
The Good Bribe

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Bribery is justifiably condemned, and is the object of a global legal campaign. This article asks whether payment of a bribe can ever be justified. In order to answer that question, the article first looks at three tropes of reasons for criminalizing bribery: as a reflection of morality, to preserve the connection between people and their government, and to prevent harm. The article then examines and dismisses two common excuses for bribery: the need to pay a bribe to conduct business, and the optimal level of legal enforcement. The article then examines arguments for paying bribes in authoritarian regimes, and concludes that such arguments must be treated with caution. Finally, the article considers bribes paid by Oskar Schindler to save the lives of Jewish workers. Schindler's bribes demonstrate that some bribes can be justified. Such bribes do not present a new checklist for evaluating bribery, nor do they represent a new trope of thinking. Rather, unique circumstances raise such bribes above the rules against and concerns about paying bribes.

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INTRODUCTION

In the 1960s, some scholars commended bribery as a means of overcoming bureaucratic obstacles in developing countries.¹ Today, it might be difficult to find scholars who embrace corruption of any sort.² The campaign against bribery has become global, and features the creation of a transnational regime that encompasses local law and international treaties.³

Much of the legal scholarship over the last fifteen years has focused on criticisms of bribery, possibly as a response to the decades during which corruption was either ignored or was tacitly encouraged. The last defense of bribery in general — a claim that it is culturally embraced in some places in the world and thus that a global regime prohibiting bribery constitutes cultural imperialism — has been eviscerated as itself culturally inaccurate and arrogant.⁴ Bribery seems legally indefensible.

This article examines the presumption that bribery is indefensible. It does so by first examining three tropes of reasoning for criminalizing bribery through the lens of three seminal works on corruption. Each

¹ See, e.g., SAMUEL P. HUNTINGTON, *POLITICAL ORDER IN CHANGING SOCIETIES* 68 (1968) (“Corruption may be one way of surmounting traditional laws or bureaucratic regulations which hamper economic expansion.”); Nathaniel H. Leff, *Economic Development Through Bureaucratic Corruption*, 8 *AM. BEHAV. SCIENTIST* 8, 11 (1964) (“[G]raft may enable an economic innovator to introduce his innovations before he has had a chance to establish himself politically.”).

² This article discusses bribery, which is a subset of corruption in general. The literature on corruption, including some of the literature referred to in this article, sometimes uses the term bribery and corruption interchangeably. See MICHAEL JOHNSTON, *SYNDROMES OF CORRUPTION: WEALTH, POWER, AND DEMOCRACY* 20-21 (2005) (describing terms and noting their interchange).

³ See Blake Puckett, *Clans and the Foreign Corrupt Practices Act: Individualized Corruption Prosecution in Situations of Systemic Corruption*, 41 *GEO. J. INT’L L.* 815, 858 (2010) (describing “a global moral campaign against corruption as a scourge that fosters inequality and global poverty, corrupts democracy and the rule of law, and jeopardizes sound governance and international security”); Elizabeth K. Spahn, *Local Law Provisions Under the OECD Anti-Bribery Convention*, 39 *SYRACUSE J. INT’L L. & COM.* 249, 251-55 (2012) [hereinafter *Local Law Provisions*] (discussing the regime, countries involved, treaties, and local law).

⁴ See, e.g., Philip M. Nichols, *The Myth of Anti-Bribery Laws as Transnational Intrusion*, 33 *CORNELL INT’L L.J.* 627, 645-50 (2000) [hereinafter *The Myth*] (finding that there is no empirical evidence to support the claim that countries are seriously offended by anti-bribery laws and that available anecdotal evidence of extraterritorial application of antitrust laws is “unsound and misleading”); Elizabeth Spahn, *International Bribery: The Moral Imperialism Critiques*, 18 *MINN. J. INT’L L.* 155, 195 (2009) (arguing that deference to supposed cultural bribery norms in reality encourages unethical business and legal practices).

of these works is foundational in legal scholarship on corruption and bribery, and each also accompanies a significant movement of criminalization of bribery. These tropes suggest that bribery should be criminalized as a reflection of society's moral indignation over the payment of bribes,⁵ as a means of preserving the relationship between a people and their government,⁶ and as a means of preventing harm.⁷ Second, this article examines two justifications that are sometimes offered for paying bribes. A claim that a bribe "must" be paid in order to engage in business survives neither empirical nor moral scrutiny.⁸ Third, this article examines the claim that bribes can be paid in authoritarian regimes in order to purchase some relief from oppression. Although this claim has more merit, the article finds problems with the general claim.⁹ Finally, the article examines a discrete set of bribes, the bribes paid to Nazi officials by Oskar Schindler to save the lives of Jewish workers.¹⁰ The article finds that these bribes are justified. Schindler's bribes, however, do not present a new way of evaluating bribery, nor do they represent a new trope of thought. Rather, these bribes demonstrate that in extraordinary circumstances certain bribes rise above the considerations represented by the three tropes of thought discussed earlier. Similar circumstances might exist today, and could also exist in the future.

I. THREE CLASSIC WORKS ON THE CRIMINALIZATION OF BRIBERY

The particular reasons for any given law criminalizing bribery probably defy simple explanation. Scholars have, however, given careful thought to why bribery in general should be controlled. This section reviews three seminal contributions to the study of corruption.¹¹ Each of these is worthy of study in and of itself. This section does not provide an exegesis of these works, but instead uses each to exemplify and to illustrate a trope of thought on the reasons

⁵ See *infra* Part I.A.

⁶ See *infra* Part I.B.

⁷ See *infra* Part I.C.

⁸ See *infra* Part II.

⁹ See *infra* Part III.A.

¹⁰ See *infra* Part III.B.

¹¹ Other scholars have made significant contributions to the study of corruption. In particular, the definitional work of Arnold Heidenheimer predates the three works discussed in this article. ARNOLD J. HEIDENHEIMER, *POLITICAL CORRUPTION: READINGS IN COMPARATIVE ANALYSIS* (1970); see also Maryvonne Génaux, *Social Sciences and the Evolving Concept of Corruption*, 42 *CRIME, L. & SOC. CHANGE* 13, 13-16 (2004) (discussing the relevance of Heidenheimer).

for imposing controls on bribery. The first of these tropes considers moral issues attached to bribes.

A. *John Noonan: Religious and Philosophical Rules*

Scholarly understanding of the relationship between law and morality is, to put it mildly, complicated.¹² Justice Holmes, in *The Path of the Law*, suggested that there is in fact no relationship.¹³ A softer version of this realist perspective suggests that “legal wrongs embody their own normativity, which is hermeneutically independent of morality.”¹⁴ Ronald Dworkin, on the other hand, suggests that law cannot be extricated from broader social concepts, particularly those related to justice.¹⁵ “According to law as integrity, propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community’s legal practice.”¹⁶

Lynn Paine participates in this debate, but also makes a relevant empirical observation. Regardless of whether law should correctly be interpreted only through its own internal normativity or whether law must turn to broader concepts of justice in order to be considered moral, “[i]n truth, the relationship between [law and ethics] is in flux: the prescriptions of law and the prescriptions of ethics coincide to different degrees at different times and in different societies.”¹⁷ Further, Paine argues, social norms often contribute to change in legal rules: “what is legally permissible but ethically questionable today may be legally restricted or prohibited tomorrow.”¹⁸

¹² Lynn Sharp Paine, *Law, Ethics, and Managerial Judgment*, 12 J. LEGAL STUD. EDUC. 153, 153 (1994) (“The question of how best to conceptualize the relationship between law and ethics is a perennial one in Western jurisprudence. It is a topic addressed by many leading thinkers in that tradition — Aquinas, Bentham, Holmes, Kelsen, Fuller, Hart, and Dworkin — to name some of the best known.”).

¹³ See Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 464 (1897) (“For my own part, I often doubt whether it would not be a gain if every word of moral significance could be banished from the law altogether, and other words adopted which should convey legal ideas uncolored by anything outside the law.”); see also Harry W. Jones, *Law and Morality in the Perspective of Legal Realism*, 61 COLUM. L. REV. 799, 799 (1961) (describing Justice Holmes as “the hero figure of the realist clan”).

¹⁴ Shyamkrishna Balganes, *The Obligatory Structure of Copyright Law: Unbundling the Wrong of Copying*, 125 HARV. L. REV. 1664, 1678 (2012).

¹⁵ RONALD DWORIN, *LAW’S EMPIRE* 5-6, 14 (1986).

¹⁶ *Id.* at 225.

¹⁷ Paine, *supra* note 12, at 165.

¹⁸ *Id.* Paine observes that “[l]aw is most often a lagging indicator of social ethics.” *Id.* at 167.

In *Bribes*, one of the earliest legal tomes on bribery, the eminent jurist John Noonan argues that “[t]he bribe has had the life of a moral concept.”¹⁹ Noonan explains that moral concepts are subject to discovery and change: “Moral concepts found enshrined in traditions do not stay the same. They undergo transformation. They are subject to investigation and criticism. They expand, shrink, or disappear. They depend on what reason can determine and what is perceived as the demand and example of God?”²⁰ Noonan concludes that “[t]he movement to restrict by law many forms of reciprocal exchange with officeholders incorporates the thrust of a dominant moral idea. The conventions that give concreteness to the idea of the bribe will be refined and made responsive to the needs satisfied by human trust and human conformity to God’s example.”²¹

Noonan’s background includes theological training in Christian philosophy, and much of his analysis focuses on the evolution of the idea within Judaism, Christianity, and Islam.²² Judaism, Christianity, and Islam all strongly condemn corruption. The venerated Judaic *Book of Education* warns that, “among the laws of the precept, there is what our Sages of blessed memory said, that both the one who gives and the one who accepts [the bribe] violate a negative precept.”²³ The Pentateuch, shared by Judaism and Christianity as the Torah or the first five books of the Christian Old Testament,²⁴ is replete with unequivocal proscriptions and condemnations of bribery: for example,

¹⁹ JOHN T. NOONAN, JR., *BRIBES* 683 (1984). See generally Beverley Earle & Anita Cava, *Are Anti-Corruption Efforts Paying Off? International and National Measures in the Asia-Pacific Region and Their Impact on India and Multinational Corporations*, 31 U. HAW. L. REV. 59, 66 (2008) (describing *Bribes* as “seminal”).

²⁰ NOONAN, *supra* note 19, at 683.

²¹ *Id.* at 706.

²² Noonan summarizes the story that he tells as beginning in the Ancient Near East and “entering into the commandments of Israel,” then into Greece and Rome, then onto “the banner of religious reform in the eleventh century” where it stayed “for over 500 years,” from whence it entered the common law of England and then the political life of the United States. *Id.* at 683-84; see also *id.* at 809-10 (“Table of Scriptural Citations”). See generally Charles J. Reid, Jr., *The Fundamental Freedom: Judge John T. Noonan Jr.’s Historiography of Religious Liberty*, 83 MARQ. L. REV. 367, 367-76 (1999) (reviewing Noonan’s training and scholarship).

²³ 1 SÉFER HAḤINNUCH, THE BOOK OF [MITZVAH] EDUCATION 325 (bracketed text in original) ([1200?] 1978).

²⁴ See generally Kenneth B. Orenbach, *The Religiously Distinct Director: Infusing Judeo-Christian Business Ethics into Corporate Governance*, 2 CHARLOTTE L. REV. 369, 404-05 (2010) (describing the Pentateuch). Islam also recognizes the Pentateuch as a divinely inspired scripture, albeit one that has been corrected by the Holy Qur’an as the “last enactment of God.” Muhamad Mugarby, *Some Impediments to the Rule of Law in the Middle East and Beyond*, 26 FORDHAM INT’L L.J. 771, 774-75 (2003).

“You shall not pervert justice. You shall not show partiality, and you shall not accept a bribe . . .”²⁵ and “you shall take no bribe, for a bribe blinds the clear-sighted and subverts the cause of those who are in the right.”²⁶ The New Testament of the Christian Bible does not itself specifically prohibit bribery, but biblical scholars note that they “have found nothing in the New Testament to suggest the Old Testament prohibitions against bribery and extortion should not be applied today. On the contrary [they] have found much to affirm the Old Testament perspective concerning bribery and extortion.”²⁷ The Holy Qur’an, the foundational religious text in Islam, bluntly states that “Allah does not like corrupters,”²⁸ and admonishes believers “not [to] consume one another’s wealth unjustly or send it [in bribery] to the rulers in order that [they might aid] you [to] consume a portion of the wealth of the people in sin, while you know [it is unlawful].”²⁹ After reviewing traditional and contemporary sources, Islamic Law scholar Mohammed Arafa concludes that “[c]orruption and bribery are serious crimes which Islamic law considers to be simultaneously religious and criminal offenses due to the serious harm caused by them to the community.”³⁰

The traditions on which Judge Noonan focuses clearly condemn bribery. Non-Abrahamic traditions, to which Judge Noonan pays less attention, also prohibit bribery. Followers of the Buddha’s teaching, for example, commit themselves to five moral precepts.³¹ Bribery violates the second of these precepts, not to steal, as well as the fourth, not to lie.³² The Dalai Lama, Buddhism’s most visible figure,

²⁵ *Deuteronomy* 16:19 (English Standard Version).

²⁶ *Exodus* 23:8 (English Standard Version).

²⁷ See, e.g., RICHARD L. LANGSTON, *BRIBERY AND THE BIBLE* 64 (1991). Among the findings: “The New Testament affirms the Old Testament’s censure of the variance bribe. It adds to the Old Testament’s condemnation of bribe takers by providing specific instances condemning bribe givers, bribe offerors, and the offer of a bribe. It illustrates how bribery can escalate from small bribes to large ones. It records Paul’s resistance of Felix’s attempted extortion or solicitation of a transactional bribe. And it shows John the Baptist telling low paid soldiers not to use their position for extortion.” *Id.*

²⁸ *Qur’an* 28:77 (Sahih International).

²⁹ *Id.* at 2:188.

³⁰ Mohamed A. ‘Arafa, *Corruption and Bribery in Islamic Law: Are Islamic Ideals Being Met in Practice?*, 18 ANN. SURV. INT’L & COMP. L. 171, 201 (2012).

³¹ These five precepts are not taking life, not taking what is not given, abstention from sexual misconduct, not making false speech, and abstention from intoxicants. Damien P. Horigan, *Of Compassion and Capital Punishment: A Buddhist Perspective on the Death Penalty*, 41 AM. J. JURIS. 271, 275 (1996).

³² See U. Dhammaratana, *The Social Philosophy of Buddhism*, in *THE SOCIAL*

specifically identifies corruption as a distortion of law. In describing a talk by the Dalai Lama to a legal audience, Rebecca French notes:

The concept of “dirty law” is powerful. The Dalai Lama uses it to explain what happens when legal power is employed for purposes other than the truth. A person acting out of revenge, for example, should not be operating in our legal system. The emphasis on personal motivation is a constant element throughout Buddhist law. When lawyers act out of negative motivations such as greed, anger, hatred, personal interests, or fear, the law that they practice becomes dirty. Examples of dirty law are exploiting others, hiding the truth, acting for personal advancement, [and] dealing corruptly³³

Kong Qiu — romanized as Confucius — teaches his followers to focus on matters other than wealth: “A gentleman, in his plans, thinks of the Way; he does not think how he is going to make a living. . . . [A] gentleman’s anxieties concern the progress of the Way; he has no anxiety concerning poverty.”³⁴ Thus Mencius, the great follower and teacher of Confucianism, teaches that “[a] fully righteous person would also recognize that it is just as shameful to accept a large bribe as it is to accept a small bribe, and so would refuse to accept either.”³⁵

Confucianism focuses on public life; Taoism focuses on private life and tranquility.³⁶ Taoism shares many of the principles of Confucianism but emphasizes a simple, natural approach to finding the way rather than the active and structured approach espoused in Confucianism.³⁷ Through a tortured interpretation of Taoism, Michael Forrest and J.T. Norris argue that the principle of simplicity and naturalism, *wu wei*, seeks to achieve efficiency and thus encompasses bribery of officials.³⁸

PHILOSOPHY OF BUDDHISM 1, 17-18 (Ven. Samdhong Rinpoche ed., C. Mani assoc. ed., 1972); *Bribery*, GUIDE TO BUDDHISM A TO Z, <http://www.buddhisma2z.com/content.php?id=474> (last visited Aug. 31, 2015).

³³ Rebecca R. French, *The Dalai Lama Speaks on Law*, 55 BUFF. L. REV. 647, 655 (2007).

³⁴ *The Analects* 15:32 (Arthur Waley trans., Alfred A. Knopf, Inc. 2000) (1938).

³⁵ Bryan Van Norden, *Mencius*, THE STAN. ENCYCLOPEDIA OF PHIL. (Edward N. Zalta ed., Winter 2014) (citing *Mengzi* 6A10), <http://plato.stanford.edu/archives/win2014/entries/mencius/>.

³⁶ See Henry Suen, Sai-On Cheung & Reuben Mondejar, *Managing Ethical Behaviour in Construction Organizations in Asia: How Do the Teachings of Confucianism, Taoism and Buddhism and Globalization Influence Ethics Management?*, 25 INT’L J. PROJECT MGMT. 257, 261 (2007).

³⁷ See *id.* at 262.

³⁸ See Michael P. Forrest & J. T. Norris, *Bribery and China Go Together Like Yin*

Simplicity, however, is fundamentally different than efficiency; for Taoists, “efficiency [is] only a by-product or something incidental, and is not the main concern of their philosophy.”³⁹ In contrast to Forrest and Norris, Chuang Tzu, the ancient Taoist scholar, condemns “[t]he intelligence of the mean man” for “not ris[ing] beyond bribes” and thus failing to find the simple way.⁴⁰

Hinduism, Sikhism, and Jainism also vigorously condemn bribery and corruption. In reviewing foundational works of the Hindu faith, Upendra Thakur notes that

a perusal of the Smṛti works makes it clear that the earlier Smṛti-writers prescribe a much more drastic punishment for the bribe-seeker [than for the bribe giver,] who finds a graphic mention in one of the early inscriptions. [Manusmṛti] and Viṣṇu [Purāṇna] also ordain that the entire property of a bribe-consuming official should be confiscated by the king. Yājñavalkya, however, provides banishment for such social offenders. Kauṭilya, the astute observer of men and affairs, gives a graphic description of measures to apprehend such an official, and like Yājñavalkya prescribes banishment for such criminals.⁴¹

Sikh texts are equally condemnatory. The *Sri Guru Granth Sahib*, Sikhism’s most authoritative text, teaches that “[t]he self-willed . . . take bribes . . . [they] do not know the essence of reality.”⁴² As the eminent Sikh scholar Harbans Singh explains, “The main object of Sikh polity . . . is ‘righteous rule’. This can be achieved either by transforming the existing corrupt rulers on moral and ethical lines of religion through peaceful persuasions, or by replacing their corrupt rule by a ‘just’ regime”⁴³ Jainism is even more blunt: “Bribes [are]

and Yang, 44 CUMB. L. REV. 423, 428 (2013–2014) (finding that American law makers and federal prosecutors draw bright lines when it comes to forbidding bribes, which is “inconsistent with Chinese economics” in part shaped by concepts like *wu wei* — “that efficiency is increased by the absence of resistance”).

³⁹ Suen, Cheung & Mondejar, *supra* note 36, at 262.

⁴⁰ See CHUANG TZU, MYSTIC, MORALIST, AND SOCIAL REFORMER 428 (Herbert A. Giles trans., 1889).

⁴¹ UPENDRA THAKUR, CORRUPTION IN ANCIENT INDIA 14 (1979) (citations omitted) (additional text added for clarity and understanding).

⁴² SRI GURU GRANTH SAHIB 1032 (Dr. Sant Singh Khalsa trans.), available at <http://www.srigranth.org/servlet/gurbani.gurbani?Action=Page&g=1&h=1&r=1&t=1&p=0&k=0&fb=0&Param=1032> (last visited Nov. 1, 2015).

⁴³ DR. HARBANS SINGH, DEGH, TEGH, FATEH: SOCIO-ECONOMIC & RELIGIO-POLITICAL FUNDAMENTALS OF SIKHISM 141 (1986). Harbans Singh was the first editor of *The*

verily the door for the advent of all evils,” and “Those living on [bribes] cut even the breast of their mother.”⁴⁴

Modern laws based on religion continue to proscribe corruption and bribery. The law of Iran, for example, is explicitly rooted in Islam.⁴⁵ Both the constitution⁴⁶ and the statutes⁴⁷ of Iran prohibit corruption. Saudi Arabia’s legal system is also based on Islam,⁴⁸ and Saudi Arabia also strictly criminalizes bribery.⁴⁹

The laws of countries such as Iran and Saudi Arabia are explicitly grounded in religion.⁵⁰ The extent to which morality underpins the bribery laws of other countries is debatable and probably not

Encyclopedia of Sikhism. See Roopinder Singh, *Prof. Harbans Singh: A Gentleman Scholar*, ROOPINDER SINGH (Jul. 9, 2013), <http://www.roopinder.com/prof-harbans-singh-a-gentleman-scholar/>.

⁴⁴ SOMADEVA SURI, NITIVAKYAMRITAM 145 (Dr. Sudhir Kumar Gupta trans., 1987).

⁴⁵ John Y. Gotanda, *Awarding Interest in International Arbitration*, 90 AM. J. INT’L L. 40, 48 (1996).

⁴⁶ Article 49 of the Iranian constitution states:

The government has the responsibility of confiscating all wealth accumulated through usury, usurpation, bribery, embezzlement, theft, . . . the operation of centers of corruption, and other illicit means and sources, and restoring it to its legitimate owner; and if no such owner can be identified, it must be entrusted to the public treasury. This rule must be executed by the government with due care, after investigation and furnishing necessary evidence *in accordance with the law of Islam*.

QANUNI ASSASSI JUMHURII ISLAMAI IRAN [THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN] 1358 [1980] (emphasis added).

⁴⁷ Most of the criminal laws of Iran are “experimental;” only Book Five of the criminal code has been permanently adopted. *Islamic Penal Code of the Islamic Republic of Iran — Book Five*, IRAN HUMAN RIGHTS DOCUMENTATION CENTER (July 18, 2013), <http://iranhrdc.org/english/human-rights-documents/iranian-codes/1000000351-islamic-penal-code-of-the-islamic-republic-of-iran-book-five.html>. Chapter Eleven of Book Five deals with “Bribery, Usury and Fraud.” *Id.* The nine articles of Chapter Eleven deal with various aspects of bribery and corruption and together impose criminal penalties on those who bribe government officials. *See id.*

⁴⁸ Courtney Jung, Ran Hirschl & Evan Rosevear, *Economic and Social Rights in National Constitutions*, 62 AM. J. COMP. L. 1043, 1069 (2014).

⁴⁹ *See Saudi Arabia: Anti-Bribery Law*, 9 ARAB L.Q. 283, 283-87 (1994) (providing Saudi Arabia’s Anti-Bribery Law). Bribery is punishable by imprisonment and fine. *See id.*

⁵⁰ *See* L. Ali Khan, *The Qur’an and the Constitution*, 85 TUL. L. REV. 161, 167-168 (2010). Khan points out that although the constitutions of these countries are grounded in and ultimately submissive to religion, there are many rules and structures that have nothing to do with religion. *Id.*; *see also* Abdullahi Ahmed An-Na’im, *Religious Norms and Family Law: Is It Legal or Normative Pluralism?*, 25 EMORY INT’L L. REV. 785, 788 (2011) (“All state law, whether of Canada, Iran, Nigeria, Saudi Arabia, or any other state, is simply the product of the political will of that state and never of any religion.”).

measurable. Judge Noonan's scholarship, however, retains relevance. When contemplating explanations for the universality of the condemnation of and moral recoil over bribery, one need turn no further than the moral evolution described by Judge Noonan and the clear condemnation found expressed by each of the major religions and faiths.

B. *Robert Klitgaard: An Agency Analysis of Bribery*

The concept of agency is central to law and to modern life.⁵¹ As Paula Dalley points out, “[i]t would be difficult to function in a modern economy for more than a few hours without interacting with an agent of some kind. The atmosphere is so thick with agents that most people rarely think about them.”⁵² Legal theorists, understandably, also use concepts of agency when describing government.⁵³

Robert Klitgaard's *Controlling Corruption*, published shortly after John Noonan's *Bribes*, also describes government using concepts of agency.⁵⁴ Professor Klitgaard is an accomplished political scientist and his book constitutes a major contribution to the understanding of corruption.⁵⁵ In contrast to Judge Noonan, who turns to notions of morality to elucidate bribery, Klitgaard describes bribery as an agency problem.⁵⁶ Bribery is unacceptable because it subverts the relationship between the Principal (the public) and the Agent (the bureaucrat), and bribery exists because the institutions that support that agency relationship are weak or are poorly supported.⁵⁷

⁵¹ See Eric Rasmusen, *Agency Law and Contract Formation*, 6 AM. L. & ECON. REV. 369, 369-370 (2004) (discussing the centrality of agency to law and numerous aspects of life).

⁵² Paula J. Dalley, *A Theory of Agency Law*, 72 U. PITT. L. REV. 495, 497 (2011).

⁵³ See Seth Davis, *The False Promise of Fiduciary Government*, 89 NOTRE DAME L. REV. 1145, 1154 (2014) (describing fiduciary theorists).

⁵⁴ See ROBERT KLITGAARD, *CONTROLLING CORRUPTION* 22-24 (1988); see also Philip M. Nichols, *United States v Lazarenko: The Trial and Conviction of Two Former Prime Ministers of Ukraine*, 2012 U. CHI. LEGAL F. 41, 46 (referring to Klitgaard's use of agency to describe bribery). See generally Earle & Cava, *supra* note 19, at 66 (discussing scholarship regarding corruption, including Klitgaard's *Controlling Corruption*).

⁵⁵ See Herbert V. Morais, *Fighting International Crime and Its Financing: The Importance of Following a Coherent Global Strategy Based on the Rule of Law*, 50 VILL. L. REV. 583, 614 n.143 (2005) (extolling Klitgaard's credentials and describing *Controlling Corruption* as one “of the best publications available”).

⁵⁶ See KLITGAARD, *supra* note 54, at 22-24.

⁵⁷ Klitgaard suggests that:

Not surprisingly, agency conceptualizations of bribery have taken strong hold among legal scholars. The most persistent definition used in legal scholarship suggests that corruption occurs when a position of trust or authority is used for personal benefit rather than the purpose for which that trust or authority was granted.⁵⁸ Although first promulgated by a political scientist, this definition has become so standard in legal scholarship that Patrick Delaney refers to it as the “classic definition.”⁵⁹

Some legal scholarship refers explicitly to Klitgaard.⁶⁰ More important than explicit reference to Klitgaard, however, is recognition of the importance of the relationship between people and their government, and the damage that bribery can inflict on that relationship. Bruce Ackerman notes that “Bureaucracy cannot work if bureaucratic decisions are up for sale to the highest bidder.”⁶¹ This is because “a failure to control [corruption] undermines the very legitimacy of democratic government. If payoffs are a routine part of life, ordinary people will despair of the very idea that they, together with their fellow citizens, can control their destinies through the democratic rule of law.”⁶² Viewed through this lens, the purpose of

[C]orruption may be represented as following a formula: $C = M + D - A$. Corruption equals monopoly *plus* discretion *minus* accountability. Whether the activity is public, private, or nonprofit . . . one will tend to find corruption when an organization or person has monopoly power over a good or service, has the discretion to decide who will receive it and how much that person will get, and is not accountable.

Robert Klitgaard, *International Cooperation Against Corruption*, 35 FIN. & DEV. 3, 4 (Mar. 1998), available at <https://www.imf.org/external/pubs/ft/fandd/1998/03/pdf/klitgaar.pdf>.

⁵⁸ This definition is usually attributed to another political scientist, Joseph Nye, rather than to Klitgaard. See J.S. Nye, *Corruption and Political Development: A Cost-Benefit Analysis*, 61 AM. POL. SCI. REV. 417, 419 (1967).

⁵⁹ Patrick X. Delaney, *Transnational Corruption: Regulation Across Borders*, 47 VA. J. INT'L L. 413, 417 (2007) (referring to Nye's as the “classic definition”).

⁶⁰ See, e.g., Indira Carr, *Corruption, the Southern African Development Community Anti-corruption Protocol and the Principal-agent-client Model*, 5 INT'L J.L. CONTEXT 147, 151 n.23 (2009) (citing Klitgaard when developing a theoretical model to describe anti-corruption legislation in southern Africa); Andrew Brady Spalding, *The Irony of International Business Law: U.S. Progressivism and China's New Laissez-Faire*, 59 UCLA L. REV. 354, 392 n.206 (2011) (using Klitgaard to explain the findings of a study in China).

⁶¹ Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 694 (2000).

⁶² *Id.*

bribery laws could then be characterized as protecting the relationship between people and their government.

Nearly every country in the world prohibits the bribery of its own officials.⁶³ Examination of discrete examples finds language that makes reference to the functioning of government officials. Germany's laws, for example, prohibit payments to a government official "in return for the fact that [the official] performed or would in the future perform an official act and thereby violates or would violate his official duties."⁶⁴ Similarly, the laws of the United States prohibit payments "to induce [a] public official or [a] person who has been selected to be a public official to do or omit to do any act in violation of the lawful duty of such official or person."⁶⁵

China provides an example of a country that has very specifically tied the enforcement of bribery laws to the functioning of government. The President of China, Xi Jinping, has announced that the Chinese government has made the enforcement of bribery laws a national priority.⁶⁶ The Chinese government has explained the need for better enforcement with statements including "improving public credibility' of justice organs, 'to ensure lawful, independent and fair use of its judicial and procuratorial authority' in order to guarantee 'unified and accurate law implementation.'"⁶⁷ Significantly, the Chinese government seems committed to improving governance by enforcing laws against bribery.⁶⁸

An agency-based understanding of bribery plausibly explains the criminalization of domestic bribery. It might not, however, explain the criminalization by one country of the payment of bribes to officials in

⁶³ See Spahn, *Local Law Provisions*, *supra* note 3, at 257.

⁶⁴ STRAFGESETZBUCH [STGB] [PENAL CODE], Nov. 13, 1998, BUNDESGESETZBLATT, Teil I [BGBL I] 945, as amended, § 334(1) (Ger.) available at <http://germanlawarchive.iuscomp.org/?p=752#334>.

⁶⁵ 18 U.S.C. § 201(b)(1)(c) (2012).

⁶⁶ See Tim Donovan, *China's Crackdown on Corruption and Government Spending: A Timeline*, CHINA BUS. REV. (Jan. 23, 2014), <http://www.chinabusinessreview.com/chinas-crackdown-on-corruption-and-government-spending-a-timeline/>.

⁶⁷ Susan Trevaskes, *Mapping the Political Terrain of Justice Reform in China*, 2 GRIFFITH ASIA Q. 18, 19 (2014).

⁶⁸ See Andrew Wedeman, *Xi Jinping's Tiger Hunt and the Politics of Corruption*, CHINA RES. CENTER (Oct. 15, 2014), http://www.chinacenter.net/2014/china_currents/13-2/xi-jinpings-tiger-hunt-and-the-politics-of-corruption/ ("[I]t appears that far from a smoke and mirrors attempt to create the impression of action, Xi Jinping's anti-corruption campaign may well be the most sustained and intensive drive against corruption since the start of the reform era.").

another country. Explanation of those laws might better lie in an understanding that focuses on the harms caused by bribery.

C. *Susan Rose-Ackerman: The Consequences of Bribery*

Susan Rose-Ackerman published *Corruption and Government* nearly a decade after Noonan and Klitgaard released their works.⁶⁹ Although Professor Rose-Ackerman is a professor of law, she is a distinguished political economist with many years of service to international organizations, all of which are reflected in her seminal work.⁷⁰ Rose-Ackerman focuses on the harms inflicted by corruption; in particular she “explore[s] the interaction between productive economic activity and unproductive rent seeking by focusing on the universal phenomenon of corruption in the public sector.”⁷¹

While Noonan illustrates the law as an embodiment of morality and Klitgaard illustrates the law as protective of the relationship between a government and its citizens, Rose-Ackerman illustrates the law as a means of preventing harm. The “harm principle” — the notion that criminal law may *only* be imposed in order to prevent the infliction of harm by persons on others — engenders substantial debate with those who believe that law can also reflect morality.⁷² As is the case with the debate over the relationship between law and morality, however, the empirics do not depend on the philosophical debate; regardless of whether the law justifiably may do more, the legal environment is replete with the use of law to prevent harms. Antitrust laws prevent harm to markets.⁷³ Criminal law prevents harm to members of society.⁷⁴ Environmental law is intended to prevent harm to the

⁶⁹ SUSAN ROSE-ACKERMAN, *CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES, AND REFORM* (1999) [hereinafter *CORRUPTION AND GOVERNMENT*].

⁷⁰ See Earle & Cava, *supra* note 19, at 67 (describing *Corruption and Government* as “seminal” and discussing trends in scholarship discussing bribery); Fred S. McChesney, *Ever the Twain Shall Meet*, 99 MICH. L. REV. 1348, 1348 (2001) (reviewing ROSE-ACKERMAN, *CORRUPTION AND GOVERNMENT*, *supra* note 69) (discussing Professor Rose-Ackerman’s work and accomplishments).

⁷¹ ROSE-ACKERMAN, *CORRUPTION AND GOVERNMENT*, *supra* note 69, at 2.

⁷² See Avani Mehta Sood & John M. Darley, *The Plasticity of Harm in the Service of Criminalization Goals*, 100 CALIF. L. REV. 1313, 1317 (2012) (discussing the harm principle and the morality debate).

⁷³ See Eleanor M. Fox, *Trade, Competition, and Intellectual Property — TRIPS and its Antitrust Counterparts*, 29 VAND. J. TRANSNAT’L L. 481, 485 (1996) (stating that under international law, “nations are allowed to adopt antitrust laws to prevent harm to themselves in their internal markets”).

⁷⁴ E.g., Jennifer Ann Drobac & Leslie A. Hulvershorn, *The Neurobiology of Decision Making in High-Risk Youth and the Law of Consent to Sex*, 17 NEW CRIM. L. REV. 502,

environment.⁷⁵ Food and drug regulations protect the health of consumers of food and drugs.⁷⁶

For many years, significant actors in the international community avoided discussion of the harms inflicted by bribery. Prior to 1996, international financial institutions and development organizations assiduously avoided the topic of corruption — the “c word” — as political and therefore outside of their jurisdictions.⁷⁷ In 1996, World Bank President James Wolfensohn vigorously announced a change in policy:

[L]et’s not mince words: we need to deal with the cancer of corruption.

In country after country, it is the people who are demanding action on this issue. They know that corruption diverts resources from the poor to the rich, increases the cost of running businesses, distorts public expenditures, and deters foreign investors. They also know that it erodes the constituency for aid programs and humanitarian relief.⁷⁸

After Wolfensohn’s speech, the World Bank began development of “a comprehensive strategy to address corruption.”⁷⁹ Professor Rose-

515 (2014) (“Criminal law prevents harm to society, as well as to individuals within society.”).

⁷⁵ See, e.g., Richard J. Lazarus, *Mens Rea in Environmental Criminal Law: Reading Supreme Court Tea Leaves*, 7 *FORDHAM ENVTL. L.J.* 861, 866-67 (1996) (discussing the deterrent effect of criminal environmental laws to protect the environment); Karen N. Scott, *International Law in the Anthropocene: Responding to the Geoengineering Challenge*, 34 *MICH. J. INT’L L.* 309, 333 (2013) (“International environmental law is arguably founded on the obligation to ensure that activities within the jurisdiction or under the control of a state do not cause harm to the environment of other states or to areas beyond national jurisdiction.”).

⁷⁶ See, e.g., Brad Estes, Note, *Prosecuting Over Peanuts: How the PCA Scandal Can Inform More Effective Federal Criminal Enforcement of Food Safety Laws*, 33 *REV. LITIG.* 145, 166 (2014) (noting that deterrence is a critical function of food and drug safety laws because of the possibility of serious harm).

⁷⁷ See generally Grant Walton & Stephen Howes, *Using the C-Word: Australian Anti-Corruption Policy in Papua New Guinea*, *DEVPOLICY BLOG* (Aug. 22, 2014), <http://devpolicy.org/using-the-c-word-australian-anti-corruption-policy-in-papua-new-guinea-20140822/> (“Corruption was a word not muttered in polite company, not in front of one’s friends (strategic allies) anyway.”).

⁷⁸ James D. Wolfensohn, Address to the Board of Governors at the Annual Meetings of the World Bank and the International Monetary Fund (Oct. 1, 1996), in *VOICE FOR THE WORLD’S POOR: SELECTED SPEECHES AND WRITINGS OF WORLD BANK PRESIDENT JAMES D. WOLFENSOHN, 1995-2005*, at 45, 50 (2005).

⁷⁹ 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, 475 (1997).

Ackerman herself tied corruption control to the law: “A basic condition for corruption control is a viable legal framework that enforces the law without political favoritism or arbitrariness.”⁸⁰ The Bank’s rules mandated that it concern itself “only with the economic causes and effects and should refrain from intervening in the country’s political affairs.”⁸¹ In other words, the Bank was required to focus on harm rather than on the connection between a people and their government.

The mid-1990s also saw the release of two numerical treatments of corruption: Transparency International’s much-heralded Corruption Perceptions Index and the World Bank’s less-acclaimed but more detailed Worldwide Governance Indicators.⁸² Quantitative scholars now had data, and research on the effects of bribery and other forms of corruption exploded.⁸³ In combination, these events ushered in a new era of legal scholarship and legal regimes which focused on the consequences of corruption and in particular corruption’s effect on development.⁸⁴

⁸⁰ Susan Rose-Ackerman, *The Role of the World Bank in Controlling Corruption*, 29 *LAW & POL’Y INT’L BUS.* 93, 106 (1997).

⁸¹ Shihata, *supra* note 79, at 477.

⁸² See, e.g., Amichai Magen, *The Rule of Law and Its Promotion Abroad: Three Problems of Scope*, 45 *STAN. J. INT’L L.* 51, 112 (2009) (describing the importance of the release of the Worldwide Governance Indicators in 1996); Elizabeth K. Spahn, *Implementing Global Anti-Bribery Norms: From the Foreign Corrupt Practices Act to the OECD Anti-Bribery Convention to the U.N. Convention Against Corruption*, 23 *IND. INT’L & COMP. L. REV.* 1, 7-8 (2013) (discussing the release of the Corruption Perceptions Index in 1995).

⁸³ See Michael Johnston, *Preface to CIVIL SOCIETY AND CORRUPTION: MOBILIZING FOR REFORM*, at xi, xvii (Michael Johnston ed., 2005) (“The past decade has produced an explosion of information and data on corruption. . . . [S]o much material, in fact, that we may well be overwhelmed by the task of finding and sorting out information.”).

⁸⁴ See, e.g., Padideh Ala’i, *The WTO and the Anti-Corruption Movement*, 6 *LOY. U. CHI. INT’L L. REV.* 259, 272 (2008) (describing emergence of “a transnational anti-corruption movement . . . based on the premise that corruption was a major impediment to the success of market economics”); Nancy Zucker Boswell, *An Emerging Consensus on Controlling Corruption*, 18 *U. PA. J. INT’L ECON. L.* 1165, 1173 (1997) (“The heads of the World Bank and IMF have provided significant impetus to the emerging consensus, particularly since the 1996 annual meetings. . . . This is a remarkable shift from only a few years earlier, when many in these institutions considered the issue too political.”); Hassane Cissé, *Crossing Borders in International Development: Some Perspectives on Human Rights, Governance, and Anti-Corruption*, 55 *VA. J. INT’L L.* 1, 3 (2014) (attributing “a significant evolution in the thinking around [governance and anti-corruption]” to “Wolfensohn’s ‘cancer of corruption’ speech”).

The harms inflicted by corruption are now known to be multitudinous and pernicious.⁸⁵ The Foreword to the United Nations Convention Against Corruption clearly outlines these harms:

Corruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organized crime, terrorism and other threats to human security to flourish.⁸⁶

Bribery changes the bases on which business decisions are made. In a properly functioning market, rational consumers decide which good or service to purchase by considering price and quality.⁸⁷ In a corrupted system, on the other hand, bribe-taking consumers do not consider the price or quality of goods or services but instead make decisions based on the size and quality of a bribe.⁸⁸ Bribery also distorts the decision-making process by creating incentives for bribe takers to delay, obfuscate, or hide information.⁸⁹ Decisions made in this way can lead to the production of lower-quality goods and to the misallocation of resources.⁹⁰

Corruption inflicts a multitude of harms. Studies associate corruption with depressed economic growth, lower rates of investment, inflation, and currency depreciation.⁹¹ Studies find a link

⁸⁵ See Selçuk Akçay, *Corruption and Human Development*, 26 CATO J. 29, 29-30 (2006) (summarizing the effects of corruption).

⁸⁶ Kofi Annan, Foreword to United Nations Convention Against Corruption, U.N. OFFICE ON DRUGS & CRIME, at iii, U.N. Sales No. V.04-56160 (2004), available at http://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf.

⁸⁷ 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).

⁸⁸ See *id.*

⁸⁹ See Scheherazade S. Rehman & Frederick V. Perry, *Corruption, Constitutions, and Crude in Latin America*, 20 LAW & BUS. REV. AM. 163, 164 (2014) (“Corruption is costly; it has been argued that when corruption is allowed to flourish, it is in the interest of government officials to make and increase bureaucratic hurdles and red tape, because this provides for more opportunity to demand bribes.”).

⁹⁰ See Omar Azfar, Young Lee & Anand Swamy, *The Causes and Consequences of Corruption*, 573 ANNALS AM. ACAD. POL. & SOC. SCI. 42, 45 (2001) (“[T]he highest bribe may be paid by a low-cost and low-quality producer, not necessarily the one who is most efficient.”); Elizabeth Spahn, *Nobody Gets Hurt?*, 41 GEO. J. INT'L L. 861, 870 (2010) (“Bribery leads to the misallocation of government funds. Vital projects that are greatly needed and directly benefit citizens are ignored.”).

⁹¹ See, e.g., Fahim A. Al-Marhubi, *Corruption and Inflation*, 66 ECON. LETTERS 199, 199 (2000) (finding “a significant positive association between corruption and inflation”); Mohsen Bahmani-Oskooee & Abm Nasir, *Corruption, Law and Order, Bureaucracy, and Real Exchange Rate*, 50 ECON. DEV. & CULTURAL CHANGE 1021, 1026

between corruption and disproportionate military spending,⁹² as well as between corruption and the percentage of paved roads in good condition⁹³ and between levels of corruption and the ratio of both public education spending and public health spending to gross domestic product.⁹⁴ Corruption is also strongly linked to mistrust of government and other institutions.⁹⁵

Bribery and corruption also inflict harms directly on persons. Corruption has been found to correlate with child mortality rates, lower child birth weight, and increase the dropout rate of children from primary school.⁹⁶ Similarly, a strong negative relationship exists between corruption and the performance and viability of healthcare systems.⁹⁷ Corruption negatively affects environmental policy and the

(2002) (finding that countries with “a high degree of corruption or less law and order tend to experience a real depreciation in their currency”); Paolo Mauro, *Corruption and Growth*, 110 Q.J. ECON. 681, 705 (1995) (“[A] negative association [exists] between corruption and investment, as well as growth, [which] is significant in both a statistical and an economic sense.”); Pak Hung Mo, *Corruption and Economic Growth*, 29 J. COMP. ECON. 66, 76 (2001) (finding that a one percent increase in the amount of corruption decreases growth in gross domestic product by almost three-quarters of a percent); Shang-Jin Wei, *How Taxing Is Corruption on International Investors?*, 82 REV. ECON. & STAT. 1, 8 (2000) (“An increase in the corruption level from the Singapore to the Mexico level would have the same negative effect on inward [foreign direct investment] as raising the tax rate by eighteen percentage points to fifty percentage points, depending on the specifications.”).

⁹² E.g., Sanjeev Gupta, Luiz de Mello & Raju Sharan, *Corruption and Military Spending*, 17 EUR. J. POL. ECON. 749, 750-51, 764 (2001).

⁹³ See, e.g., Benjamin A. Olken, *Monitoring Corruption: Evidence from a Field Experiment in Indonesia*, 115 J. POL. ECON. 200, 221-23 (2007) (finding a relationship between bribery and low quality roads in Indonesia); Vito Tanzi & Hamid Davoodi, *Corruption, Public Investment, and Growth* 3 (Int’l Monetary Fund, Working Paper No. 139, 1997) (discussing the association of corruption with deteriorating infrastructures).

⁹⁴ See, e.g., Paolo Mauro, *Corruption and the Composition of Government Expenditure*, 69 J. PUB. ECON. 263, 272-75 (1998) (analyzing correlation between corruption and government expenditures).

⁹⁵ See Susan Rose-Ackerman, *The Political Economy of Corruption*, in CORRUPTION AND THE GLOBAL ECONOMY 31, 45 (Kimberly Ann Elliot ed., 1997); Adam H. Kurland, *The Guarantee Clause as a Basis for Federal Prosecutions of State and Local Officials*, 62 S. CAL. L. REV. 367, 486 (1989).

⁹⁶ Sanjeev Gupta, Hamid Davoodi & Erwin Tiongson, *Corruption and the Provision of Health Care and Education Services* 23-24 (Int’l Monetary Fund, Working Paper No. 116, 2000), available at <http://www.imf.org/external/pubs/ft/wp/2000/wp00116.pdf>. See generally Taryn Vian, *Corruption and the Health Sector*, USAID & MGMT. SYS. INT’L (Nov. 2002), http://pdf.usaid.gov/pdf_docs/pnact877.pdf (discussing the relationship between corruption and poor medical service).

⁹⁷ See, e.g., Maureen Lewis, *Governance and Corruption in Public Health Care Systems* 44-45 (Ctr. for Global Dev., Working Paper No. 78, 2006), available at

quality of the environment.⁹⁸ A relationship has even been found between corruption and increases in traffic fatalities.⁹⁹

Awareness of the harms inflicted by corruption contributed to the emergence of a global anticorruption regime.¹⁰⁰ As Professor Roger Alford describes, “The race to establish international norms against corruption had begun. In a development worthy of wonder, the result has been a flurry of international treaties against corruption.”¹⁰¹ Those treaties for the most part require signatories to criminalize domestic bribery and, to the extent possible, to criminalize transnational bribery.¹⁰² These laws together form what Professor Elizabeth Spahn describes as a dynamic and interactive framework of ubiquitous, overlapping, far reaching rules in which “[e]nforcement competition mixed with enforcement cooperation play the central roles.”¹⁰³

II. TWO JUSTIFICATIONS FOR BRIBERY

Although widely condemned and criminalized, arguments are sometimes made to justify the payment of a bribe. These arguments generally fall into one of two different categories. The first of these, that a bribe must be paid to conduct business, is easily dismissed. The other, that the optimal level of controlling bribery is not zero, is not really a justification of bribery and certainly does not justify any particular bribe.

http://www.cgdev.org/files/5967_file_WP_78.pdf (arguing that corruption is a factor inhibiting good governance, which in turn hinders effective healthcare).

⁹⁸ See Lorenzo Pellegrini & Reyer Gerlagh, *Corruption, Democracy, and Environmental Policy: An Empirical Contribution to the Debate*, 15 J. ENV'T. & DEV. 332, 333 (2006).

⁹⁹ See Nejat Anbarci, Monica Escaleras & Charles Register, *Traffic Fatalities and Public Sector Corruption*, 59 KYKLOS INT'L REV. SOC. SCI. 327, 331, 341 (2006).

¹⁰⁰ See generally Rachel Brewster, *The Domestic and International Enforcement of the OECD Anti-Bribery Convention*, 15 CHI. J. INT'L L. 84, 95 (2014) (“Thus, in addition to any ethical, social, or moral justifications, one of the background justifications for adopting anti-corruption measures is an economic one: decreasing corruption will increase economic growth and national welfare, particularly in developing countries where the problems of corruption are the worst.”).

¹⁰¹ Roger P. Alford, *A Broken Windows Theory of International Corruption*, 73 OHIO ST. L.J. 1253, 1254-55 (2012).

¹⁰² See Nichols, *The Myth*, *supra* note 4, at 635-39 (describing transnational treaties working to criminalize bribery).

¹⁰³ Elizabeth K. Spahn, *Multijurisdictional Bribery Law Enforcement: The OECD Anti-Bribery Convention*, 53 VA. J. INT'L L. 1, 43 (2012).

A. *The “Necessity” to Pay to Do Business*

It is sometimes claimed that a business firm must pay a bribe to be able to do business in a particular jurisdiction. James Adonis, a business reporter in Australia, makes a sweeping claim:

In essence, the bribery debate is not about whether the practice is good or bad. . . . The argument has more to do with whether it’s avoidable. And in many cases it’s not. In some places, a deal isn’t sealed with the shaking of hands. It’s sealed with the handing over of a bulky envelope.¹⁰⁴

Former Italian Prime Minister Silvio Berlusconi, in defending the head of an Italian state-controlled firm accused of bribery, makes a similar claim: “Bribes are a phenomenon that exists and it’s useless to deny the existence of these necessary situations when you are negotiating with third world countries and regimes.”¹⁰⁵ Berlusconi went on to proclaim “If you want to make moralisms like that, you can’t be an entrepreneur on a global scale.”¹⁰⁶ While pleading guilty to violation of bribery laws, Vicente Eduardo Garcia, a regional director with SAP International, said that “he believed paying such bribes was necessary to secure both the initial contract and additional Panamanian government contracts.”¹⁰⁷ Others make similar claims.¹⁰⁸

¹⁰⁴ James Adonis, *Bribery: A necessary evil?*, SYDNEY MORNING HERALD (Oct. 11, 2013), <http://www.smh.com.au/small-business/managing/work-in-progress/bribery-a-necessary-evil-20131010-2vb8s.html#ixzz3riFDm5Jt>.

¹⁰⁵ Guy Dinmore & Ferdinando Giugliano, *Berlusconi Defends Need for Bribery*, FT.COM (February 14, 2013), <http://www.ft.com/cms/s/0/be7b2b5c-76bb-11e2-ac91-00144feabdc0.html#axzz3riNbjyIY>.

¹⁰⁶ Andrew Frye, *Berlusconi Tells Italian Firms to Keep Bribing After Orsi Arrest*, BLOOMBERGBUSINESS (Feb. 14, 2013), <http://www.bloomberg.com/news/articles/2013-02-14/berlusconi-tells-italian-firms-to-keep-bribing-after-orsi-arrest>.

¹⁰⁷ Press Release, Fed. Bureau of Investigation, *Former Executive Pleads Guilty to Conspiring to Bribe Panamanian Officials* (Aug. 12, 2015), available at <https://www.fbi.gov/miami/press-releases/2015/former-executive-pleads-guilty-to-conspiring-to-bribe-panamanian-officials>.

¹⁰⁸ See Frank Anechiarico, *Prosecution as Corruption Control: Paradigms of Public Integrity in Context*, 52 WAYNE L. REV. 1415, 1416 (2006) (claiming that bribes must be paid in New Jersey, Rhode Island, Maryland, Nevada and West Virginia by contractors or those seeking permits); Carl Pacini, *The Foreign Corrupt Practices Act: Taking a Bite Out of Bribery in International Business Transactions*, 17 FORDHAM J. CORP. & FIN. L. 545, 554 (2012) (making the general claim that U.S. corporations pay bribes out of necessity despite the United States’s Foreign Corrupt Practices Act); 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, 279 (1998) (discussing the claim that U.S. corporations needed to pay bribes to compete on equal footing with foreign entities).

The claim that a bribe must be paid in order to conduct business in a particular polity implies that the paying of the bribe is permissible or at least understandable, and further implies that the payer of the bribe is excused from blame. Neither the empirical nor the moral claim survive scrutiny. The empirical basis of such claims is rarely if ever offered, and seems to rely more on some shared wisdom than on actual fact. Even if such a business environment existed, however, the moral logic of this claim is perilously weak.

1. The Empirical Claim

That bribe requests constitute a serious challenge for transnational businesspeople cannot be gainsaid. Survey after survey find that transnational businesspeople identify bribe requests as one of if not the primary challenges that they face in creating business relationships.¹⁰⁹

Nonetheless, the claim that bribes *must* be paid in order to engage in business must be treated with some skepticism. Surveys do suggest

¹⁰⁹ E.g., GRANT THORNTON VIETNAM, PRIVATE EQUITY IN VIETNAM: INVESTMENT SENTIMENT AND OUTLOOK QUARTER 2, 5 (2013) (reporting that private equity investors continue to identify corruption as one of the three greatest obstacles to investment); Erin Sheley, *Perceptual Harm and the Corporate Criminal*, 81 U. CIN. L. REV. 225, 251 (2012) (reporting a 2005 World Bank survey that found “that 71% of businesses considered corruption the biggest barrier to foreign investment” in Russia); Jelena Budak & Edo Rajh, *Corruption as an Obstacle for Doing Business in the Western Balkans: A Business Sector Perspective* 14-15 (Ekonomski Institut Zagreb, Working Paper No. 1104, 2011), http://hrcak.srce.hr/index.php?show=clanak&rid_clanak_jezik=112046 (reporting survey of businesspeople in Balkans showing bribery is serious obstacle to entering into business relationships); Press Release, United Nations Office on Drugs & Crime, EU, UNODC and EFCC Partner with the National Bureau of Statistics in the Conduct of the First Ever Business Crime and Corruption Survey in Nigeria (July 1, 2010), http://www.unodc.org/nigeria/en/press-release_business-crime-and-corruption-survey-in-nigeria.html (“The survey reveals that for more than 70% of Nigerian businesses, crime and corruption constitute the most serious obstacles to conducting business in Nigeria.”); Press Release, World Bank, Kyrgyz Republic: Business Climate Improved, But Corruption Remains Key Problem—New World Bank-EBRD Study (Apr. 2, 2014), <http://www.worldbank.org/en/news/press-release/2014/04/02/kyrgyz-republic-business-climate-improved-but-corruption-remains-key-problem-new-world-bank-ebrd-study> (noting that, even as other business barriers recede, corruption is considered by businesspeople the second-greatest barrier to engaging in business relationships in Kyrgyzstan); Press Release, The Business Environment and Enterprise Performance Survey, The Russian Regions: Results 1 (May 2013), <http://www.ebrd.com/documents/comms-and-bis/business-environment-and-enterprise-performance-survey-the-russian-regions.pdf> (“The 2012 BEEPS results show that most enterprises in Russia identify corruption, access to finance and workforce skills as the main constraints.”).

that bribery is a pernicious problem, but generally do not suggest that it is a problem that is faced by every businessperson in every situation. Jason Yockey, for example, reviews two surveys analyzing “data on the frequency of bribe solicitation.”¹¹⁰ He acknowledges that the data presents difficulties and may understate the frequency of solicitation requests.¹¹¹ Yockey finds that in some countries businesses frequently face bribe requests and that business firms are understandably concerned; it is important, however, to note that neither of the surveys he reviews suggest that all business firms face bribe requests.¹¹² While the seriousness of endemic bribery must not be minimized, it is important to understand that even in endemically corrupt polities some firms find a way to avoid bribe requests or the payment of bribes.¹¹³

There may be, for the sake of argument, polities in which it truly is impossible to conduct business without paying bribes. The mere fact that paying bribes might be an absolute requirement to engage in business would not itself end the inquiry. The ends themselves do not justify the means. It is doubtful, for example, that society would excuse a business that engaged in slavery, even if slavery were required to conduct business in a polity.¹¹⁴ Ultimately, the moral claim must be examined.

¹¹⁰ See Joseph W. Yockey, *Solicitation, Extortion, and the FCPA*, 87 NOTRE DAME L. REV. 781, 797 (2011).

¹¹¹ See *id.*

¹¹² See *id.*

¹¹³ In 2013 the author attended a conference on corruption at the University of Yaroslavl, in Yaroslavl, Russia. While conversing with a group of scholars from Russia and from Western Europe, a graduate student joined the group saying that he had just heard a disturbing paper about Russia. The paper presented the findings from a long term study, including the finding that over a two-year period around twenty-five percent of the firms studied had at least once paid a bribe. Each of the members of the group of scholars was shocked and skeptical. The Russian scholars were shocked that the number was so high and expressed concerns for what such a high number meant for their country. The Western European scholars were shocked because they simply assumed that any such survey would find that every Russian business paid bribes as a matter of course. Even though the members of this informal group had long experience studying issues of corruption, the incident revealed the biases that can distort clear thinking about the actual incidence of corruption, as well as the fact that even small amounts of corruption are a cause for great concern.

¹¹⁴ See Kyron Huigens, *Solving the Apprendi Puzzle*, 90 GEO. L.J. 387, 438 n.279 (2002) (describing the universal condemnation of slavery even though slavery still exists); see also NOONAN, *supra* note 19, at 706 (predicting that just as slavery is no longer accepted nor practiced, so too will bribery “become obsolete”).

2. The Moral Claim

The claim that one must pay a bribe in order to engage in business hides a moral claim. That claim is that a person has a right to engage in business, and therefore clearing the way to exercise that right through bribery is permissible. Such a claim requires scrutiny.

Substantial evidence supports the observation that humans traded long before written history.¹¹⁵ The earliest written records also refer to trade and to business.¹¹⁶ Richard Smith concludes, “Trade, like art and religion, appears to be characteristic of our species.”¹¹⁷ Nonetheless, there is little argument for an inalienable right to engage in business.

The Supreme Court of the United States has acknowledged “the right of a citizen of the United States to engage in business.”¹¹⁸ This “right,” however, was recognized in the context of limits imposed by one State on citizens of another State, which the Court found to be in violation of the Fourteenth Amendment.¹¹⁹ Arguably, the right created by the Fourteenth Amendment extends to businesses in the form of corporations.¹²⁰ The “rights” at issue in these cases are rights conferred within the United States with respect to the balance of powers between the Federal and State governments, and do not necessarily imply a universal right to engage in business.¹²¹ With

¹¹⁵ See Richard D. Horan, Erwin Bulte & Jason F. Shogren, *How Trade Saved Humanity from Biological Exclusion: An Economic Theory of Neanderthal Extinction*, 58 J. ECON. BEHAV. & ORG. 1, 5-6 (2005). Horan, Bulte and Shogren, in fact, argue that early homo sapiens’ trade activities gave them such an advantage over competing homo neanderthalis that it contributed to the demise of Neanderthals. *Id.* at 21.

¹¹⁶ See Denise Schmandt-Besserat, *Decipherment of the Earliest Tablets*, 211 SCI. 283, 283-84 (1981) (interpreting early writings as types of business records).

¹¹⁷ RICHARD L. SMITH, *PREMODERN TRADE IN WORLD HISTORY*, at viii (2009).

¹¹⁸ *Colgate v. Harvey*, 296 U.S. 404, 430 (1935), *overruled on other grounds by Madden v. Kentucky*, 309 U.S. 83, 93 (1940).

¹¹⁹ *Colgate*, 296 U.S. at 430-31 (“A state law prohibiting the exercise of any of these rights in another state would, therefore, be invalid under the Fourteenth Amendment.”).

¹²⁰ See Stephen A. Siegel, *Understanding the Nineteenth Century Contract Clause: The Role of the Property-Privilege Distinction and “Takings” Clause Jurisprudence*, 60 S. CAL. L. REV. 1, 69 n.350 (1986) (“Consider, for example, Daniel Webster’s argument, as counsel in *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 551-55 (1839), that since the federal privileges and immunities clause guaranteed citizens of any state the right to engage in business in all the states, and since corporations were mere aggregates of citizens, a corporation chartered by any state had a federal constitutional right to engage in business in any state.”).

¹²¹ Similarly, the Court invalidated a law enacted in Massachusetts that prohibited state agencies from buying goods or services from any persons doing business with Burma, not on the grounds of a universal right to conduct business, but instead on the grounds of the Supremacy Clause of the United States Constitution because it

respect to persons outside of the United States who wish to engage in business within the United States, the United States frequently limits or prohibits such business relationships.¹²² The power of the Federal government to impose these restrictions on business entry into the United States probably lies in the allocations of power in the United States Constitution.¹²³ The United States is not alone; many countries impose some restriction on foreign investment into their territory.¹²⁴ International law supports the abilities of countries to do so.¹²⁵

Even if such a right existed, it could easily be subordinate to another right that would have priority.¹²⁶ Ronald Dworkin illustrates this using the right of free speech:

Someone who claims that citizens have a right against the Government need not go so far as to say that the State is *never* justified in overriding that right. He might say, for example, that although citizens have a right to free speech, the Government may override that right when necessary to protect the rights of others, or to prevent a catastrophe . . .¹²⁷

Dworkin goes on to suggest that some rights are more important than others and that the government can limit the less important right if it conflicts with a right of more importance. “The individual rights that our society acknowledges often conflict in this way, and when they do

conflicted with Federal strategies to deal with Burma. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 388 (2000).

¹²² See, e.g., MICHAEL V. SEITZINGER, CONG. RESEARCH SERV., RL33103, FOREIGN INVESTMENT IN THE UNITED STATES: MAJOR FEDERAL STATUTORY RESTRICTIONS 8-13 (2013) (describing limits on or prohibitions of foreign investment in the shipping industry, the aircraft industry, mining, energy, mass media, banking, and government contracting in the United States).

¹²³ See *id.* at 3-4 (finding power for such laws in “the federal powers over immigration and naturalization, the federal power to regulate interstate and foreign commerce, and the power to provide for the national defense” (citations omitted)).

¹²⁴ See Anupam Chander, *Diaspora Bonds*, 76 N.Y.U. L. REV. 1005, 1094 (2001) (“Most, and perhaps all, countries impose special restrictions on certain categories of foreign investment.”).

¹²⁵ See Julien Chaisse, *The Treaty Shopping Practice: Corporate Structuring and Restructuring to Gain Access to Investment Treaties and Arbitration*, 11 HASTINGS BUS. L.J. 225, 264 (2015) (“Under international law, the usual rule that derives from the principle of territorial sovereignty allows a state to prohibit the admission of foreigners and to deny the right to settle within its territory. . . . In other words, . . . the host country has the exclusive authority to decide whether the investment may be allowed on its territory.”).

¹²⁶ See generally RONALD DWORIN, IS DEMOCRACY POSSIBLE HERE?: PRINCIPLES FOR A NEW POLITICAL DEBATE (2006) (discussing rights).

¹²⁷ RONALD DWORIN, TAKING RIGHTS SERIOUSLY 191 (1977).

it is the job of government to discriminate. . . So we must acknowledge that the Government has a reason for limiting rights if it plausibly believes that a competing right is more important.”¹²⁸

There is ample reason to believe that the inchoate right of a person to conduct business through corruption should be subordinate to the articulated right of peoples to have governments free of corruption. A growing body of literature suggests that corruption interferes with the fulfillment of numerous human rights, and that corruption itself violates rights. This literature springs from scholars and policymakers around the world and certainly is not limited to a Western European or North American perspective.

Julio Bacio-Terracino, an Argentinian legal scholar who works for the Organisation for Economic Co-operation and Development, has comprehensively catalogued the ways in which corruption interferes with the fulfillment of human rights.¹²⁹ He finds that corruption interferes with rights to education, health, adequate housing, water, food, and work.¹³⁰ He also finds that corruption interferes with special rights accorded to children.¹³¹ Bacio-Terracino is hardly alone. Navil Pillay, a South African judge who served as the United Nations High Commissioner for Human Rights, unequivocally states, “[C]orruption is an enormous obstacle to the realization of all human rights — civil, political, economic, social and cultural, as well as the right to development.”¹³² Nigerian legal scholar Kolawole Olaniyan makes the same argument for Africa, adding the rights to be free of slavery and the right to be free of torture and inhumane treatment to the list of rights interfered with by corruption.¹³³

Corruption, and particularly bribery of government officials, itself constitutes a violation of human rights. Bribery violates the rights of all people to fair and equitable governance. Pillay again summarizes

¹²⁸ *Id.* at 193-94.

¹²⁹ See, e.g., Julio Bacio-Terracino, *Corruption as a Violation of Human Rights*, INT’L COUNCIL ON HUM. RTS. POL’Y (forthcoming), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1107918.

¹³⁰ *Id.* (manuscript at 16-30).

¹³¹ *Id.* (manuscript at 14-15).

¹³² Navi Pillay, High Comm’r for Human Rights, United Nations Office of the High Comm’r, Opening Statement at the 22nd Session of the Human Rights Council, Thematic Panel on “The Negative Impact of Corruption on Human Rights,” (Mar. 13, 2013), in THE HUMAN RIGHTS CASE AGAINST CORRUPTION at 8, available at <http://www.ohchr.org/Documents/Issues/Development/GoodGovernance/Corruption/HRCASEAGAINSTCORRUPTION.pdf>.

¹³³ KOLAWOLE OLANIYAN, CORRUPTION AND HUMAN RIGHTS LAW IN AFRICA 263-65 (2014).

the extent of the violation: “Corruption . . . exacerbates inequality, weakens governance and institutions, erodes public trust, fuels impunity and undermines the rule of law — in particular the right to a fair trial, the right to due process, and the victim’s right to effective redress.”¹³⁴ Kolawole Olaniyan similarly emphasizes corruption’s violation of the rights of people to participate in the governance of their own countries.¹³⁵ Indonesian legal scholar Nadirsyah Hosen supports this analysis, and argues that the collapse of the venal Soeharto regime in Indonesia underscored the violative nature of corruption.¹³⁶

A justification of bribery based on a claim that one has a right to engage in business clearly fails. Bribery in many cases is not necessary but is instead simply expedient. Even if bribery is necessary, an inchoate right to engage in business should be subordinate to a plethora of other rights that would be violated by the payment of that bribe. Bribery cannot be justified simply because someone would like to engage in business.

B. *Optimal Levels of Corruption*

Both Susan Rose-Ackerman and Robert Klitgaard suggest that “the optimal level of corruption is not zero.”¹³⁷ This, they argue, is because the marginal costs of detecting and removing corruption increase as incidents of corruption become less frequent, and the costs of removing the last remnants of corruption might surpass the social benefits to be gained by doing so.¹³⁸ Social costs include not just time and money but also the diversion of the attention of the government from other socially-desirable objectives.¹³⁹

Two observations must be made regarding this argument. The first is that although presented as a quantitative statement, the difficulty — if not impossibility — of measurement renders the argument

¹³⁴ Pillay, *supra* note 132, at 8.

¹³⁵ See OLANIYAN, *supra* note 133, at 270.

¹³⁶ NADIRSYAH HOSEN, HUMAN RIGHTS, POLITICS AND CORRUPTION IN INDONESIA: A CRITICAL REFLECTION ON THE POST SOEHARTO ERA 3 (2010).

¹³⁷ KLITGAARD, *supra* note 54, at 24; see ROSE-ACKERMAN, CORRUPTION AND GOVERNMENT, *supra* note 69, at 52.

¹³⁸ KLITGAARD, *supra* note 54, at 26; see also ROSE-ACKERMAN, CORRUPTION AND GOVERNMENT, *supra* note 69, at 52.

¹³⁹ See KLITGAARD, *supra* note 54, at 25-27; see also MELANIE MANION, CORRUPTION BY DESIGN: BUILDING CLEAN GOVERNMENT IN MAINLAND CHINA AND HONG KONG 4-5 (2004) (“[T]he ‘pursuit of absolute integrity’ is quite dysfunctional, distorting the purpose of government and its agencies.” (citation omitted)).

theoretical rather than definite.¹⁴⁰ Among other things, measuring the nonmonetary costs imposed by corruption, as well as indirect benefits accrued by reducing corruption, is difficult.¹⁴¹ With measurement so difficult determining the “optimal” level of corruption is equally difficult, and therefore no particular bribe can be identified as somehow allowed under this theory.

Second, and more importantly, as Klitgaard himself makes clear, the optimal level of corruption argument is not really an argument *for* corruption.¹⁴² The elimination of corruption remains a worthy goal.¹⁴³ The cost-benefit analysis serves merely to remind those who develop anti-corruption programs of the constraints imposed by reality.¹⁴⁴

At most, the optimal level of corruption argument addresses the concerns raised by Rose-Ackerman and others concerned with the harms imposed by corruption. The optimal level of corruption argument acknowledges those harms but suggests as a matter of theory that the cost of preventing all corruption would be even more burdensome for society. The optimal level of corruption argument does not in any way, however, address the observations of Noonan or Klitgaard. It would be difficult to argue that just because it is expensive to prevent the payment of a bribe, that a bribe somehow

¹⁴⁰ See generally Matthew C. Turk, *A Political Economy Approach to Reforming the Foreign Corrupt Practices Act*, 33 NW. J. INT'L L. & BUS. 325, 354 n.150 (2013) (“It is likely impossible to exactly specify the optimal level of FCPA enforcement on a global scale — taking into account supply- and demand-side enforcement by the United States, other OECD states, and Host countries — in any meaningful or rigorous way.”).

¹⁴¹ See generally Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 1221 (2001) (“[Q]uantifying the social cost of corruption is hardly a straightforward task.”); Steven L. Schooner, *Fear of Oversight: The Fundamental Failure of Businesslike Government*, 50 AM. U. L. REV. 627, 709-12 (2001) (criticizing optimal level of corruption arguments for failing to account for secondary benefits of eradicating corruption).

¹⁴² KLITGAARD, *supra* note 54, at 24 (“I did not mean that an ideal world would contain corruption, nor that if we could remake a society completely we would want any corruption.”).

¹⁴³ See, e.g., Vincent R. Johnson, *Corruption in Education: A Global Legal Challenge*, 48 SANTA CLARA L. REV. 1, 29 (2008) (“As a matter of principle, the *total* elimination of corruption is an appropriate goal — perhaps the only appropriate goal.” (emphasis added)).

¹⁴⁴ See *id.* (advocating a practical approach and suggesting that “perfect enforcement of ethical principles should not be the objective”). Bryane Michael proposes a practical use of cost-benefit analyses, by linking anti-corruption agencies’ budgets to successful enforcement. Bryane Michael, *Issues in Anti-Corruption Law: Drafting Implementing Regulations for Anti-Corruption Conventions in Central Europe and the Former Soviet Union*, 36 J. LEGIS. 272, 286-87 (2010).

would not be morally condemned, or that that bribe would not interfere with the relationship between the public and their government. The optimal level of corruption argument, in other words, does not support the notion of a good bribe.

III. THE GOOD BRIBE

Authoritarian regimes offer a final place in which to find a justifiable bribe. Corruption does occur in democratic countries. The United States, generally considered a democratic country,¹⁴⁵ suffers from corruption.¹⁴⁶ Indeed, in states such as Illinois corruption appears commonplace.¹⁴⁷ It would trivialize the hardships experienced in nondemocratic countries, however, to not acknowledge that much of the corruption found in the world occurs in authoritarian regimes.¹⁴⁸ Authoritarian regimes tend to be repressive.¹⁴⁹ Arguably, bribes might be justified as a means of escaping such repression.

A. *The Argument in General*

In authoritarian regimes personal space and freedom is by definition limited. Activities that persons might think of as normal are often prohibited.¹⁵⁰ Such activities, therefore, take place in a private realm

¹⁴⁵ See, e.g., Arch Puddington, *Discarding Democracy: A Return to the Iron Fist*, FREEDOMHOUSE.ORG 14 (2015), available at https://freedomhouse.org/sites/default/files/01152015_FTW_2015_final.pdf (depicting the United States on a map as “Free”).

¹⁴⁶ See, e.g., Philip M. Nichols, *The Perverse Effect of Campaign Contribution Limits: Reducing the Allowable Amounts Increases the Likelihood of Corruption in the Federal Legislature*, 48 AM. BUS. L.J. 77, 83-85 (2011) (discussing perceived levels of corruption in the United States, especially in Congress).

¹⁴⁷ See, e.g., Adam M. Samaha, *Regulation for the Sake of Appearance*, 125 HARV. L. REV. 1563, 1615 (2012) (noting “[t]he familiarity of former Illinois governors with the criminal justice system”).

¹⁴⁸ See, e.g., Eric Chang & Miriam A. Golden, *Sources of Corruption in Authoritarian Regimes*, 91 SOC. SCI. Q. 1, 1 (2010) (“[N]ondemocratic regimes . . . are on average more corrupt than regimes where political leaders are freely elected . . .”).

¹⁴⁹ See Mark Tushnet, *Authoritarian Constitutionalism*, 100 CORNELL L. REV. 391, 446 n.288 (2015) (“In my view, the literature on stable authoritarian regimes locates a great deal of the stability in authoritarian repression, often violent, and fraudulent elections.”).

¹⁵⁰ The manner in which authoritarian regimes repress their people and the specific modes of life that are repressed vary, of course, from regime to regime. For very thoughtful accounts of life in repressive regimes, see, for example, BLAINE HARDEN, *ESCAPE FROM CAMP 14: ONE MAN’S REMARKABLE ODYSSEY FROM NORTH KOREA TO FREEDOM IN THE WEST* (2012); HARRIET ANN JACOBS, *INCIDENTS IN THE LIFE OF A SLAVE GIRL: WRITTEN BY HERSELF* (Jean Fagan Yellin ed., Harvard Univ. Press rev. ed. 2000) (1861); ALEKSANDR SOLZHENITSYN, *THE GULAG ARCHIPELAGO* (Thomas P. Whitney

outside of the scrutiny of the government.¹⁵¹ Legal sociologist Kim Scheppele has described how this arrangement led to corruption in the former Soviet countries through the creation of unofficial economies.¹⁵² The desire for a private sphere, however, also contributes to bribery. In particular, people who live in authoritarian regimes can buy private space through the payment of bribes.¹⁵³ Bribes, therefore, are paid so that people may engage in activities such as practicing a religion,¹⁵⁴ secretly learning to read,¹⁵⁵ bartering and exchanging goods,¹⁵⁶ or visiting family.¹⁵⁷

trans., 1973). For further discussion, see generally Daniel Byman & Jennifer Lind, *Pyongyang's Survival Strategy: Tools of Authoritarian Control in North Korea*, 35 INT'L SECURITY 44, 47-58 (2010); Andrei Plesu, *Intellectual Life Under Dictatorship*, 49 REPRESENTATIONS 61 (1995).

¹⁵¹ See, e.g., George L. Priest, *The Ambiguous Moral Foundations of the Underground Economy*, 103 YALE L.J. 2259, 2262-68 (1994) (discussing the creation of numerous unofficial markets in the Soviet Union, which "prohibited a wide range of private economic activities"); Jeanne L. Schroeder, Commentary, *The End of the Market: A Psychoanalysis of Law and Economics*, 112 HARV. L. REV. 483, 535 n.181 (1998) (referring to the black market in the Soviet Union); Hansjörg Strohmeyer, *Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor*, 95 AM. J. INT'L L. 46, 56 n.44 (2001) (describing the creation of unofficial institutions among ethnic Albanians in Kosovo).

¹⁵² Kim Lane Scheppele, *The Inevitable Corruption of Transition*, 14 CONN. J. INT'L L. 509, 514-18 (1999).

¹⁵³ See, e.g., James Heinzen, *The Art of the Bribe: Corruption and Everyday Practice in the Late Stalinist USSR*, 66 SLAVIC REV. 389, 389 (2007) ("Bribery was an everyday phenomenon in the late Stalinist USSR. The bribe represented a particular variety of informal relationship between the Soviet population and representatives of the state."); David Remnick, *Soviet Union's "Shadow Economy" – Bribery, Barter, Black-Market Deals Are The Facts Of Life*, SEATTLE TIMES (Sept. 22, 1990), <http://community.seattletimes.nwsourc.com/archive/?date=19900922&slug=1094485> ("[N]early everyone now must participate in the immense 'shadow economy' of speculation and petty bribery, barter deals and black-marketeers.").

¹⁵⁴ See, e.g., *Burma*, U.S. DEP'T STATE 8 (last visited Oct. 29, 2015), <http://www.state.gov/documents/organization/171649.pdf> (describing bribes paid to practice religion in Burma).

¹⁵⁵ See, e.g., HEATHER ANDREA WILLIAMS, *SELF-TAUGHT: AFRICAN AMERICAN EDUCATION IN SLAVERY AND FREEDOM* 20 (Waldo E. Martin, Jr. & Patricia Sullivan eds., 2005) (describing bribes paid by slaves in the United States to procure education).

¹⁵⁶ See, e.g., Duncan DeVille, *Combating Russian Organized Crime: Russia's Fledgling Jury System on Trial*, 32 GEO. WASH. J. INT'L L. & ECON. 73, 85 (1999) (describing bribes paid to allow black markets in the Soviet Union).

¹⁵⁷ See Soo-Am Kim et al., *Relations Between Corruption and Human Rights in North Korea*, KOR. INST. NAT'L UNIFICATION 30, 44 (July 2013), available at <http://www.kinu.or.kr/upload/neoboard/DATA05/ss13-02.pdf> (describing bribes paid for mobility in North Korea).

Activities such as learning to read and visiting family are undeniably desirable; it may be tempting to proclaim bribes paid in authoritarian regimes as good. Such bribes, however, merit some scrutiny. Such bribes might prolong the authoritarian regime and delay reform. It is also difficult to distinguish between these inoffensive bribes and bribes that inflict societal damage.

Despite the caricature image held by many who live in democratic regimes, leaders in authoritarian regimes usually depend on the support of others in order to maintain power.¹⁵⁸ Material reward is a common and successful incentive offered for that support.¹⁵⁹ Institutionalized corruption, in turn, is frequently the mechanism used to provide material reward to politically relevant supporters.¹⁶⁰ In such a system, bribes paid in order to secure personal freedoms may, ironically, support and prolong the regime that denies personal freedom.

A blanket assertion that bribes may be paid in authoritarian regimes also raises concerns about distinguishing between repressive dictatorships and imperfect democracies. A Sudanese student studying in the United States argues that

[M]any countries, including the United States and Great Britain, have “winner takes all” elections that limit meaningful representation of minorities. When such deprivation is permanent and systematic, as is the case in pluralistic or heterogeneous societies, the line between democracy and tyranny is often blurred.¹⁶¹

Even though the United States, for example, is objectively regarded as free it is not difficult to find U.S. citizens who consider it to be oppressive. Rose-Ackerman discusses these critics, who “argue that

¹⁵⁸ See generally Barbara Geddes, *Authoritarian Breakdown*, UCSD.EDU 5-7 (Jan. 2004), available at http://pages.ucsd.edu/~mnaoi/page4/POLI227/files/page1_11.pdf (discussing features of different authoritarian regimes).

¹⁵⁹ See Joseph Wright, *Do Authoritarian Institutions Constrain? How Legislatures Affect Economic Growth and Investment*, 52 AM. J. POL. SCI. 322, 323 (2008) (“The basic method of rule in personalist regimes is simply the exchange of material rewards to a select group of regime insiders in return for mobilizing political support [e.g., a legislature].” (citations omitted)).

¹⁶⁰ See BRUCE BUENO DE MESQUITA ET AL., *THE LOGIC OF POLITICAL SURVIVAL* 204 (2003) (discussing perpetuation of the “loyalty norm” in corrupt regimes through “access to private goods”).

¹⁶¹ Ahmed T. el-Gaili, Note, *Federalism and the Tyranny of Religious Majorities: Challenges to Islamic Federalism in Sudan*, 45 HARV. INT’L L.J. 503, 509 (2004). Although it has experienced some transition, “Sudan remains governed by authoritarian elites.” Mark Fathi Massoud, *International Arbitration and Judicial Politics in Authoritarian States*, 39 L. & SOC. INQUIRY 1, 26 (2014).

market actors who pay bribes to avoid complying with the rules, to lower tax bills, or to get favors, limit the harm that the state can do and consequently enhance the benevolent operation of the free market as a locus of individual freedom.”¹⁶² These claims may be easy to refute in a fairly democratic country such as the United States; distinction becomes less clear when the arguments are applied to a historically oppressed people within a democracy, or to a flawed or semi-democracy.

The notion that bribes paid to secure relief from repression is attractive. The argument in general, however, might not overcome the criticisms represented in the works of Klitgaard and Rose-Ackerman. Although virtually impossible to measure, the overall harm generated by providing support to an authoritarian regime might outweigh the specific relief from harm secured by paying the bribe. The notion also comes dangerously close to undermining the relationship between the public and its government, in that individuals who do not agree with the choices of the majority might label such choices as repressive and use that “repression” as a justification for paying bribes.

B. *The Good Bribe*

The life of Oskar Schindler has been documented, novelized, and portrayed in an award winning movie.¹⁶³ In brief, Schindler was a German businessman and member of the Nazi party who moved to Poland shortly after the beginning of the Second World War. He acquired a factory and used his connections with the Nazi party to secure government contracts. His factory employed several Jewish workers, and eventually used the services of over a thousand Jewish workers. As the treatment of Jewish people became more savage, and particularly as the war approached its conclusion, Oskar Schindler protected these workers from abuse, torture, deportation, and death.¹⁶⁴ He did so by using personal relations, through deception, and in

¹⁶² Susan Rose-Ackerman, *Corruption: Greed, Culture, and the State*, 120 YALE L.J. ONLINE 125, 126 (2010), available at <http://www.yalelawjournal.org/forum/corruption-greed-culture-and-the-state>.

¹⁶³ See, e.g., DAVID M. CROWE, OSKAR SCHINDLER: THE UNTOLD ACCOUNT OF HIS LIFE, WARTIME ACTIVITIES, AND THE TRUE STORY BEHIND THE LIST (2004); THOMAS KENEALLY, SCHINDLER'S ARK (1982); SCHINDLER'S LIST (Universal Studios 1993).

¹⁶⁴ See generally CROWE, *supra* note 163 (providing a biographical account of Schindler's life with a focus on what he did during WWII to help the Jewish people); MIETEK PEMPER, THE ROAD TO RESCUE: THE UNTOLD STORY OF SCHINDLER'S LIST 126-31 (David Dollenmayer trans., 2008) (describing Schindler's actions to help rescue Jewish people from death at the hands of the Nazis).

particular by paying bribes.¹⁶⁵ More than a thousand people survived an extraordinary horror due in large part to Oskar Schindler's courage and guile, but also because he paid bribes. But were these good bribes?

The bribes paid by Oskar Schindler would seem to fall easily within the three tropes of reasons for which bribery is criminalized. As described earlier in this paper, Judaism — the religion of the people whom he saved — condemns bribery.¹⁶⁶ The bribes undermined the system of governance in the Third Reich; Heinrich Himmler, the *Reichsführer* of the SS, was so concerned about corruption within the administration of the concentration camps that he assigned a judge as a special auditor to review the activities in those camps — including the camp from which Schindler rescued people.¹⁶⁷ Schindler's bribery clearly distorted production within the Third Reich; among other things he participated extensively in the black market and his munitions factory produced very little ammunition.¹⁶⁸ Schindler's bribes seem to be paradigmatically worthy of condemnation.

And yet they are not. Although Judaism condemns bribery, for the act of paying these bribes Oskar Schindler has been proclaimed by Yad Vashem, the Jewish People's living memorial to the Holocaust, as "Righteous Among the Nations."¹⁶⁹ Nor are Schindler's bribes the only bribes excused by Judaism: rabbis seem not to have condemned bribes paid to Ottoman officials by Jewish people who had been dispossessed by the Ottomans, so that those Jewish people could return to their homes.¹⁷⁰

Schindler's acts violated the law. Lon Fuller, however, has argued at great length that the laws of the Nazis were law in name only and failed to rise to the standards that would require others to think of it

¹⁶⁵ Schindler reported that he paid \$234,375 in bribes. CROWE, *supra* note 163, at 279. That amount would be worth \$3,162,877 today. See also Daniel T. Ostas, *Civil Disobedience in a Business Context: Examining the Social Obligation to Obey Inane Laws*, 47 AM. BUS. L.J. 291, 298 (2010) (mentioning Schindler's defrauding of Nazi officials); Eric A. Posner & Adrian Vermeule, *Transitional Justice as Ordinary Justice*, 117 HARV. L. REV. 761, 819 n.207 (2004) (mentioning Schindler's bribes).

¹⁶⁶ See *supra* notes 23–26 and accompanying text.

¹⁶⁷ See Herlinde Pauer-Studer & J. David Velleman, *Ethics of a Nazi Judge*, AEON (June 2, 2015), <http://aeon.co/magazine/philosophy/can-a-nazi-judge-have-a-conscience/>.

¹⁶⁸ CROWE, *supra* note 163, at 276, 438–39.

¹⁶⁹ *Schindler's List: Oskar and Emilie Schindler*, YAD VASHEM, <http://www.yadvashem.org/yv/en/righteous/stories/schindler.asp> (last visited Oct. 28, 2015). The "Righteous Among the Nations" are also referred to as Righteous Gentiles.

¹⁷⁰ See ARYEH SHMUELEVITZ, *THE JEWS OF THE OTTOMAN EMPIRE IN THE LATE FIFTEENTH AND THE SIXTEENTH CENTURIES* 50–51 (1984) (noting that these bribes were recorded by rabbis in a manner that allowed them not to be called bribes).

as law.¹⁷¹ It would have been ludicrous to have demanded that Schindler be put on trial for bribery.¹⁷² Similarly, the laws of the United States regarding escaped slaves were patently unjust, and violation of those laws constituted civil disobedience.¹⁷³ At least one bribe was paid by the Underground Railroad, which rescued people from the horrors of slavery.¹⁷⁴ Yet the conductors of the Underground Railroad are regarded as heroes.¹⁷⁵ The legal system of the Third Reich is not, of course, the only legal system that presents these issues. The legal system of North Korea is also used primarily as a tool of the authoritarian regime.¹⁷⁶ Interestingly, bribery seems to be widespread in North Korea; not just to acquire the freedom to interact in an oppressive regime,¹⁷⁷ but also to escape from that oppressive regime.¹⁷⁸

Schindler's bribes distorted the Nazi economy and its productive capabilities. Nonetheless, Schindler's sabotage is lauded as heroic.¹⁷⁹ Schindler was not, of course, alone in his sabotage; resistance groups throughout the parts of Europe administered by the Nazis attempted

¹⁷¹ See Lon L. Fuller, *Positivism and Fidelity to Law – A Reply to Professor Hart*, 71 HARV. L. REV. 630, 653-57, 661 (1958).

¹⁷² See R. George Wright, *Is Natural Law Theory of Any Use in Constitutional Interpretation?*, 4 S. CAL. INTERDISC. L.J. 463, 486 (1995) (noting the obvious moral problem with interfering with Schindler's rescue operations).

¹⁷³ See KERRY WALTERS, *THE UNDERGROUND RAILROAD: A REFERENCE GUIDE* 122-23 (2012) (describing "civil disobedience" to "unjust slave laws"); Sanford Levinson & J.M. Balkin, *The "Bad Man," the Good, and the Self-Reliant*, 78 B.U. L. REV. 885, 895 n.29 (1998) (quoting and referring to Ralph Waldo Emerson's disgust with slave laws).

¹⁷⁴ See WILLIAM J. SWITALA, *UNDERGROUND RAILROAD IN PENNSYLVANIA* 2 (1st ed. 2001) (describing a bribe paid in the transportation of Henry Brown from slavery to freedom).

¹⁷⁵ See Joseph G. Sansone, *Preface to A. Leon Higginbotham, Jr., My Metaphorical Journey on the Underground Railroad*, 67 U. CIN. L. REV. 761, 761 (1999) (referring to "the heroism of the Underground Railroad's conductors").

¹⁷⁶ See, e.g., Darren C. Zook, *Reforming North Korea: Law, Politics, and the Market Economy*, 48 STAN. J. INT'L L. 131, 148 (2012) (stating that the "sole function [of courts in North Korea] seems to be to facilitate the exercise of power in the interest of the state").

¹⁷⁷ See generally Byung-Yeon Kim, *Markets, Bribery, and Regime Stability in North Korea* 19 (EAI Asia Sec. Initiative, Working Paper No. 4, 2010), available at http://121.78.112.190/data/bbs/eng_report/2010040811122565.pdf (discussing widespread bribery in North Korea).

¹⁷⁸ See MIKE KIM, *ESCAPING NORTH KOREA: DEFIANCE AND HOPE IN THE WORLD'S MOST REPRESSIVE COUNTRY*, at xi (2008) (noting that "[b]order guards are freely taking bribes to let people cross the China-North Korea border").

¹⁷⁹ See Natalie Pompilio, *Oskar Schindler: Unlikely Hero*, LEGACY.COM (Jan. 27, 2015), <http://www.legacy.com/news/legends-and-legacies/oskar-schindler-unlikely-hero/2265/> (describing Schindler's actions to help Jews during the WWII Holocaust).

to disrupt the Nazis.¹⁸⁰ These groups were not condemned by other citizens; instead, pride in these groups became an integral part of the reconstruction of the European psyche following the end of the war.¹⁸¹

Schindler's bribes fit within the three tropes of reason for criminalizing bribery in only the most superficial way. Schindler's bribes also elude the general critiques of the authoritarian regime justification for bribery. Corruption was rampant in the Third Reich.¹⁸² The means through which Hitler acquired and maintained power are the subject of debate, but the charisma that he exercised over the German people seems to have played an unusually important role.¹⁸³ This is markedly different than, for example, Leonid Kuchma's reign in Ukraine, during which "corruption and illegality among the elite were accepted, condoned, and even encouraged by the top leadership, resulting in a general atmosphere of impunity."¹⁸⁴ It would be difficult to argue that the bribes paid by Oskar Schindler to local Nazi officials prolonged Adolf Hitler's regime.

The other cautionary note regarding the justification of bribes paid under authoritarian regimes is that it is sometimes difficult to distinguish an authoritarian regime from a flawed democracy. That is not the case with respect to the Third Reich. The Third Reich has become the paradigmatic dictatorial regime, in ways to which flawed democracies could never aspire. Michael Berenbaum describes the Holocaust as a "negative absolute."¹⁸⁵ He explains: "In a world of moral relativism, the Holocaust has taken its place as an absolute. We may say we don't know what is good or what is bad. But we do know that the Holocaust was evil, absolute evil."¹⁸⁶ The dissatisfied members of a democracy identified by Rose-Ackerman complained of

¹⁸⁰ See, e.g., Gordon Wright, *Reflections on the French Resistance (1940–1944)*, 77 POL. SCI. Q. 336, 336 (1962) (noting resistance groups).

¹⁸¹ *Id.* at 337.

¹⁸² See Richard Bessel, *Introduction to LIFE IN THE THIRD REICH*, at xvi (Richard Bessel ed., 1987) ("The day-to-day reality of the Third Reich involved a complex mixture of fear and bribery . . .").

¹⁸³ See Ian Kershaw, *Hitler and the Uniqueness of Nazism*, 39 J. CONTEMP. HIST. 239, 245-46 (2004) (arguing that Hitler was the "indispensab[le]" component of the Nazi regime and describing the bond between Hitler and the German people as "quasi-religious").

¹⁸⁴ Keith A. Darden, *Blackmail as a Tool of State Domination: Ukraine Under Kuchma*, 10 E. EUR. CONST. REV. 67, 68 (2001).

¹⁸⁵ Michael Berenbaum, *Who Owns the Holocaust?*, 25 MOMENT 60 (December 2000), available at <http://search.proquest.com/docview/228023966/fulltext/A80A0FDBA2DE4A8FPQ/15?accountid=14707>.

¹⁸⁶ *Id.*

government policies such as safety regulations, taxes, and equality laws. These seem trivial when compared to the horrors from which bribery saved the Schindlerjuden. Schindler's bribery saved people from slavery, torture, and death, not from paperwork. The two sets of complaints are easily distinguished, as are the governments that promote them. Acknowledging the justification of Schindler's bribes does not open a door to subversion of a democratic government.

Having determined that Schindler's bribes were justified, it does not seem that they themselves represent any trope of thinking or any easily identifiable category of bribes. Rather, Schindler's bribes seem to rise above the traditional reasoning for criminalizing bribes. Moreover, the context in which these bribes were paid is so clear as to avoid the sorts of concerns that attach to arguments that bribes may sometimes be paid in authoritarian regimes. Schindler's bribes do not present a new checklist, a formula for a good bribe. Rather, they serve as a stark lesson that in extraordinary circumstances a bribe can be justified.

Although extraordinary, similar circumstances exist today. In North Korea the Human Rights Council of the United Nations found "systematic, widespread and gross human rights violations . . . [that] in many instances . . . constitute crimes against humanity."¹⁸⁷ The council ominously noted that "[t]he gravity, scale and nature of these violations reveal a State that does not have any parallel in the contemporary world."¹⁸⁸ In Eritrea the council found "systematic, widespread and gross human rights violations" and that "[t]he enjoyment of rights and freedoms are severely curtailed in an overall context of a total lack of rule of law."¹⁸⁹ In Syria, the council found "gross violations of human rights and the war crimes of murder, torture, rape, sexual violence and targeting civilians."¹⁹⁰ Islamic State has "carried out ethnic cleansing on a historic scale in Northern Iraq" and has "subjected [women and girls] to rape or sexual abuse, forced [them] to marry fighters, or sold [them] into sexual slavery."¹⁹¹ Repression and brutality exist elsewhere.¹⁹²

¹⁸⁷ Human Rights Council, Rep. of the Comm'n of Inquiry on Human Rights in the Democratic People's Republic of Korea 15, U.N. Doc. A/HRC/25/63; GAOR, 25th Sess. (Feb. 7, 2014).

¹⁸⁸ *Id.*

¹⁸⁹ Human Rights Council, Rep. of the Comm'n of Inquiry on Human Rights in Eritrea 14, U.N. Doc. A/HRC/29/42; GAOR, 29th Sess. (June 4, 2015).

¹⁹⁰ Human Rights Council, Rep. of the Indep. Int'l Comm'n of Inquiry on the Syrian Arab Republic 20, U.N. Doc. A/HRC/30/48; GAOR, 30th Sess. (Aug. 13, 2015).

¹⁹¹ AMNESTY INTERNATIONAL, ETHNIC CLEANSING ON A HISTORIC SCALE: ISLAMIC STATE'S SYSTEMATIC TARGETING OF MINORITIES IN NORTHERN IRAQ 4, 20 (2014).

¹⁹² See FREEDOM HOUSE, FREEDOM IN THE WORLD 2015, at 20 (2015) (listing Central

It is likely that an analysis of bribes paid to extricate persons from any of those conditions would be found to be as justified as those paid by Schindler. The condition of the world in the future is unknowable, and that world might present conditions that cannot be described today. It is possible that those conditions too might constitute circumstances that justify the payment of bribes.

CONCLUSION

Given the nature of legal writing, at some point this article will be cited as claiming that bribery is good. That is not at all the point of this article. There are important reasons for criminalizing bribery, and bribery is in almost all cases unjustifiable. Both ancient and modern moral norms, from all corners of the world, condemn bribery. The law reflects this moral disapprobation. Bribery undermines the connection between people and their systems of governance. Law, an integral piece of those systems of governance, attempts to protect that connection by preventing bribery. And bribery inflicts severe harms on people, preventing them from fulfilling themselves as humans, and thwarting mechanisms such as markets or social programs that could improve their lives. A vibrant and active transnational legal regime has evolved to counter these pernicious effects.

Most attempts to justify the payment of a bribe have no merit. The most common claim, that the payment of a bribe will allow the conduct of business, survives neither empirical nor moral scrutiny. Arguments regarding optimal levels of corruption are not arguments *for* bribery, and defy measurement in the real world.

Unlike claims of business necessity or administrative efficiency, a claim that a bribe might be paid in an authoritarian regime elicits some degree of sympathy. In most cases, however, such a claim must be treated with caution. In some cases such bribes might actually prolong the existence of the authoritarian regime. Moreover, acknowledging such bribes as justified might lead to a slippery slope in which persons dissatisfied with non-authoritarian regimes might claim that they can pay bribes to escape from policies or practices with which they disagree.

In extraordinary circumstances, however, a bribe may be justified. The bribes paid by Oskar Schindler to save the Schindlerjuden present just such a circumstance. These bribes literally purchased life from a

African Republic, Equatorial Guinea, Eritrea, North Korea, Saudi Arabia, Somalia, Sudan, Syria, Turkmenistan, Uzbekistan, Tibet, and Western Sahara as "the worst of the worst").

brutally oppressive regime. They are recognized as moral. They did little damage to an already broken system. And the local harm that they inflicted paled in comparison to the overall benefit.

The Nazi regime was a paradigmatically oppressive regime. Unfortunately, however, oppression is not a unique or even rare phenomenon. It is not to be hoped for, but the world will probably create other circumstances that justify the payment of a bribe.