicia of cultural sensitivity are not yet fully developed. *See* Charles R. Ridley et al., *Cultural Sensitivity in Multicultural Counseling: A Perceptual Schema Model*, 41 J. COUNSELING PSYCHOL. 125, 125 (1994) (critically reviewing multicultural counseling literature and finding four limitations to conceptualizing cultural sensitivity: "definitional variance, inadequate descriptions of [indicators of cultural sensitivity], lack of theoretical grounding, and limitations in measurement and research designs"). These limitations arguably exist in the legal literature as well.

143. Every transnational businessperson probably has an apocryphal story of a deal lost or nearly lost due to some social blunder, and numerous sources assist businesses—and courts—in learning the social rules of different countries. *See, e.g.*, TERRI MORRISON ET AL., KISS, BOW, OR SHAKE HANDS: HOW TO DO BUSINESS IN SIXTY COUNTRIES (1994); PARKER PEN CO., DO'S AND TABOOS AROUND THE WORLD (Roger E. Axtell ed., 3d ed. 1993); Getting Through Customs, *Omnibus* (visited Oct. 1, 2000) <http://www.getcustoms.com/omnibus.html>. More untold stories probably exist, however, of deals successfully concluded even though one party found the other odd or rude. In daily life, the boorish behavior of others is usually shrugged off.

144. *See* Collin Randlesome & Andrew Myers, *Cultural Fluency: Results from a UK and Irish Survey*, BUS. COMM. Q. No. 3, Sept. 1997, at 9, 34 (finding cultural fluency critical

decode exchanges in the same way as members of a given culture.[145] With respect to intercultural communication, it is more important to understand the meaning assigned to and taken from artifacts than to merely imitate the actions of the host culture's members.

The height of cultural insensitivity would be to require those who interact with other cultures to shed all values of their own culture. An observant Jew visiting Bali does not have to eat pork. A Muslim wearer of the veil who visits New York does not have to travel bare-faced. A business-person whose home country has criminalized transnational bribery does not have to pay a bribe. At the very edges,[146] some conduct that is legal and culturally acceptable in the host country will be prohibited by the home country. Sensitivity to these prohibitions is the essence, rather than a denial, of multiculturalism.

Conclusion

Anti-bribery laws that criminalize the payment of bribes to foreign government officials are an established component of the multinational arsenal to combat transnational bribery. Although criticized by some as morally-imperialistic and dangerous intrusions into the affairs of other nations, those criticisms of the laws are unfounded. Anti-bribery laws are legally and ethically unremarkable, and no evidence supports a claim they are considered intrusive or generate hostility. Anti-bribery laws, therefore, should continue to be considered available for multinational and unilateral efforts to combat corruption.

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to success in transnational ventures and stating that an emphasis on cultural sensitivity "obscure[s] the underlying issues").

145. *See* Linda Beamer, *Learning Intercultural Competence*, 29 J. Bus. Comm. 285 (1992) (describing meanings that "match" the meanings originating from the communicator's repository or database). Collin Randlesome and Andrew Myers consider the ability to decode meaning the most important aspect of cultural fluency. *See* Collin Randlesome & Andrew Myers, *Cultural Fluency: The United Kingdom Versus Denmark*, Eur. Bus. J. No. 4, 1998, at 184, 185 (emphasizing the decoding aspect of Beamer's definition).

146. It must be remembered that this discussion involves the edges of a global understanding on corruption. In that context, it is interesting to note the selectivity with which opponents of anti-bribery laws emphasize the edges of a universal norm. Torture and unjustified murder have been offered by opponents of anti-bribery laws as universal norms capable of universal enforcement, *see* Salbu, *Premature Evocation*, *supra* note 95, at 233 n.59 (offering torture as an example); Salbu, *Global Harmony*, *supra* note 95, at 439 & n.111 (murder), although the precise boundaries of each across different cultures is not fixed. The European Court of Human Rights, for example, upheld the United Kingdom's refusal to extradite a German national to the United States on the grounds that forcing the defendant to face the death penalty would constitute a cruel violation of human rights, *see* Soering, 161 Eur. Ct. H.R. (ser. A) at 44-45 (1989), whereas the U.S. Supreme Court has ruled that the death penalty does not constitute cruel or unusual punishment, *see* Gregg v. Georgia, 428 U.S. 153, 168-69 (1976).