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## International Bribery: The Moral Imperialism Critiques

Elizabeth Spahn\*

[T]he literary-cultural establishment as a whole has declared the serious study of imperialism and culture off limits. For Orientalism brings one up directly against that question — that is, to realizing that political imperialism governs an entire field of study, imagination, and scholarly institutions—in such a way as to make its avoidance an intellectual and historical impossibility. Yet there will always remain the perennial escape mechanism of saying that a literary scholar and a philosopher, for example, are trained . . . not in politics or ideological analysis. In other words, the specialist argument can work quite effectively to block the larger and, in my opinion, the more intellectually serious perspective.<sup>1</sup>

Edward Said, ORIENTALISM

Consumers are learning firsthand the dangers of widely divergent global safety standards. In the United States this past year, the focus has been primarily on vast numbers of unsafe Chinese manufactured products, such as toxic toothpaste, lead paint in children's toys, poisoned pet food, and contaminated milk.<sup>2</sup> The problem is by no means limited to

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\* Professor of Law, New England School of Law. I am grateful to Dean John O'Brien for the summer stipend that made this article possible. My thanks also go to Melissa Johnson, Erica Spahn Mena-Landry, Amanda Tarzwell, and Antonio Trebbiano for their research assistance and as always to our invaluable research librarian Barry Stearns.

1. EDWARD SAID, *ORIENTALISM* 13–14 (Pantheon Books 1978).

2. *Legislation to Improve Consumer Product Safety for Children: Hearing on H.R. 2474, H.R. 1699, and H.R. 1721 Before Subcomm. on Commerce, Trade, and Consumer Protection*, 110th Cong. (2007). See also *Consumer Product Safety Modernization Act of 2007*, H.R. 4040, 110th Cong. (2007) (introduced by Comm. on Energy & Commerce and a hearing is proposed for Nov. 6, 2007). For a small sample of just a few of the many incidents this year, see Walt Bogdanich, *China Prohibits Poisonous Industrial Solvent in Toothpaste*, N.Y. TIMES, July 12, 2007, at C4; Walt Bogdanich, *Chinese Chemicals Flow Unchecked Onto World Drug Market*, N.Y. TIMES, Oct. 31, 2007, at A1; Jane Spencer & Nicholas Casey, *Toy Recall*

Chinese goods, however, as products are imported from a large number of countries with weak legal regimes and high levels of corruption. Promises of reform and effective enforcement of product safety or contractual standards in the manufacturing economies are hampered by systemic corruption.<sup>3</sup> Efforts to clean up or prevent damaging environmental business practices are undermined by bribery.<sup>4</sup> Egregious human rights violations such as international child sex trafficking are made possible by cultures of corruption.<sup>5</sup> Bribes skew purchasing choices as well, wasting tax dollars and undermining any semblance of a rational market. Bribes hit poor people the hardest, and exacerbate the gap between the truly wealthy and the desperately poor. From any perspective, international bribery presents significant problems.

While it is difficult to obtain hard data on the amount of money involved in bribes given by multinational corporations (MNCs) to officials of foreign nations in order to do business abroad, even the lowest estimates are staggering.<sup>6</sup> There is an

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*Shows Challenge China Poses to Partners*, WALL ST. J. (Aug. 3, 2007), available at <http://online.wsj.com/article/SB118607762324386327.html>; Jim Yardley, *Chinese Baby Formula Scandal Widens*, N.Y. TIMES, Sept. 16, 2008, at A6; BBC News, *Japan Scare Over China Dumplings*, <http://news.bbc.co.uk/1/hi/asia-pacific/7219365.stm> (Jan. 31, 2008)..

3. Edward Wong, *Courts Compound Pain of China's Tainted Milk*, N.Y. TIMES, Oct. 18, 2008, at A1.

4. On a factory visit in a remote part of China in 2005 we were shown a state-of-the-art water treatment equipment for a soy bean processing factory, while the guide proudly explained how the World Bank funded equipment returned the processing water to better than potable standards. A few minutes later, one of the factory employees asked if I was the law professor. S/he then proceeded to quietly draw me aside and explain that the treatment equipment was only turned on when foreigners came to visit. Otherwise it was not used in order to save on electricity costs. I asked about whether the regional Chinese Environmental Protection officials performed inspections. They did, s/he reported, but were paid off by the factory managers not to report that the equipment was not plugged in.

5. See, e.g., VORSAKDI MAHATDHANOBOL, CHINESE WOMEN IN THE THAI SEX TRADE (Pornpimon Trichot ed., Aaron Stern trans., Chinese Studies Ctr., Asian Research Ctr. for Migration, Inst. of Asian Studies, Chulalongkorn Univ. 1998); PASUK PHONGPAICHIT, SUNGSIDH PIRIYARANGSAN & NUALNOI TREERAT, GUNS, GIRLS, GAMBLING, GANJA: THAILAND'S ILLEGAL ECONOMY AND PUBLIC POLICY (Silkworm Books 1998). I personally observed, in January of 2000, a thick bundle of cash being openly handed to the Thai Army border guard at the bridge crossing from Burma into Cheng Rai (the notorious Golden Triangle) by a middle aged Thai woman leading a procession of about 12 Burmese children about 8-9 years-old as they entered, destined I believe and my Thai police source confirmed, for the brothels of Bangkok. The Burmese Army guards on the other side had waved her through, without any overt bribe that I observed.

6. Official U.S. government estimates from the U.S. Department of Commerce

extensive economics literature that analyzes various impacts of international bribery and corruption.<sup>7</sup> “Early economic work on corruption was sometimes tolerant of corruption, seeing it as a way around repressive government regulations. Recently, however, most economists have rethought that position and have become much less tolerant of corruption than their predecessors. Current research emphasizes the adverse welfare consequences of corruption.”<sup>8</sup> The economists appear to have largely reached consensus that there is a significant relationship between widespread corruption and systemic poverty, particularly the role of systemic corruption in exacerbating the gap between very wealthy elites and the impoverished masses.<sup>9</sup>

The problem is not for lack of law on paper. The U.S. Foreign Corrupt Practices Act (FCPA) criminally prohibits U.S. corporations from bribing officials of foreign governments in order to obtain business has been in effect for thirty years.<sup>10</sup> In 1998, the Organization for Economic Co-operation and

range from \$45 billion U.S. dollars to \$80 billion in contracts lost by U.S. corporations competing with bribe-giving corporations primarily from Europe prior to ratification of the OECD Convention. See Duane Windsor & Kathleen A. Getz, *Multilateral Cooperation to Combat Corruption: Normative Regimes Despite Mixed Motives and Diverse Values*, 33 CORNELL INT'L L.J. 731, 761 (2000). Although speculative, the World Bank estimates the annual cost of corruption to be more than \$80 billion, while the International Monetary Fund estimates that a country's growth rate can reduce by 0.5% a year due to corruption. See Nancy Zucker Boswell & Peter Richardson, *Anti-Corruption: Unshackling Economic Development*, 8 ECON. PERSP., March 2003, at 16, available at <http://usinfo.state.gov/journals/ites/0303/ijee/boswell.htm>.

7. Professor Susan Rose-Ackerman of Yale leads the economics scholarship on international corruption issues. See, e.g., SUSAN ROSE-ACKERMAN, *CORRUPTION: A STUDY IN POLITICAL ECONOMY* (Academic Press 1978); see also SUSAN ROSE-ACKERMAN, *CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES AND REFORM* (Cambridge Univ. Press 1999). For an excellent summary of the current economics research, see Johann Graf Lambsdorff, *Causes and Consequences of Corruption: What do we Know from a Cross-Section of Countries?*, in *INTERNATIONAL HANDBOOK ON THE ECONOMICS OF CORRUPTION* 3, 23–28 (Susan Rose-Ackerman ed., Edward Elgar Publ'g 2006).

8. Lambsdorff, *supra* note 7, at 4.

9. See, e.g., Sanjeev Gupta, Hamid Davoodi & Rosa Alonso-Terme, *Does Corruption Affect Income Inequality and Poverty?*, 3 ECON. OF GOVERNANCE 23 (2002).

10. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. §§ 78a, 78m, 78dd-1, 78dd-2, 78ff (2000)) (amending scattered sections of 15 U.S.C. §§ 77a-78kk (1994)), amended by International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302.

Development (OECD) adopted an anti-bribery convention<sup>11</sup>, now ratified by all OECD member states,<sup>12</sup> that requires similar criminal laws prohibiting their corporations from bribing foreign government officials. In 2002, the United Nations adopted the Convention Against Corruption (U.N. CAC),<sup>13</sup> which has been ratified by more than 100 member states.<sup>14</sup> Regional organizations such as the Organization of American States,<sup>15</sup> the Council of Europe,<sup>16</sup> and more recently the African Union,<sup>17</sup> have also developed anti-corruption conventions. The World Bank and the International Monetary Fund have launched various efforts to measure and combat corruption over the years.<sup>18</sup> The

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11. Organization for Economic Co-operation and Development, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, 37 I.L.M. 1, available at [http://www.oecd.org/document/21/0,2340,en\\_2649\\_201185\\_2017813\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/21/0,2340,en_2649_201185_2017813_1_1_1_1,00.html).

12. See Organization for Economic Co-operation and Development, Working Group on Bribery in International Business Transactions, Aug. 6, 2007, DAF/INV/BR(2007)1/REV2, available at <http://www.oecd.org/dataoecd/50/33/1827022.pdf> (listing steps taken by member states that have ratified and implemented domestic criminal legislation to combat bribery and corruption).

13. United Nations Convention Against Corruption, Dec. 9, 2003, 43 I.L.M. 37, available at [http://www.unodc.org/pdf/crime/convention\\_corruption/signing/Convention-e.pdf](http://www.unodc.org/pdf/crime/convention_corruption/signing/Convention-e.pdf).

14. United Nations Office on Drugs and Crime, Signatories to the United Nations Convention Against Corruption, Oct. 27, 2007, <http://www.unodc.org/unodc/en/treaties/CAC/signatories.html> (listing the signatories and ratifications of the UN Convention Against Corruption). In less than two years, more than half of all nations in the world ratified the UN Convention Against Corruption. Press Release, United Nations Convention Against Corruption Receives 100th Ratification, UNIS/CP/548 (October 2, 2007), available at <http://www.unis.unvienna.org/unis/pressrels/2007/uniscp548.html>.

15. Organization of American States, Inter-American Convention Against Corruption, Mar. 29, 1996, 35 I.L.M. 724, available at <http://www.oas.org/juridico/english/Treaties/b-58.html>.

16. Council of Europe, Criminal Law Convention on Corruption, Jan. 27, 1999, ETS No. 173, available at <http://conventions.coe.int/Treaty/EN/Treaties/Html/173.htm> [hereinafter CoE Criminal Convention].

17. African Union Convention on Preventing and Combating Corruption, July 11, 2003, 43 I.L.M. 5, available at <http://www.africa-union.org/root/au/Documents/Treaties/Text/Convention%20on%20Combating%20Corruption.pdf>. For a list of ratifying countries see Status List: African Union Convention on Preventing and Combating Corruption, May 26, 2007, <http://www.africa-union.org/root/au/Documents/Treaties/List/African%20Convention%20on%20Combating%20Corruptio>n.pdf.

18. The multilateral development banks (World Bank, International Monetary Fund and regional development banks) announced a cooperative effort to combat corruption in 2006. See *MDBs Agree on Common Framework Against Corruption*, Sept. 17, 2006, <http://web.worldbank.org> (click "News"; then click "Featured Stories"; then select Sept. 17, 2006 from the drop down); see also J. Nolan McWilliams, *Tug of War: The World Bank's New Governance and Anticorruption Efforts*, 17 KAN. J.L. &

growing international grassroots campaign to combat bribery in international business transactions has been spearheaded by a highly regarded non-governmental organization, Transparency International, based in Berlin, Germany.<sup>19</sup>

The international legal movement against bribery of foreign governments by large MNCs has engendered vigorous scholarly debate, primarily among professors of business ethics.<sup>20</sup> Law professors have yet to play a major role in scholarly debates regarding these issues, with the notable exception of Yale Professor Susan Rose-Ackerman's very substantial contributions over many years to the economics literature.<sup>21</sup> Contemporary U.S. legal education otherwise pretty much ignores both the problem and efforts to regulate it. The U.S. lawyers' Multi-State Professional Responsibility examination<sup>22</sup> and the standard U.S. law school courses teaching legal ethics<sup>23</sup>

PUB. POL'Y 1 (2007); Sope Williams, *The Debarment of Corrupt Contractors from World Bank-Financed Contracts*, 36 PUB. CONT. L.J. 277 (2007); James Anderson and Cheryl Gray, *World Bank: Anti-Corruption in Transition 3: Who is Succeeding... and Why?*, July, 2006, [http://siteresources.worldbank.org/INTECA/Resources/ACT3executive\\_summary.pdf](http://siteresources.worldbank.org/INTECA/Resources/ACT3executive_summary.pdf).

19. Transparency International [TI], <http://www.transparency.org>.

20. Political scientists, sociologists and international development scholars have also developed major contributions to this topic, which are beyond the scope of this article. See, e.g., ROBERT KLITGAARD, *CONTROLLING CORRUPTION* (Univ. of Cal. Press 1988); *POLITICAL CORRUPTION: CONCEPTS & CONTEXTS* (Arnold J. Heidenheimer & Michael Johnston eds., Transaction Publishers 3d ed. 2002). For the free-the-market view that legal regulation is ineffective and not worth the price see FRANK ANECHARICO & JAMES B. JACOBS, *THE PURSUIT OF ABSOLUTE INTEGRITY: HOW CORRUPTION CONTROL MAKES GOVERNMENT INEFFECTIVE* (Univ. of Chicago Press 1996).

21. Professor Susan Rose-Ackerman of the Yale Law School who continues to lead the economics scholarship is the notable exception. See ROSE-ACKERMAN, *supra* note 7. More recently Professor David Kennedy of the Harvard Law School entered the fray briefly, on the other side, but appears to have withdrawn from the field after one appearance. See Kennedy, *infra* note 77. Most recently Professor Padideh Ala'i of the Washington College of Law, American University has made a valuable contribution to serious legal scholarship, with a careful examination of a specific historical case involving grand corruption by imperialist power Britain in the context of colonial India. See Ala'i, *infra* note 111.

22. National Conference of Bar Examiners: Subject Matter Outline, <http://www.ncbex.org/multistate-tests/mpre/subjects0/outline> (2006).

23. Only one out of three of the professional responsibility texts I examined mentions the issue of international law ethics regulations; it does so in a two page summary, and without mentioning the FPCA, the U.S. anti- money laundering statutes, or the EU's Gatekeeper regulations even in a footnote. GEOFFREY HAZARD, ET AL., *THE LAW AND ETHICS OF LAWYERING* 1134-38 (Foundation Press 4th ed. 2005). In the other two texts I examined I found no mention of any international law practice ethics problems such as the FCPA. STEPHEN GILLERS, *REGULATION OF LAWYERS* (Aspen 7th ed. 2005); THOMAS D. MORGAN & RONALD D. ROTUNDA,

do not currently include international bribery and money laundering laws. Legal ethics remain stubbornly parochial in their domestic U.S. focus, leaving new lawyers entering the global economy unprepared. U.S. law school courses in international business transactions typically include very short units on international bribery given the vast amounts of money involved, especially in light of reports from practitioners in the field that bribery is a widespread international business problem.<sup>24</sup>

Various proposals regarding individual criminal culpability for the "gatekeepers" themselves (lawyers, bankers and accountants) who structure international business deals, including potential bribes and money laundering, are currently being debated in a number of legal settings within the United States,<sup>25</sup> Canada and Europe.<sup>26</sup> Law students who are preparing

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PROFESSIONAL RESPONSIBILITY: PROBLEMS AND MATERIALS (Foundation Press 9th ed. 2006); see also, Laurel S. Terry, *A "How To" Guide for Incorporating Global and Comparative Perspectives into the Required Professional Responsibility Course*, 51 ST. LOUIS U. L.J. 1135 (2007).

24. The FCPA is addressed specifically in one problem and thirty-two (out of 1390) pages of text in one leading International Business Transactions coursebook, RALPH H. FOLSOM, ET AL., INTERNATIONAL BUSINESS TRANSACTIONS: A PROBLEM-ORIENTED COURSEBOOK (Thomson/West 9th ed. 2006) Problem 8.3 at pages 732-35. Because international business is such a rapidly expanding field, it is without doubt difficult to develop too much depth in any one topic in an introductory survey course. Despite these constraints, the Folsom coursebook manages to cover the circumstances leading to the legislative origins of the FCPA reforms significantly better than Steven Salbu managed in multiple long law review articles. *Id.* at 737-39. The Folsom coursebook raises the cultural differences problem very briefly. *Id.* at 760, note 18.

Another leading text devotes twenty-five (out of 840) pages and four problems. DANIEL C.K. CHOW & THOMAS J. SCHOENBAUM, INTERNATIONAL BUSINESS TRANSACTIONS: PROBLEMS, CASES AND MATERIALS (Aspen Publishers 2005). The discussion of legislative history is within the casebook's United States v. Kay edited opinion, pages 461-66, focusing narrowly on the issue presented in that case regarding the meaning of obtaining or retaining business under the FCPA. A discussion of cultural differences is not presented. The unilateral aspect of the U.S. position prior to the OECD actions is discussed briefly at note 1 page 454.

25. See American Bar Association, Task Force on Gatekeeper Regulation and the Profession: Task Force Actions and Related Documents, <http://www.abanet.org/crimjust/taskforce/actions.html> (last visited Sep. 9, 2008). For a list of articles discussing the ABA Gatekeeper Initiative Task Force, see American Bar Association, Task Force on Gatekeeper Regulation and the Profession: Articles, <http://www.abanet.org/crimjust/taskforce/articles.html> (last visited Sep. 9, 2008).

26. See Stephanie Ben-Ishai, *Corporate Gatekeeper Liability in Canada*, 42 TEX. INT'L L.J. 441 (2007); John W. Brooks & Roberta Vassallo, *Attorney Cathy's Continuing Quandary, or, Can the Gatekeeper Initiative Be Reconciled with the Multi-Jurisdictional Practice of Law?*, 41 INT'L LAW. 59 (2007); Rebecca Gregory, *The Lawyer's Role: Will Uncle Sam Want You in the Fight Against Money*

themselves for international business practice are left virtually ignorant about the legal frameworks, the risks to their clients and the personal criminal risks they potentially face as gatekeepers. Perhaps most importantly, the larger ethical and social policy aspects of these problems are simply not taught, leaving law students entering global business ignorant and vulnerable.

The problem of bribery in international business is immediately important to consumers of globally produced products as well as to any progressive reform efforts in poverty reduction, environmental protection or human rights. Addressing the problem of bribery is central to any hope of a more or less rational free global market.<sup>27</sup> For those involved directly in international business transactions the problem presents potentially devastating personal risk as gatekeeper initiatives are implemented.<sup>28</sup> National security and international law enforcement professionals are increasingly aware of the implications for organized groups of ordinary criminal gangs or even terrorist gangs where widespread bribery is exploited to avoid legal restrictions.<sup>29</sup> The corporate compliance industry is booming. The problem is vast, and the consequences are significant.<sup>30</sup>

The question is why comparatively little legal scholarship is addressing the problem; why law professors are not training their students as the business schools are doing? Why don't legal educators want to talk about international bribery?

Law professors are uncomfortable with the topic, I think, because of a well intentioned discomfort with the idea of

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*Laundering and Terrorism?*, 72 UMKC L. REV. 23 (2003).

27. See Barbara Crutchfield George, Kathleen A. Lacey & Jutta Birmele, *The 1998 OECD Convention: An Impetus for Worldwide Changes in Attitudes Toward Corruption in Business Transactions*, 37 AM. BUS. L.J. 485, 491–93 (2000); Philip M. Nichols, *The Myth of Anti-Bribery Laws as Transnational Intrusion*, 33 CORNELL INT'L L.J. 627, 628–29 (2000).

28. See, e.g., Jane Welch et al., *Comparative Implementation of EU Directives (II)—Money Laundering* 40–53 (British Institute of International and Comparative Law City Research Series, Paper No. 10, 2006), available at [http://213.86.34.248/NR/rdonlyres/528A5F1F-C1D9-4F14-8B8C-532448E2C9DA/0/BC\\_RS\\_Money\\_Laundering\\_FINALPRINTVERSION.pdf](http://213.86.34.248/NR/rdonlyres/528A5F1F-C1D9-4F14-8B8C-532448E2C9DA/0/BC_RS_Money_Laundering_FINALPRINTVERSION.pdf) (discussing the criminal and civil sanctions imposed by the Italian Government for failure to comply with money-laundering directives).

29. 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, 618 (2005).

30. See *supra* notes 27–29.



imposing Western moral values on cultures and systems vastly different from our own. Most of us value tolerance and abhor the idea of imposing our own values indiscriminately on others. These noble reservations are often shared by our law students.

My own attention was directed to anti-corruption reform at the very beginning of my field work in Asia. Before entering China to teach law, I decided that I should learn more about rice in order to better understand the root of Asian culture. I spent six weeks in Bali, Indonesia (an idyllic setting). One week I spent in a village without running water or electricity, vainly attempting to learn how to plant rice. At the inevitable banquet, on the night before I, as a Western "imperialist human rights feminist rule of law" advocate, was nervously to enter Communist China, I chatted with the patriarch of the Balinese family, a gracious elderly farmer who was blind due to cataracts he knew could be cured by Western surgery if only the money were available.

"What one thing would help his family most?" I asked. I anticipated several potential answers: running water, better medical access, perhaps electricity run into the village (I had already provided the all-important new soccer ball for the village kids as my thank you gift). His answer was that if only the corruption could be eliminated or even just reduced, his family, his village, could manage the rest on their own. This was the beginning of my true education about Asia.

Eighteen months later, at the end of my long stay in China, I was no longer nervous. (The saying is that you visit China for two weeks, you write an article; you visit for six months and write a book. After a year you can no longer speak at all. After a year and a half immersion, my connection to Chinese culture was firm, and I was pretty much speechless.)

Walking around elite Peking University's beautiful Nameless Lake for the last time with one of my very favorite Chinese students of all time, who is perhaps the last of the genuine true believers in Marxism and the Party, I asked what topic I could work on that might really help Chinese people. "Corruption," he said.

The simple Balinese rice farmer and the elite Peking University Party Member agreed. And so this human rights/rule of law advocate turned her attention to corruption. Seven years of hard study later, I must say they were both correct. I am grateful to both of them for my education and happy to have my speech back.

In this article, I propose to examine in depth one facet of the scholarly debate regarding criminal laws that ban bribery of officials of foreign governments. I have been teaching the U.S. Foreign Corrupt Practices Act, as well as the OECD and UN Conventions for the past eight years to both U.S. and non-U.S. law students. My experience is that before we can begin to address the more technical legal issues involved, law students and their professors need to explore our underlying attitudes about whether international bribery should be considered a criminal activity at all. The primary concern is that by criminalizing bribery of foreign officials, the United States is unilaterally and forcibly imposing American values about bribery on foreign cultures that have very different customs regarding gift giving.

This concern about American moral imperialism regarding bribery/gift giving is extensively developed in the scholarly debates among professors of business ethics in the U.S. business schools. The charge of U.S. moral imperialism has great resonance not only among many American law students, but very significantly among international audiences in both developed and developing economies. In any discussion about developing stronger global legal systems, systemic bribery is the pink elephant in the room that everyone sees but no one wants to discuss. As I write in 2008, the United States is still engaged in a very controversial war in Iraq, the charge of moral imperialism is particularly laden with emotion. In this article, I will examine various approaches to the moral imperialism critiques of the U.S. anti-bribery law, the FCPA.

It is my hope that by carefully examining the moral imperialism critiques from a variety of perspectives,<sup>31</sup> we can advance the discussion among audiences in the “North” (European/U.S./developed nations), within the developed economies of the United States, Canada, Europe and Japan, as well as encourage a productive dialogue with legal, government and business leaders in nations with developing and transition economies, the “South.”

The central question is whether attempts to legally enforce restrictions on international bribery by the North’s MNCs of officials of the South’s governments constitute U.S. moral

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31. This method of examining a topic from the differing viewpoints of various audiences is inspired by my late colleague, Professor Mary Jo Frug’s landmark article *Re-Reading Contracts*. Mary Joe Frug, *Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 AM. U. L. REV. 1065 (1985).

imperialism and should be abandoned, or whether we should move beyond our initial discomfort facing this charge, continuing U.S. and other developed nations' efforts to legally prohibit bribery of foreign governments by our MNCs.

Charges of moral imperialism against the United States for leading modern international anti-bribery campaigns can be categorized into three basic approaches. The first approach emphasizes the "Ugly American" aspect of the U.S. led campaign against bribery relying on early U.S. legislative history emphasizing the sanctimonious comments by Senator Jesse Helms, as well as the unilateral nature of the U.S. anti-bribery statute and U.S. pressure on, or bullying of, other developed countries to join the U.S. in criminalizing bribery of foreign officials.

The second approach to the moral imperialism critique draws upon new-left, or critical legal studies, jurisprudence. The second approach can be roughly described as the "Wolf in Sheep's Clothing" critique. In this formulation, the moral imperialism critique focuses on the use of the anti-corruption campaigns as an ideological and rhetorical device that legitimates a specific political and economic agenda favoring foreign direct investment, privatization, deregulation and free trade. Anti-bribery rhetoric is used to de-legitimize developing nations failing to adhere to free trade agendas by affixing the label corruption, while propping up developing nations adhering to a free trade agenda by holding out the false promise of corruption reform.

The third type of moral imperialism critique emphasizes the colonial and racial legacies of foreign imperial powers corrupting local leadership and its contemporary implications. This approach, the "rule of geographic morality," broadens the critique to include European nations as well as the United States, and emphasizes the racial and religious stereotypes underlying the North's discourse about corruption in the South. This third critique is by far the most interesting as it both flips and broadens the moral imperialism critique to include not only the anti-corruption campaigns, but also the critics of international anti-bribery reform efforts.

Examination of the imperialism element of the critique then turns to the perspectives from the South, the bribe-recipients. The reasoning from the South perspective focuses on accepting or extracting extra payments under the table as a form of reparations, payback from the imperialist North as a

mechanism for personal profit but perhaps as importantly, a mechanism for enhancing national and personal honor. Anti-bribery reform efforts are viewed as interferences in the South's sovereign prerogatives to extract tributes from foreigners seeking to do business in that country. Hence, efforts to curtail bribery constitute imperialism.

Rebuttals to criticisms on the imperialism element are then examined. The oft-repeated critique of the legislative history of the FLSA, guilt by association with infamous Senator Jesse Helms, is actually an isolated, cherry picked quotation. The actual supporters of the original statute were the Watergate-inspired reform movement drawn from political liberals and moderates.<sup>32</sup>

Nor can the contemporary anti-bribery movements be fairly characterized as "imperialist" on the basis of facts currently in the debate. The United States, as the early leader of this movement, did not profit. Indeed the United States lost tens of billions of dollars in business with emerging economies as U.S. corporations are criminally prohibited from handing out bribes, while their German competitors could and did legally take tax deductions on bribes given to foreigners as legitimate business expenses.<sup>33</sup> Professor Shaw characterizes this as economic "unilateral disarmament" on the part of the United States. Losing large amounts of business certainly does not meet any normal understanding of imperialist action.

Further, the rebuttal points out that U.S. law places ultimate power over whether the gift/bribe is a crime solely in the hands of the foreign sovereign. Under the U.S. statute, if the payment or gift/bribe is permitted under the laws of the receiving nation, it does not violate the FCPA. Imperialist actors do not generally hand over their power to tax and regulate their own corporations to foreign sovereigns as the FCPA has done. Nor can anti-bribery efforts fairly be characterized as "unilateral" given the Latin American push against bribery and corruption through the OAS. The Council of Europe also took early significant action. The most recent

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32. Joshua D. Clinton, *Congress Lawmaking, and Political Failure? The Case of the Fair Labor Standards Act*, Work in Progress 21 (Feb. 19, 2008) (unpublished manuscript, Princeton University) available at [http://politics.as.nyu.edu/docs/IO/6985/Clinton\\_Talk-Paper.pdf](http://politics.as.nyu.edu/docs/IO/6985/Clinton_Talk-Paper.pdf).

33. H. Lowell Brown, *The Extraterritorial Reach of the U.S. Government's Campaign Against International Bribery*, 22 HASTINGS INT'L & COMP. L. REV. 407, 407-09 (1999).

decade since 1998 has seen substantial participation by both developed and developing nations through the OECD and U.N. Convention Against Corruption. Closer examination of the critics' arguments reveals the charge of "unilateral imperialism" is essentially propagandistic in the context of U.S. and other nations' efforts to combat bribery of foreign government officials by deep pocket MNCs.

After examining the various critiques of anti-bribery efforts on the charge of "imperialism", the article then turns to the "moral" aspect of the issue. The first group of critics of anti-bribery reform efforts urges an approach stressing tolerance for diverse cultural practices drawing explicitly on methods developed by cultural anthropologists. The cultural anthropology advocates argue that anti-bribery moral values are not in fact universal at all but culturally specific.<sup>34</sup> A second group of critics draws from a law and economics analysis to advocate soft-law normative regime development over time, rather than immediate, hard law criminal sanctions for bribe-givers. These advocates concede that bribery is a moral wrong in the abstract but argue that more time is required for global values to develop in actual practice.<sup>35</sup> Both cultural pluralism and normative regime critics have as their fundamental premise that the moral value against bribery is in fact not universally shared at the present time sufficiently to legitimate hard law criminal sanctions against bribe givers.<sup>36</sup>

Rebuttal to these two lines of criticism on the moral values issue has traditionally rested on Judge John Noonan's landmark work tracing religious and ethical prohibitions against bribery of officials back to the Code of Hammurabi and across all the major world religions.<sup>37</sup> In this article, I offer a second line of rebuttal, arguing that the cultural pluralism approach also falls prey to what the late Professor Edward Said describes as "orientalism" which carries its own significant dangers of imperialism.<sup>38</sup> I also argue that cultural anthropology/pluralism regarding bribery is a dangerously inappropriate pedagogy for law and business students who will not be passive academic

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34. Steven R. Salbu, *The Foreign Corrupt Practices Act as a Threat to Global Harmony*, 20 MICH. J. INT'L L. 419, 439-40 (1999).

35. Windsor & Getz, *supra* note 6, at 769 (2000).

36. *Id.* at 769-70.

37. JOHN T. NOONAN, JR., *BRIBES* (Macmillan Publishing 1984).

38. SAID, *supra* note 1; EDWARD SAID, *CULTURE AND IMPERIALISM* (Alfred A. Knopf, Inc. 1993).

observers but are in fact active participants in international bribery transactions. In addition, cultural pluralism in the context of corporate bribery of non-Caucasian foreigners carries significant dangers of exacerbating the racism inherent in the rule of geographic morality as examined by Professor Ali'a.<sup>39</sup>

The third line of rebuttal on the question of whether a moral value against bribery is widely shared across diverse cultures is developed most notably by Professor Nichols of the Wharton Business School in his groundbreaking empirical research examining contemporary attitudes toward bribery of those actually living in a highly corrupted transition economy.<sup>40</sup> The non-governmental organization Transparency International has also developed substantial empirical data regarding attitudes toward bribery and corruption among ordinary people in the countries most adversely impacted.

Next the article turns to an examination of the stories we tell ourselves about bribery. Elite business and legal professionals working on behalf of MNCs engage in complex business transactions in partnership with elite government officials from the developing or transition economies. These elites explain the practice of bribery as a harmless and mutually beneficial practice. It is used in China, for example, as a mechanism for providing incentives or bonuses to underpaid government employees while relieving foreign corporations from pesky product safety, environmental and labor regulations that drive up the bottom line costs. As the toxic toothpaste incidents multiply, however, the premise that no one is getting hurt must be re-examined. Consumers are actually physically harmed and sometimes killed. Environmental reform efforts are undermined by corporate bribery of local officials.

From the perspective of scholars working inside the non-Western cultures, we find insights that are not currently a central part of the discussion in the Western literatures. The impact on local Chinese businesses unable to compete with deep pocket MNCs' bribe giving capacities strangles domestic businesses in their infancy, as Professor Huang of MIT has pointed out. Professor Xin Frank He of Hong Kong provides a

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39. Padideh Ala'i, *The Legacy of Geographical Morality and Colonialism: A Historical Assessment of the Current Crusade Against Corruption*, 33 VAND. J. TRANSNAT'L L. 877 (2000).

40. Philip M. Nichols, *The Fit Between Changes to the International Corruption Regime and Indigenous Perceptions of Corruption in Kazakhstan*, 22 U. PA. J. INT'L ECON. L. 863 (2001).

particularly helpful analysis of the regime-reinforcing impact of sporadic crackdowns.<sup>41</sup> Promises of crackdowns, erratic and sporadic reform campaigns themselves are used in a sophisticated maneuver to deflect criticism and increase the market value of bribes while simultaneously reinforcing authoritarian control by bribe taking elites.

The story of a mutually beneficial harmless transaction told by the dynamic duo of elite North bribe givers and elite South bribe takers cannot be accepted without deeper examination. The stories of corruption "reform" through erratic crackdowns can also not be accepted at face value. More nuanced and sophisticated approaches need to be developed through deeper engagement by law professors and law students as well as their business school counterparts directly involved in the global economies. The article concludes with some suggestions for further analysis, particularly with respect to expanding Professor Nichols' empirical approach surveying attitudes within the developing and transition economies regarding tolerance for bribery.

It is my hope that this article will help to address our noble reservations, our reluctance to engage in 'moral imperialism' enough so that we in the North can begin to actually discuss our problems with international bribery frankly, realistically and with some deeper understanding of what is actually going on, and what is actually at stake. Perhaps we might even be able to open meaningful and substantive conversations about the pink elephant in the room with our colleagues in the South.

## II. IMPERIALISM

### A. THE UGLY AMERICAN

The first and most simplistic category of moral imperialism critique paints the anti-corruption campaigns as a deliberate and conscious effort by the United States to export a specifically American moral culture and forcibly impose it unilaterally on the rest of the world. Despite its almost cartoon like caricatures and over simplifications, this "Ugly American" critique is surprisingly commonplace, not only among the few remaining

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41. Xin Frank He, *Sporadic Law Enforcement Campaigns as a Means of Social Control: A Case Study From a Rural-Urban Migrant Enclave in Beijing*, 17 COLUM. J. ASIAN L. 121 (2003).

hard liners within the Chinese Communist Party or a xenophobic small faction in India, but among otherwise respected U.S. business ethics professors and the global business students they train. Dean Stephen Salbu, formerly at the University of Texas and currently at Georgia Tech, leads the U.S. business ethics scholarship critiquing anti-bribery campaigns on the basis of this version of moral imperialism.<sup>42</sup>

Salbu's first piece of evidence in support of the Ugly American moral imperialism critique is the sanctimonious commentary made by the infamous racial segregationist, nationalist/militarist Senator Jesse Helms during the legislative debates over passage of the U.S. Foreign Corruption Practices Act (FCPA) during the 1970s. Salbu describes it thus:

The vernacular of Senator Jesse Helms in regard to the Convention on Combating Bribery captures an attitude U.S. interests adopt all too often in the debate over corruption. In Helms' own words, there is "a need to push—and I use that word advisedly—to push our European allies and other countries to enact laws that criminalize bribery of foreign officials by their citizens overseas." The comment is telling in two ways—it evokes a tradition of aggressive, forceful U.S. demands that the world resolve problems in the U.S.-endorsed manner, and it reinforces the idea that "[t]he only right way is our way—the way we do it in the United States." In view of Helms' comments and similar statements, it is little wonder that both the FCPA and aggressive U.S. measures to bring other countries in line with the statute's philosophy have met with resistance and resentment.<sup>43</sup>

The shortcomings of Salbu's approach are obvious to any legally or historically sophisticated analyst. Senator Helms was of course not the only, or even the primary, supporter of the FCPA.<sup>44</sup> He represented a very extreme, and happily now discredited, political philosophy grounded in the then unreconstructed American South's philosophy of racial segregation based on their interpretation of the Christian Bible, combined with extreme conservative nationalism and American militarism.

Salbu "cherry picks" or plucks a single, most odious and extreme quotation from among the wide array of legislative

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42. Steven R. Salbu, *The Foreign Corrupt Practices Act as a Threat to Global Harmony*, 20 MICH. J. INT'L L. 419, 441 (1999).

43. *Id.*

44. H.R. REP. NO. 95-640 (1977), reprinted in 1977 U.S.C.C.A.N. 4098; S. REP. NO. 95-114 (1977), reprinted in 1977 U.S.C.C.A.N. 4098; H.R. REP. NO. 95-831 (1977) (Conf. Rep.), reprinted in 1977 U.S.C.C.A.N. 4121. Sponsors include Democratic Senators Edward William Proxmire of Wisconsin and Harrison A. Williams, Jr. of New Jersey.



supporters and opponents, most of whom were not in fact Confederate flag waving conservative segregationists. There is no attempt to set the quotation into any kind of historical context. There is no discussion of the official committee reports.<sup>45</sup> The actual legislative statement of purpose is ignored.<sup>46</sup> Salbu attempts to discredit the entire U.S. anti-bribery effort based on the participation of a now discredited person. He completely ignores the actual legislative debates.

A somewhat more grounded and nuanced approach to the historical context existing when the United States enacted the FCPA is evidenced by other respected U.S. professors of business ethics. Professor Peter Schroth briefly summarizes the actual legislative history of the FCPA.<sup>47</sup> Professors George and Lacey place the legislative momentum for the FCPA in the context of the politically liberal uprising in the United States over the Watergate affair, when U.S. President Richard Nixon was discovered to have been involved in a criminal conspiracy to cover up a burglary of the opposition party's headquarters in an effort to obtain their briefing materials for the upcoming Presidential campaign TV debates. As George and Lacey laconically describe it, "the passage of the FCPA during President Jimmy Carter's term in office seems to have been a by-product of the righteous indignation and political backlash following the Watergate affair."<sup>48</sup> In this version of the ideological origins of the FCPA, it is the political moderates and liberals, not Helms and the conservatives, who are the originators of the anti-bribery U.S. reform effort.

Unfortunately actual analysis of the legislative motivations of the United States in passing the FCPA ends there among the business ethics scholarship. George and Lacey proceed to attribute the FCPA to generalized American Puritan ethics, without supporting evidence from the legislative debates

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45. H.R. REP. NO. 95-640 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4098; S. REP. NO. 95-114 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4098.

46. H.R. REP. NO. 95-640 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4098 (stating that the purpose of the legislation was "to prohibit the corrupt use of the mails or other means and instrumentalities of interstate commerce by U.S. corporations, directly or indirectly, to bribe foreign officials, foreign political parties, or candidates for foreign political office.").

47. Peter W. Schroth, *The United States and the International Bribery Conventions*, 50 AM. J. COMP. LAW SUPP. 593, 596-98 (2002).

48. Barbara Crutchfield George & Kathleen Lacey, *A Coalition of Industrialized Nations, Developing Nations, Multilateral Development Banks, and Non-Governmental Organizations: A Pivotal Complement to Current Anti-Corruption Initiatives*, 33 CORNELL INT'L L.J. 547, 555 (2000).

themselves, claiming that "In the United States, the motivation to pass the FCPA probably derived from the strong Puritan religious background fostered among the settlers. Puritan religious ideology fundamentally influenced the American sense of morality. Many Puritans equated success in business with proof of divine favor and predestination for salvation."<sup>49</sup>

It should be noted that George and Lacey, unlike Salbu, are not in fact critics of the FCPA. Thus the burden of proof on charges that U.S. legislative motives constitute moral imperialism should not rest particularly on them. Rather it seems that Salbu, who is in fact the leading proponent of the moral imperialism critique of the FCPA, is obligated to offer a more detailed analysis of the legislative origins of this landmark statute than a single cherry-picked quotation before concluding that its ideological basis lies in politically conservative moral imperialism. The absence of careful analysis of the actual legislative history combined with the emotionally laden judgment of moral imperialism seems to discredit Salbu's critique at least in the absence of more convincing evidence.

Despite the glaring evidentiary weakness of Salbu's argument on this point, other business ethics professors continue to repeat his critique. Shaw, for example, summarizes the Salbu moral imperialism critique thus:

The most commonly used argument, however, against the FCPA-led efforts to combat international bribery is that it constitutes moral imperialism and overreaches into the sovereignty of individual countries. In effect, the FCPA acts as a Western legal construct that superimposes its moral identity and values on the rest of the world without recognizing the subtle differences among the world's various cultures. As such, anti-bribery efforts are offensive to other governments in that they presuppose a moral highroad in comparison to the governments' actions.<sup>50</sup>

Constant repetition of the Salbu critique by respected U.S. business ethics scholars naturally influences U.S. and international students as well.<sup>51</sup> Repetition of the charges in the absence of reflection on the evidence, or lack thereof, reinforces pre-existing stereotypes, rendering an already difficult debate

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49. *Id.*

50. Bill Shaw, *The Foreign Corrupt Practices Act and Progeny: Morally Unassailable*, 33 CORNELL INT'L L.J. 689, 701 (2000).

51. See Marie M. Dalton, *Efficiency v. Morality: The Codification of Cultural Norms in the Foreign Corrupt Practices Act*, 2 N.Y.U. J.L. & BUS. 583, 619-20 (2006); see also Kenneth U. Surjadinata, *Revisiting Corrupt Practices From a Market Perspective*, 12 EMORY INT'L L. REV. 1021, 1023 (1998).

more problematic.

Of course one might fairly ask whether anyone today actually cares what the ideological origins of the FCPA were. It was thirty years ago. Times have indeed changed. Analyzing "legislative intent" carries substantial complexities of its own, and may not be probative anyway.

My point here is not that the legislative history of the ideological origins of the FCPA necessarily is, or should be, central to modern debates. My point here is to highlight the absence of actual evidence in support of the cartoon stereotype of the Puritanical Ugly American bullying the rest of the world into acquiescing to American moral imperialism. Unreflective repetition of this argument does not advance serious discussion of real conflicts. Simplistic caricatures such as the one advanced by Salbu and repeated by others provide a veneer of academic respectability covering an essentially propagandistic approach. The business ethics professoriate should amend their discussions of the moral imperialism approach with respect to the ideological origins of the FCPA. Perhaps legal historians could provide some technical assistance on this point.

The business ethics professors supporting the anti-bribery campaigns have done an excellent job rebutting Salbu's charge of moral imperialism otherwise. Responding to the charge of moral imperialism, a number of scholars point out very explicitly that the FCPA is neither "imperial" in any meaningful sense of that word, nor is it a "moral" issue.<sup>52</sup>

The FCPA is not even arguably "imperialist" according to the rebuttal view. First, the FCPA did not serve any U.S. competitive advantage, indeed legislation caused U.S. multinationals to lose substantial amounts of business, if the MNCs themselves and the U.S. Trade Department are to be believed. Shaw, in fact, characterizes the FCPA as economic "unilateral disarmament."<sup>53</sup>

Indeed the enactment of the FCPA may well have been economically irrational on the part of the United States, given the amount of business believed to be lost. Windsor describes it as both irrational and impulsive:

The decision to prohibit foreign bribery by U.S. citizens and their agents may well have been irrational. The United States proceeded on a legislative impulse, under domestic political stress, and without a

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52. Philip M. Nichols, *The Myth of Anti-Bribery Laws as Transnational Intrusion*, 33 CORNELL INT'L L.J. 627, 645-46 (2000); Shaw, *supra* note 50, at 689.

53. Shaw, *supra* note 50, at 689.

carefully considered theory of sound policy. This decision turned out to have costs and burdens, but it was not a decision easily reversed.<sup>54</sup>

The question of precisely how much business was allegedly lost by U.S. MNCs is more difficult to determine. Various U.S. government reports in the run up to the OECD convention negotiations reflect numbers in the forty-five to eighty billion dollar range.<sup>55</sup> The data, however, is subject to a number of unknowable factors given the secretive nature of bribe transactions, making firm estimates difficult.<sup>56</sup> Virtually any loss of business by U.S. interests however serves to support the point of those rebutting the moral imperialism charge. Even if only one million dollars in total business was lost, it is still an economic loss. No data exists in the current scholarship that supports the notion that the United States or its MNCs in any way profited in terms of business from the FCPA.

Generally one thinks of an "imperialist" action as economically benefiting the imperial actor in some manner. The common critique involves economic exploitation by the imperial actor of the subjected colony in order to generate a lucrative slave trade, or obtain valuable minerals or oil. For an imperial actor to adopt criminal sanctions, causing its businesses to lose money, trades, market share and access to emerging economies, does indeed seem to border on irrational, at least in the economic sense. Characterizing such an action, at least in the absence of evidence of some other gains, as imperialist exploitation is ludicrous.

Of course it is possible that the imperialist U.S. corporate interests were willing to lose billions of dollars in order to achieve some other nefarious purpose, a loss leader so to speak. Given corporate sensitivity to profits it must have been some very major reason indeed to justify losing tens of billions of dollars. The burden of producing evidence in support of such a vague theory must rest on those claiming the FCPA constitutes moral imperialism. What was in fact the allegedly nefarious secret purpose worth losing billions of dollars in trade? I was unable to find a shred of evidence in the scholarship critiquing the FCPA, beyond the name calling, of actual economic imperialism.

The second point made by those rebutting the charge of

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54. Windsor & Getz, *supra* note 6, at 770.

55. *Id.* at 761.

56. Philip M. Nichols, *Regulating Transnational Bribery in Times of Globalization and Fragmentation*, 24 YALE J. INT'L L. 257, 289 (1999).

moral imperialism is to point out that criminalizing bribery of foreign officials cannot be dismissed as “unilateral” as the statute is written. U.S. law explicitly adopts an affirmative defense to international bribery placing the power solely in the hands of the bribe-receiving sovereign. If the bribe, or gift, is legal in the receiving nation, it is not a crime for a U.S. corporation to give it under U.S. law (U.S. law only operates over U.S. corporations; it does not in any way regulate foreign officials directly).<sup>57</sup> If the payment is legal under the laws of the foreign sovereign, it cannot constitute a “bribe” under the FCPA, and indeed might even be tax deductible as a legitimate business expense under U.S. tax law.

Far from being a “unilateral” U.S. action forcing foreign sovereigns into compliance, the FCPA actually hands over U.S. sovereign power to tax and regulate its own U.S. corporations to the foreign sovereign. All the foreign sovereign needs to do in order for its local gift giving customs to control the transaction is amend its own laws to recognize the payment as legal. Ultimate power rests in the foreign sovereign. This cannot fairly be characterized as either “unilateral” or “imperial.”

Salbu rebuts this by arguing that it is somehow unfair to require foreign sovereigns to pass written laws permitting the gift/bribe.<sup>58</sup> Salbu concedes that every nation in the world currently has criminal laws prohibiting their own officials from accepting foreign bribes. He argues that unwritten local customs of taking bribes from foreigners should trump the written laws of both the bribe-receiving and the bribe-giving nations out of respect for cultural differences.<sup>59</sup>

It is difficult for a lawyer to take such an argument

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57. 15 U.S.C. §§ 78dd-1(c)(1), 78dd-2(c)(1), 78dd-3(c)(1) (stating there is an affirmative defense when “the payment, gift, offer, or promise of anything of value that was made, was lawful under the written laws and regulations of the foreign official’s, political party’s, party official’s, or candidate’s country.”).

58. See generally Steven R. Salbu, *Are Extraterritorial Restrictions on Bribery a Viable and Desirable International Policy Goal Under the Global Conditions of the Late Twentieth Century?*, 24 YALE J. INT’L L. 223 (1999) [hereinafter Salbu, *Late Twentieth Century*]; Steven R. Salbu, *Battling Global Corruption in the New Millennium*, 31 LAW & POLY INT’L BUS. 47 [hereinafter Salbu, *New Millennium*] (1999); Steven R. Salbu, *Bribery in the Global Market: A Critical Analysis of the Foreign Corrupt Practices Act*, 54 WASH. & LEE L. REV. 229 [hereinafter Salbu, *Critical Analysis*] (1997); Salbu, *supra* note 34, at 441; Steven R. Salbu, *Information Technology in the War Against International Bribery and Corruption: The Next Frontier of Institutional Reform*, 38 HARV. J. ON LEGIS. 67 (2001) [hereinafter Salbu, *Information Technology*].

59. Salbu, *Late Twentieth Century*, *supra* note 58, at 232–50.

seriously. The disdain for written law is troubling. Assuming Salbu's thesis, for the sake of argument, that bribe receiving is an accepted and widely practiced custom outside the United States, it should be a fairly simple matter to amend local laws to reflect the allegedly widely accepted local customs. Just call the payment a "tax," a "commission," or a "license fee" or even a legally permitted "gift" under the law of the foreign sovereign and the U.S. corporation can make the payment without fear of U.S. criminal sanction. Indeed the corporation could probably legally deduct the "gift/tax/fee/commission" under U.S. law as a legitimate business expense. The power to determine whether it is a legal "gift" or an illegal "bribe" rests unilaterally and solely in the hands of the foreign sovereign. The fact that no nation has authorized these bribe/gifts under their domestic laws, relying instead on under the table allegedly customary practices, indicates that perhaps approval of bribes is not as widespread outside the United States as Salbu would have us believe.

In any event, criminalizing acts by MNCs that bribe foreign officials is no longer even arguably "unilateral." Recent international anti-bribery and anti-corruption conventions have been adopted by both the developed nations of the North (1998 OECD Anti-Bribery Convention) as well as many of the developing and transition economy nations of the South (2002 UN Anti-Corruption Convention).

Salbu, among others, complains about the U.S. "bullying"<sup>60</sup> other developed nations in the OECD to adopt the 1998 Anti-Bribery Convention. There certainly is plenty of evidence that the Clinton Administration<sup>61</sup> did in fact prioritize this, responding to the vociferous complaints of U.S. businesses that were criminally prohibited from giving bribes, while their German corporate competitors could not only bribe foreign officials with impunity, but could actually deduct the bribe as a legitimate business expense.<sup>62</sup>

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60. Salbu, *Late Twentieth Century*, *supra* note 58, at 254 ("Attempts to improve the world's business climate in the late 1990s and early twenty-first century should be attempts at persuasion rather than coercion. Stated differently, the United States and other sympathetic countries would be wise to avoid trying to force cultural monism throughout the world. If the world is ever to fulfill its promise of becoming a true global village, it is unlikely to be the result of domineering behavior.")

61. Windsor & Getz, *supra* note 6, at 748; *see also* Nancy Zucker Boswell, *The Law Expectation, and Reality in the Marketplace: The Problems of and Responses to Corruption*, 30 LAW & POL'Y INT'L BUS. 139, 140 (1999).

62. ORG. FOR ECON. CO-OPERATION AND DEV., CTR. FOR TAX POLICY AND

Even accepting the bullying point for the sake of argument, however, it is difficult to characterize U.S. relations, however aggressive, with respect to OECD nations as what one normally thinks of as "imperialist." The OECD member nations are drawn from the developed economies, such as those of Europe and Japan.<sup>63</sup> It is very difficult to characterize developed European nations such as Britain, France or Germany as abject colonies subject to abuses of imperial U.S. power. For example, France and Germany certainly did not fold under substantial U.S. pressure to support the war in Iraq.<sup>64</sup> Perhaps the opponents of the FCPA would be more persuasive with more tempered language. The U.S. did aggressively push the OECD to adopt an anti-bribery convention. Whether that can be construed as "imperialist" is quite another matter.<sup>65</sup>

In any event, all the developed nations of the OECD did, finally, adopt and ratify the 1998 Anti-Bribery Convention. German businesses can no longer deduct bribes to foreign officials as legitimate business expenses (although past bribes were grandfathered into the German tax code).<sup>66</sup> The developed

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ADMIN., UPDATE OF COUNTRY DESCRIPTIONS OF TAX LEGISLATION ON THE TAX TREATMENT OF BRIBES TO FOREIGN PUBLIC OFFICIALS (2008), <http://www.oecd.org/dataoecd/42/43/37116153.pdf> (explaining that "[u]nder previous German tax law, deductions for bribes were not allowed if either the briber or the recipient had been subject to criminal penalties or criminal proceedings that were discontinued on the basis of a discretionary decision by the prosecution. New legislation adopted on 24 March 1999 deleted these procedural conditions and denied the tax deductibility of bribes."); see also Robert S. Leiken, *An End to Corruption*, WASH. POST, Apr. 16, 1996, at A15 ("If a German bribes a German he gets thrown in jail; if he bribes a foreign official he gets a tax deduction.").

63. See generally Organisation for Economic Co-operation and Development, <http://www.oecd.org> (last visited Sept. 9, 2008).

64. See generally Laura McClure, *Coalition of the Billing—or Unwilling?* SALON, May 12, 2003, [http://dir.salon.com/story/news/feature/2003/03/12/foreign\\_aid](http://dir.salon.com/story/news/feature/2003/03/12/foreign_aid); Press Release, White House, (Mar. 27, 2003) <http://www.whitehouse.gov/infocus/iraq/news/20030327-10.html>.

65. See A. Timothy Martin, *The Development of International Bribery Law*, 14 NAT. RESOURCES & ENV'T, 95, 102 (1999). See generally Organisation for Economic Co-operation and Development, *supra* note 63.

66. See Strafgesetzbuch [StGB] [Penal Code] Nov. 13, 1998, Bundesgesetzblatt [BGBl.] I at 945, §§ 334-336, 338, translated by the Federal Ministry of Justice (2001), <http://www.iuscomp.org/gla/statutes/StGB.htm>; Act on Combating Bribery of Foreign Public Officials in International Business Transactions, Sept. 10, 1998, <http://www.oecd.org/dataoecd/62/3/2377209.pdf> (German legislation implementing the Convention signed at the OECD Anti-Bribery Convention); see also U.S. DEP'T OF COMMERCE, INT'L TRADE ADMIN., ADDRESSING THE CHALLENGES OF INTERNATIONAL BRIBERY AND FAIR COMPETITION (2001), [http://tcc.export.gov/wcm/groups/marketresearch/@tcc/documents/briberyreport/exp\\_005907.pdf](http://tcc.export.gov/wcm/groups/marketresearch/@tcc/documents/briberyreport/exp_005907.pdf) (explaining the German implementing legislation and also stressing the language requiring

nations of the North now stand united, at least in principle and on paper, if not yet in actual prosecutions, that a First World MNC bribing its way into business by corrupting officials of foreign governments is and should be a crime.<sup>67</sup>

It might, however, still be possible to pursue the charge of moral imperialism on the theory that criminalizing corporate bribery of foreign officials constitutes a form of imperialism by the developed First World nations of the OECD against the developing and transition South economies. Thus the charge might be re-framed to pit the imperialist North against the colonized South as a more general matter. The actions become “unilateral” then, in the sense that the North nations have acted alone, without due consideration of the wishes of the South nations. I have not found such an argument articulated explicitly in the current English language literature, but I can certainly imagine my favorite Chinese Communist Party cadres making such an argument.

Developing nations did, however, create their own measures to address both international corporate bribery as well as the larger issue of corruption. The Organization of American States (OAS), for example, has quite an impressive Anti-Corruption Convention.<sup>68</sup> Leadership in the OAS did not come from the U.S. on this issue. Rather Latin American reformers,<sup>69</sup> concerned about the devastating effects of corruption and bribery on their own countries were and continue to be the leaders in that effort. Their efforts pre-date the OECD Convention by two years.

The Council of Europe, which includes transition economies in the former Soviet empire, also adopted anti-bribery as well as anti-corruption measures.<sup>70</sup> More recently, the Organization of African States has adopted, on paper at least, an Anti-Corruption Convention.<sup>71</sup> Asia and the Middle East have not

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future acts).

67. See generally Organisation for Economic Co-operation and Development, Anti-Bribery Convention, [http://www.oecd.org/department/0,2688,en\\_2649\\_34859\\_1\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/department/0,2688,en_2649_34859_1_1_1_1_1,00.html) (last visited Sept. 9, 2008).

68. See Inter-American Convention Against Corruption, *supra* note 15.

69. Lucinda A. Low & Jacqueline de Gramont, *The Inter-American Convention Against Corruption: Overview and Status at Three Years Since Its Inception*, 15 AM. U. INT'L L. REV. 768, 768–69 (2000); Andrea D. Bontrager Unzicker, *From Corruption to Cooperation: Globalization Brings a Multilateral Agreement Against Foreign Bribery*, 7 IND. J. GLOBAL LEGAL STUD. 655, 674 (2000).

70. See CoE Criminal Convention, *supra* note 16.

71. See African Union Convention on Preventing and Combating Corruption, *supra* note 17.



addressed the problem regionally, although the Association of South East Asian Nations (ASEAN) appears at the moment I write to be moving forward.<sup>72</sup>

Finally, the adoption of the U.N. CAC<sup>73</sup> certainly rebuts any North/South imperialism argument, since the U.N. includes developing and transitioning nations. It should be noted that U.S. support for the U.N. CAC was tepid at best under the leadership of President George W. Bush.<sup>74</sup> Certainly the United States did not even arguably bully the U.N. into adopting that Convention.

None of the contemporary anti-bribery movements can be fairly characterized as “imperialist” or “unilateral” on the basis of facts currently in the debate. The United States, as the early leader of this movement, did not profit. Indeed the United States lost valuable business in emerging economies. U.S. law places ultimate power over whether the gift/bribe is a crime solely in the hands of the foreign sovereign.<sup>75</sup> It cannot be characterized as “unilateral” U.S. action during the first two decades, given the Latin American push against bribery and corruption through the OAS, and the Council of Europe’s early actions. The most recent decade since 1998 has seen substantial participation by both developed and developing nations through the OECD and U.N. Conventions.<sup>76</sup>

Even conceding that anti-corruption measures do not meet the “imperialist” element of the charge as developed by Salbu, however, the attack may then turn to the “moral” element. It is on the “moral” element, rather than the “imperial” one, that Salbu has primarily staked out his critique. I find myself more sympathetic to that portion of his critique and I will address it

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72. See John Burton & Roel Landingin, *Scepticism Greets Asean Plans for Closer Integration*, FIN. TIMES (London), Jan. 15, 2007, available at <http://www.ft.com/cms/s/0/ef162116-a43c-11db-bec4-0000779e2340.html>; Yasheng Huang & Bernard Yeung, *Asean's Institutions are Still in Poor Shape*, FIN. TIMES (London), Sept. 1, 2004, available at <http://www.ft.com/cms/s/1/442393f6-fc41-11d8-bb3a-00000e2511c8.html>; see also Richard McGregor, *Corruption Poses 'Lethal Threat' to China*, FIN. TIMES (London), Oct. 10, 2007, available at <http://www.ft.com/cms/s/0/3dbe4178-774a-11dc-9de8-0000779fd2ac.html>.

73. See United Nations Convention Against Corruption, *supra* note 13.

74. Paul Lewis, *A World Fed Up with Bribes: Nations Begin Following U.S. Curbs on Corruption*, N.Y. TIMES, Nov. 28, 1996, at D1.

75. See A. Timothy Martin, *The Development of International Bribery Law*, 11–13 available at <http://www.transparency.ca/Reports/Readings/SR-G02.pdf>.

76. See Julie B. Nesbit, Note, *Transnational Bribery of Foreign Officials: A New Threat to the Future of Democracy*, 31 VAND. J. OF TRANSNAT'L. L. 1273, 1298–1300, 1306–07 (1998).

in some detail below. Before we turn to the “moral” element as explicated by Salbu, however, I would like to examine two substantially different approaches to the charge of imperialism.

## B. THE WOLF IN SHEEP’S CLOTHING

Because the charge of moral imperialism is widespread among non-U.S. actors and the educated elites of developing and transition economies most directly affected by international bribery, it deserves a more substantive development than that provided by Salbu. A more significant critique of the anti-bribery campaigns comes from the new left approach of the critical legal studies (CLS) jurisprudence. Harvard Law Professor David Kennedy, a leading CLS scholar, provides a very different version than Salbu of the moral imperialism critique of anti-bribery reforms.

Kennedy’s approach is to de-construct the rhetoric of the anti-corruption campaigns, revealing the underlying political and economic agenda of supply-side free trade Reaganomics.<sup>77</sup> It is primarily an ideological tool rather than a substantive policy to be enforced in his view: “[M]y own instinct is that the anti-corruption campaign is vastly more significant as an ideological tool than as a policy to reduce departures from the rule of law or advance development.”<sup>78</sup> This ideology of reform is used primarily as a device to cover up an underlying agenda of supply-side free trade economics: “[T]he anti-corruption campaign gets all mixed up with a broader program of privatization, deregulation and free trade.”<sup>79</sup>

Like Salbu, Kennedy’s initial approach here is guilt by association. Where Salbu trots out the infamous segregationist Jesse Helms, Kennedy trots out free trade Reaganomics. Unlike Salbu, however, Kennedy does not end his analysis of imperialism there.<sup>80</sup> The problem in Kennedy’s view is the tone of moral certainty employed in the anti-bribery campaigns. By drawing on the nearly universal moral condemnation of corruption, combined with the economic impact arguments, anti-bribery advocates in Kennedy’s view insulate their position from criticism, masking the underlying critiques of global free

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77. See David Kennedy, *The International Anti-Corruption Campaign*, 14 *CONN. J. INT’L L.* 455 (1999).

78. *Id.* at 459.

79. *Id.* at 459, 461.

80. Compare Kennedy, *supra* note 77, with Salbu, *supra* note 34, at 441.

trade/privatization capitalism. Or as Kennedy himself puts it: "the anti-corruption campaign transforms the politically or ideologically contestable into the technically necessary and the morally imperative. Corruption works against and reinforces an idea about the 'normal' arrangement of entitlements."<sup>81</sup>

Transforming fundamentally and deeply contested ideas about free trade into "technically necessary"<sup>82</sup> and "morally imperative" ones about corruption constitutes the core of Kennedy's critique of the anti-corruption campaigns' rhetoric. Free trade supply-side Reaganomics might be good ideas, but they certainly do not constitute a universally agreed upon approach, as the many economic and political critics both in the United States and in developing economies of the North American Free Trade Agreement (NAFTA) and Central American Free Trade Agreement (CAFTA), to name a few, demonstrate on a more or less regular basis.<sup>83</sup> The World Bank and the International Monetary Fund now appear to agree, at least in the Soviet transition context, that unregulated privatization in the absence of developed civil society and rule of law presented opportunities for widespread bribery and corruption that undermined the economy and development of Russia.<sup>84</sup> Others continue, of course, to vigorously support the basic Reaganomics supply-side free trade privatization approach.<sup>85</sup>

Kennedy's point is that the free trade/privatization approach is itself hotly contested, and that anti-corruption-universal-values rhetoric masks an underlying political and

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81. Kennedy, *supra* note 77, at 461-62.

82. *Id.* at 460-61 (explaining that "even where post-colonial elites play by the rules, the rules by which they play are too discretionary to conform to the rule of law and this discretionary margin is exercised in ways which discriminates against outside capital. It is in this sense that their economies lack 'transparency,' and in this sense that their legal systems depart from the rule of law.")

83. See, e.g., JOSEPH E. STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* (W.W. Norton & Co. 2002).

84. See JOINT REPORT OF THE INT'L MONETARY FUND, WORLD BANK, EUROPEAN BANK FOR RECONSTRUCTION & DEVELOPMENT, AND ASIAN DEVELOPMENT BANK, *Report on Progress Under CIS-7 Initiative*, at 14 ¶ 29, Rep. No. 25758 (Apr. 7, 2003), available at [http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2003/04/25/000094946\\_03041204014388/Rendered/PDF/multi0page.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2003/04/25/000094946_03041204014388/Rendered/PDF/multi0page.pdf); Thomas C. Dawson, *Globalization, the Transition Economies, and the IMF*, INT'L MONETARY FUND [IMF] (Mar. 14, 2003) <http://www.imf.org/external/np/speeches/2003/031403.htm>.

85. See, e.g., *The State as Owner: Re-Bonjour, Monsieur Colbert*, *ECONOMIST*, Oct. 25, 2008 at 18.

economic agenda, presenting something as morally correct and technically necessary. This precludes debate on the underlying agenda.<sup>86</sup>

Kennedy's critique is much more serious for the anti-bribery campaign. An idea which is probably a good idea, eliminating corruption, is being used as cover to insulate controversial economic and political policies from debate. The anti-corruption campaign, in Kennedy's view, is like the archetypical wolf in sheep's clothing. In Kennedy's telling of the tale, the anti-corruption campaigners may be manipulative, or they may be dupes, but they certainly cannot claim the moral high ground. They are in collusion with economic imperialists exploiting developing economies.<sup>87</sup>

Thus Kennedy's view is that the anti-bribery movement is "moralistic"<sup>88</sup> in the sense that it deploys allegedly universally shared values against corruption, utilizing a grand tone of moral condemnation which virtually precludes opposition. How could anyone actually favor bribery and corruption? The anti-corruption campaign becomes "imperialistic"<sup>89</sup> in the classic old-left sense of developed North nations forcing a particular economic and political free trade regime on the colonies of the undeveloped South.<sup>90</sup> Kennedy himself states that "[a]nti-corruption campaigning often mixes moral opprobrium with both economic theory (corruption stunts development) and faith in a universalist and rational rule of law. This can be a dangerous ideological mix."<sup>91</sup>

The response to Kennedy's challenge has been astonishingly muted. The business ethics professors so deeply engaged in the anti-corruption debate on both sides have largely ignored him. This may be due to Kennedy's foray into the world of anti-corruption debates appears to have been a one-off single, relatively casual effort as a commentator at a symposium. Kennedy himself does not appear to have continued pressing the point. It may be that the business school professors are reluctant to challenge the hierarchical prestige of a full professor at the Harvard Law School who possesses an endowed

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86. Kennedy, *supra* note 77.

87. *See id.*

88. The "opposition to the anti-corruption campaign often seizes on what seems a stigmatizing moral tone in the campaign that makes the effort seem unfair to the periphery." *Id.* at 458.

89. *Id.* at 462.

90. *See id.* at 464-65.

91. *Id.* at 458.

chair, particularly one with an incisive mind and a notoriously sharp tongue who thrives on hand to hand intellectual combat. Or it may be that professors in a business school environment simply dismiss CLS jurisprudence, particularly in the context of a critique of global free trade capitalism, as silly and irrelevant. The few who do even mention Kennedy's article on the topic simply drop a footnote without attempting to engage on the substance.

Avoiding the Kennedy challenge instead of rebutting it is a mistake for those involved in the anti-corruption debates. The resistance to and outright rejection of international anti-bribery techniques is fundamentally a hearts and minds campaign. It cannot be won unilaterally by disciplining the supply-side bribe givers in Western MNCs. It takes two parties to make a bribe work. Both bribe givers and bribe takers are intimately involved here. While Kennedy's CLS critique may not speak to a business oriented American audience of potential bribe givers, this type of argument resonates deeply in the developing and transitioning economies which are most directly affected by grand corruption and where the bribe takers live.<sup>92</sup>

Professor Balakrishnan Rajagopal, for example, articulates what he terms a "critical development theory" which draws upon and expands the CLS critique.<sup>93</sup> Where Kennedy obfuscates harsh points with elegant prose, Rajagopal employs a more far-reaching attack couched in postmodern Foucaultian theory/jargon of the unabashed critic of global capitalism. The underlying points are much the same.

Anti-corruption reform efforts, in Rajagopal's view, are "elitist, statist and Eurocentric."<sup>94</sup> While such language is unlikely to win hearts and minds inside American business or law schools, it is very effective among the elites in places like China with socialist traditions which promote rabid nationalism. There are obviously other places where anti-American feelings run much higher than China, such as among developing/transition economies suffering the very real pains of global capitalism, and of course in some Muslim countries, particularly after the American invasion of Iraq. It is this charge of moral imperialism which a truly global anti-bribery

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92. See, e.g., Kenneth U. Surjadinata, Comment, *Revisiting Corrupt Practices from a Market Perspective*, 12 EMORY INT'L L. REV. 1021, 1028-37 (1998).

93. Balakrishnan Rajagopal, *Corruption, Legitimacy and Human Rights: The Dialectic of the Relationship*, 14 CONN. J. INT'L L. 495, 496 (1999).

94. *Id.*

reform effort must address if it is to reach beyond the narrow circle of Northern corporate and legal elites.

The anti-bribery discourse, in Rajagopol's view, is an attempt to shift the blame for increasing poverty and misery in the South from the North onto the victims themselves.<sup>95</sup> Free trade and open markets promoted by the North or developed nations have caused immense misery in these South nations. The rising tide has not lifted all boats, in fact the rising tide has exacerbated the gap between rich and poor in developing and transition economies in this view. Rather than face the actual consequences of the failures of global capitalism, Rajagopol's view is that the blame for the failures is shifted away from the developed nations of the North and their multinational corporate predators, using anti-corruption rhetoric to blame the impoverished victims of the South:<sup>96</sup> "But for corruption, the belief goes, development would benefit all, everyone would enjoy rights, rule of law would flourish, and democracy would actually constrain power."<sup>97</sup>

Thus Rajagopol, like Kennedy, views corruption discourse as the malevolent imperialist wolf of free trade "development" global capitalism cloaking itself in the morally unassailable sheep's clothing rhetoric of opposing bribery and corruption. Rajagopol's second point, however, goes substantially beyond Kennedy's approach. Rajagopol invokes the central issue of legitimacy of the South nation states in the context of the anti-corruption movements, drawing an explicit parallel between human rights and anti-corruption movements.<sup>98</sup>

It would appear as though the two discourses of corruption and human rights are remarkably similar. They do not merely delegitimize the state, as it is commonly asserted. They delegitimize a particular kind of state, performing particular kinds of functions; but more importantly, they re-legitimize certain other ideas, institutions and phenomena.<sup>99</sup>

While Kennedy focuses primarily on the ideological content of the identity cloaking mechanism of anti-corruption language, Rajagopol emphasizes the effect of anti-corruption campaigns on the legitimacy of certain nation states (presumably more

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95. See *id.* at 502–03.

96. *Id.*

97. *Id.* at 503.

98. *Id.* at 502.

99. *Id.*

socialist regimes) in the South.<sup>100</sup> At the same time, among favored South nations who adhere more closely to the free trade North's agenda, development "proliferates" the ruling group while anti-corruption discourse "gives the appearance of something being done, distracting, co-opting and undermining substantive efforts to address the true causes of illegitimacy of the state which is the vast numbers of dis-empowered and poverty stricken."<sup>101</sup>

Not only does the anti-corruption discourse mask a free-trade pro-development global capitalism agenda, in Rajagopol's view, it also deflects and diverts attention away from efforts to ensure more truly legitimate nation states in the South.<sup>102</sup> The process of selective legitimation works by simultaneously delegitimizing socialist South nations by affixing the judgment of corruption, while at the same time holding out the false promise that if only the corruption problem could be fixed, the free trade South nations would then better serve their own poverty stricken masses.<sup>103</sup>

Rajagopol's third and final major attack on the campaigns to combat corruption targets the international reformers themselves. In his view, the reformers are also imperial profiteers, exploiting the victims of the South, and rewarding themselves with cushy jobs, grants and purchases of expensive infrastructure such as computers, which are unwise as well as futile expenditures in such deeply poverty stricken areas.<sup>104</sup>

Rajagopol's critique in a nutshell is that the anti-corruption campaigns: (1) cloak Northern free trade/privatization /development imperialist agendas; (2) undermine the legitimacy of South nations which do not follow the North's agenda by affixing the label "corrupt"; while (3) simultaneously legitimizing and shoring up South nations that do follow the North's agenda by holding out the false promise of corruption reform alleviating widespread poverty created by global capitalism; and (4) divert scarce resources and reform energy into Northern consultants' and technocrats' personal career

100. *Id.*

101. *Id.* at 503-505.

102. *Id.*

103. *Id.*

104. *Id.* ("From this 'critical development theory' perspective, corruption discourse simply provides yet another point of insertion for new state programs and interventions that expand the power of governmentality, in a Foucaultian sense. Corruption discourse is, in this sense, yet another part of the continuing etatization of social life.").

development.<sup>105</sup> Not surprisingly, Rajagopol's critique has gone largely unanswered by the anti-bribery campaign proponents.<sup>106</sup>

Potential for rebuttal on the first point seems fairly simple. Anti-corruption campaigns are in fact not particularly tied to free trade/privatization/development imperialist corporate agendas. MNCs (the wolf/predators in Kennedy/Rajagopol's version of the story) have in fact long opposed and resisted the U.S. Foreign Corrupt Practices Act, as well as the OECD Anti-Bribery Convention. MNCs are perfectly happy to bribe their way into emerging economies, as long as they do not face legal sanctions at home.<sup>107</sup> Too often MNCs bribe their way in anyway, even with the threat of legal sanctions. Even a casual perusing of the anti-corruption literature reveals non-governmental organizations (NGOs), economists, and business ethics professors struggling mightily to persuade powerful MNCs that bribery can be reduced or eliminated without necessarily ending global trade altogether. Perhaps Kennedy and Rajagopol have misread the audience for these articles and books?

The impetus for anti-bribery campaigns did not originate with MNCs seeking free trade access to emerging economies, any more than it originated with American apartheid advocates like Jesse Helms. True believers in Reaganomics oppose any legal restrictions on free market competition; they are certainly not enthused about criminal laws banning bribes, much less the dreaded SEC reporting requirements.<sup>108</sup> Lobbyists for the MNCs have very effectively increased the mens rea intent requirement for criminal culpability in the latest amendments to the FCPA.<sup>109</sup> Nor does continuing and growing support for anti-corruption efforts come from MNCs, despite some grudging voluntary compliance soft-law efforts of a few "socially responsible" consumer product MNCs worried about reputation

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105. *Id.*

106. Salbu grants a perfunctory nod to Rajagopol. Salbu, *Critical Analysis*, *supra* note 58, at 239 ("[E]fforts to control bribery in other nations constitute moral imperialism.").

107. See generally Wenhua Shan, *From "North-South Divide" to "Private-Public Debate": Revival of the Calvo Doctrine and the Changing Landscape in International Business Law*, 27 *NW. J. INT'L L. & BUS.* 631, 656 (2007).

108. See Christopher J. Duncan, *The 1998 Foreign Corrupt Practices Act Amendments: Moral Empiricism or Moral Imperialism?* 1 *ASIAN-PAC. L. & POL'Y J.* 16, 10–11 (2000); see also M. Sornarajah, *Power and Justice: Third World Resistance in International Law*, 10 *SING. Y.B. OF INT'L L.* 19, 32 (2006).

109. International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302.



damage to their market shares along the lines of a Kathy Lee or Nike scandal. MNCs have been dragged along, more or less kicking and screaming, into the brave new world of global business ethics.

If the anti-corruption movements cannot be proved to be consciously in cahoots with Northern corporate predators, however, perhaps they can still be charged with being fools, naive liberal human rights types duped into collusion by clever free trade ideologues. This is Kennedy's critique. Certainly Rajagopal explicitly connects the international human rights movements with the anti-corruption movements. His convoluted arguments regarding selective legitimization of states echoes the standard cultural relativist defenses against universal human rights. Using noble sounding ideas to divert attention from underlying inequities caused by the North is also a standard part of the cultural relativist critique of universal human rights.

It is here that I find agreement with Rajagopal's analogy, if not his conclusion. I agree that the anti-corruption movements have much in common with human rights campaigns. In fact, I'll see Rajagopal's bet and raise him one. My thesis is that the anti-corruption campaign is a genuine global grassroots movement in its nascent stage, comparable not only to the human rights movements, but also the environmental movements. It would behoove business and legal elites in the developed economies to pay more attention to the most telling of Rajagopal's critiques, that criticizing only our enemies such as Burma or North Korea for systemic cultures of corruption while tolerating and participating in corruption with our economic allies such as Saudi Arabia, India, Mexico, or China casts significant doubt on the legitimacy of the entire project.<sup>110</sup> He implies the remedy is to abandon reform efforts altogether. With the latter suggestion I cannot in good conscience concur.

### C. GEOGRAPHIC MORALITY: THE RACE PROBLEM

The third basic approach to the charge of moral imperialism differs substantially from the simplistic Ugly American approach as well as the CLS/Foucaultian Wolf in Sheep's Clothing versions of the imperialism critique. The third approach draws from a richly detailed historical analysis of the legacy of British colonial imperialism in the specific context of

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110. Rajagopal, *supra* note 93.

international grand corruption. Professor Padideh Ala'i of American University Washington College of Law, analyzes a specific legal case in which the British House of Commons impeached the Governor-General of Bengal (Warren Hastings) on charges of corruption and bribery in 1787.<sup>111</sup> Seven years later, the British House of Lords acquitted him of all charges.<sup>112</sup> The charge of "imperialism" here is not merely propagandistic name calling. Ala'i's analysis is thoroughly grounded in a specific historical context which constitutes a classic period of British colonial "imperialism."<sup>113</sup> Ala'i argues:

[T]hat one legacy of colonialism—the "rule of geographical morality"—has infected the discussion of transnational corruption and bribery. The "rule of geographical morality" is defined as the norm by which a citizen of a country in the North may engage in acts of corruption in any country in the South, including bribery and extortion, without the attachment of any moral condemnation to those acts. It has been one of the bases by which the North has justified exploitation of the South. More importantly, *the rule of geographical morality is based on a world view that non-Christian, non-Western, and non-white individuals are fundamentally immoral and corrupt when measured by European standards.*<sup>114</sup>

Examining the specific language used by both the prosecution and the defense in the Hastings corruption impeachment proceedings, Ala'i observes the overt tone of racially based moralism. Hastings was charged by the prosecutor, Edmund Burke, of running an organized gang comprised of both British and Indians operating to systemically loot and plunder India.<sup>115</sup> The scale of corrupt profits for Hastings was grand indeed, even by the generous standards of British colonialists in India of the era.<sup>116</sup> Hastings specifically recruited "black tyrants" to run his operations because they, in Hastings' view, were easier to control and intimidate than the licentious and debauched expatriated whites.<sup>117</sup> Convicting Hastings was, according to Burke's argument, essential to preserve fundamental British values of intolerance for public

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111. Padideh Ala'i, *The Legacy of Geographical Morality and Colonialism: A Historical Assessment of the Current Crusade Against Corruption*, 33 VAND. J. TRANSNAT'L L. 877 (2000).

112. *Id.* at 883.

113. *Id.*

114. *Id.* at 881 (citations omitted) (emphasis added).

115. *Id.* at 884–85.

116. *Id.* at 885.

117. *Id.* at 884–85.

corruption,<sup>118</sup> as well as to preserve Christian moral values, and to prevent foreign corrupt practices from infecting the homeland.<sup>119</sup>

The defense of Hastings' scheme of grand corruption was primarily racially based. As Ala'i describes it:

Hastings never denied receiving payments. In his defense, he first invoked what Burke called "geographical morality," meaning "actions in Asia do not bear the same moral qualities which the same actions would bear in Europe." It was true that he had exercised arbitrary power, Hastings said, but that type of power had been thrust upon him because despotism was the only form of government that existed in Asia. Arbitrary power, Hastings argued, was in the "constitution of Asia." According to the defense, the peoples of Hindustan knew nothing but "arbitrary power," and Hastings, as Governor-General, had been obliged to behave in ways that were disagreeable to him. Hastings maintained that he had not created the corrupt system of government in India, as the prosecutors had charged, but merely inherited it.

"Therefore, the defense argued, it would be unfair to judge Hastings' actions in India by the moral standards applicable to public officials in Britain. The implication of this assertion was that the peoples of India did not deserve the same kind of government as the people of Britain; indeed, that they were incapable of understanding anything other than despotism."<sup>120</sup>

Hastings envisioned Indian Hindus and Muslims as benighted barbarians who neither knew, nor could they learn, less corrupt methods of conducting business and government. He merely inherited their corrupt culture.<sup>121</sup> Burke's contrasting view was that British Christian values of clean government are universal, not dropped at the border of India. The acquittal of Hastings by the House of Lords affirmed the

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118. *Id.* at 886 (noting that "he who would set up a system of corruption, and attempt to justify it upon the principle of utility, that man is staining not only the nature and character of office, but that which is the peculiar glory of the official and judicial character of this country; and therefore, in this House, which is eminently the guardian of the purity of all the offices of this kingdom, he ought to be called eminently and peculiarly to account." (quoting Edmund Burke, Speech in Opening, in 10 THE WORKS OF THE RIGHT HONORABLE EDMUND BURKE 7 (Little, Brown & Co. 1889))).

119. *Id.* at 886.

120. *Id.* at 887 (quoting Edmund Burke, Speech in General Reply in the Impeachment of Warren Hastings, in 9 THE WORKS OF THE RIGHT HONORABLE EDMUND BURKE 447 (Little, Brown & Co. 1889)).

121. Nichols observes a major inconsistency in Salbu's approach. Salbu assumes that Western businessmen can learn and adapt to foreign cultures, but that their counterparts, foreign officials cannot learn or adapt themselves.

racial view espoused by Hastings.<sup>122</sup>

Indeed the British anti-corruption campaign following the Hastings impeachment trial was conducted based on the racial view of Hastings, that Indians are inherently corrupt, and therefore only white, Christian, European civil servants could ensure a clean, less corrupt colonial administration.<sup>123</sup> Both the corrupt imperialists and the corruption reformers of that era alike shared the racist vision of non-white, non-Christians as inherently corrupt.<sup>124</sup>

Ala'i's critique of moral imperialism differs significantly from both the Ugly American and the Wolf in Sheep's Clothing approaches. First, Ala'i actually provides extensive evidence, not merely cherry picked isolated quotes or abstract theory/jargon, in support of her argument. Second, her evidence is set in an historical context, which is without doubt "imperial" as well as morally based. The purpose of Hastings' grand corruption, and his ultimately successful defense was to enhance the profits of the East India Company and Britain itself by looting India.<sup>125</sup>

Perhaps most importantly for modern discussions of international corruption reform, Ala'i points out that the underlying world view shared by both the corruption reformers of that era, as well as the corrupt imperialists, is based on views that in modern times we would characterize as bigotry. While the anti-corruption reformers like Burke may be charged with "moral imperialism" in their effort to apply universal British Christian values of clean government, the defenders of corruption such as Hastings are perhaps even more odious in their racially based vision of easily intimidated, compliant "black tyrants" selling out their country for relatively petty short term personal profits.<sup>126</sup>

The other two approaches to the charge of moral imperialism in modern corruption debates focus their attention solely on one side in the debate: the shortcomings of anti-corruption reformers allegedly attempting to forcibly export universal moral values of the North/developed nations onto South economies. Ala'i's historically grounded scholarship draws our attention to the real hazards of racially and

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122. Ala'i, *supra* note 111.

123. *Id.* at 892.

124. *Id.* at 893.

125. *Id.*

126. *Id.*

religiously based stereotypes about non-white, non-Christians deployed by defenders of corruption in international business as well: it is okay to bribe blacks and Asians, who are not Christians, because they are already deprived, morally benighted and less than fully human.<sup>127</sup>

This insight is significant for modern audiences in the U.S. and European business and law schools, because it forces re-examination of previously held stereotypes by all the various people participating in these debates. Certainly a parochial, naive American business or law student who is truly shocked at the idea of foreign "cultures of corruption," smug and assured in her forcible export of universal American, white, Christian free trade moral values, must re-examine the narrowness of her approach.

Equally important, however, is Ala'i's highlighting of racial stereotypes underlying the smug and unreflective "practical business" approach, which justifies bribery abroad on some simplistic version of a pseudo-utilitarian world view which abandons mutual respect at the border on the grounds that the local non-white, non-Christian culture is barbaric and fundamentally deprived. It is just practical business to bribe (non-white) foreigners, just don't try to bribe the white folks at home (Germans, Brits or Americans).<sup>128</sup>

Modern practical business people and their lawyers should not be eager to embrace Hastings' racially and religiously bigoted defense of corruption. The significance of Ala'i's historical scholarship is that it should force both naive American reformers as well as practical American business audiences to re-examine racially and religiously based stereotypes underlying both world views.

#### D. BRIBES AS REPARATIONS: A BRIBE-TAKER'S PERSPECTIVE

While Ala'i's article is important for U.S./European business and legal audiences, it may be even more significant for non-white, non-Christian, non-American (South) highly educated people involved in sophisticated international business dealings. Educated citizens of South nations often justify taking bribes from MNCs of the North on the grounds that this is morally acceptable as a type of reparations, some small payback

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127. *Id.*

128. *Id.*

for the North MNC's exploitation of the South economies.<sup>129</sup> By accepting, or perhaps even demanding, a juicy bribe from the MNC trying to do business in that country, the educated elite citizen of the South tells herself that ripping off the rich North is justified, since the rich North is ripping off the victimized South. The bribe just levels the economic playing field a little in this reparations world view.

The reparations world view of the highly educated citizen of the South is often combined with national pride. Extracting a bribe from the American MNC is a victory for the rest over the West. The clever citizen of the South has negotiated a good, tough deal by forcing the rich American corporation to pay more for whatever business they conduct in the South nation. The American MNC may be richer, but the educated citizen of the South is more clever. Face is gained by negotiating a bribe, a form of tribute to the sovereign South's pride. It's no crime to rip off rich, dumb, arrogant, aggressive Americans. No one really gets hurt, the Americans can certainly afford it; the business gets done. The cleverness of the South's citizen getting a little extra under the table, ripping off the Americans, vindicates national and personal honor. It comes with bragging rights in the home culture. Face is gained.

It comes as a real shock for those holding the reparations/national pride world view to realize the deep seated racial and religious bigotry underlying a Western businessman's willingness to bribe a non-white, non-Christian citizen of the South. The contempt in which bribe takers are viewed—as the lackeys, the “black tyrants” of Hastings and his ilk of bribe givers—is, and should be, deeply unsettling to a reparations/national pride South audience. Accepting a bribe and its concomitant view of racial and religious barbarism reinforces and implies acceptance of and collusion in some very ugly stereotypes indeed.

Highlighting a specific historical precedent and context of racial and religious bigotry against non-white, non-Christian

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129. I have not found any materials in the current literature that explicitly express this view. My sources here are multiple conversations over the past seven years with highly intelligent, educated law students from various South nations, not only China, but Argentina, Brazil, Mexico, South Korea, Taiwan, Serbia, Russia, Ghana, Nigeria and Ukraine among others. These law students are truly the best and the brightest, and highly ethical. Their parents are typically among the economic, educational and political elites of their countries, who know bribe takers and their cultural justifications well. I am deeply indebted to these students for their honesty and their invaluable insights.

people by real colonial imperialists who believed that only white European Christians were worthy of moral respect as equal human beings, Ala'i has done a tremendous service to the modern corruption debates. It is a real shame that her work is largely overlooked by other scholars in the field. While the critical theory/jargon may not resonate in the education of modern global capitalists and their lawyers, particularly those for whom English is not the native tongue, Ala'i's well written, historically specific critique highlighting racial and religious stereotypes can present a vivid and grounded vision of truly imperial attitudes of reformers, but also by those foreigners eager to bribe local leadership.

Whether the audience is a local American or European business or law school, or includes educated people from South nations, we should all be debating the real dangers of "moral imperialism" involved in ugly racial and religious stereotypes used to justify bribe giving, as well as unreflective export of American anti-bribery moral values tied to a specific economic free trade approach. Practical corporate bribe givers, as well as reformers, must re-examine the racial and religious stereotypes underlying their justifications. Educated citizens of the South, both free traders and socialists, must re-examine the stereotype re-enforcing consequences of their culture's social acceptance of bribe taking from foreigners as well.

Dismissing, out of hand, the critique of "imperialism" is unwise if we are to progress in developing legal and business ethical common ground in this era of global trade. Potential bribe givers, as well as potential bribe takers, and reformers all deserve a better education and more serious scholarly debate on this topic. While name calling and jargon are perhaps justly ignored, they reflect a deeper problem in the dynamic of global grand corruption. The use of such an emotionally laden word as "imperialism" is deeply unsettling, as it should be. Perhaps more polite language, such as Ala'i's use of Edmund Burke's phrase "geographical morality" might facilitate keeping minds open long enough to engender real communication.

All the rational economic studies in the world about the damaging effects of corruption cannot reach, much less persuade minds firmly barricaded behind ugly, unexamined stereotypes regarding race, religion, geography, or nationalist pride. As scholars, and above all as teachers, we must do better. The stakes in the modern corruption debates are very high.

## III. THE MORAL ELEMENT

## A. CULTURAL PLURALISM

Having addressed the “imperialism” element of the charge against corruption reform efforts, we can now turn our attention to the “moral” factor. Stephen Salbu again leads the scholarly critics of anti-corruption efforts developing, in a quartet of influential articles,<sup>130</sup> his thesis about the “moral” element in much greater detail than he managed on the “imperialism” element.

Salbu adopts an anthropological approach to the “moral” element, explicitly drawing from cultural anthropology methods emphasizing detached observation without value judgments, and non-interference in foreign cultures. He defines the problem in primarily anthropological terms, pointing out that in “many ways . . . corruption is a cultural construct.”<sup>131</sup> In the absence of agreement across cultures about what Salbu calls “reciprocities” only superficially understood by foreigners, externally imposed legal action carries “moral and political perils.” He warns that in a “world that acknowledges cultural pluralism,” externally imposed laws are too (morally) narrow. His proposal is cultural pluralism, tolerance for foreign cultures and customs, and avoidance of harsh legal sanctions on those attempting to do business and adapt to foreign customs.<sup>132</sup>

Cultural anthropology techniques are explicitly employed by Salbu, who advocates reducing efforts to combat bribery when MNCs are trying to do business abroad. He states: “Entering an unfamiliar cultural territory, we are tempted to assess behaviors through our own cultural lenses. Unfortunately, our assessments are often inaccurate when we evaluate activities from the outside, especially when our understanding of the systems and social structures we observe is superficial.”<sup>133</sup>

The prescription here is to adapt to the customs of the foreign culture, and to respect customs which may not be acceptable at home. Salbu adds to this cultural anthropology

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130. See generally Salbu, *Late Twentieth Century*, *supra* note 58; Salbu, *New Millennium*, *supra* note 58; Salbu, *Critical Analysis*, *supra* note 58; Salbu, *supra* note 34, at 441; Salbu, *Information Technology*, *supra* note 58.

131. Salbu, *Late Twentieth Century*, *supra* note 58, at 233.

132. See *id.* at 231, 249.

133. *Id.* at 243.



approach by drawing upon the scholarship regarding the symbolic functions of gift giving in various cultures. "Symbols are inextricably attached to their cultural milieu; symbolic functions of gift-giving protocols simply cannot be identified in a vacuum. Accordingly, the challenge of classification is best left to the internal, domestic forces that best understand cultural context. Extraterritorial tampering creates a recipe for misinterpretation of motives."<sup>134</sup>

Here Salbu stresses the central importance of the context of any gift exchanges. Indeed he challenges the fundamental claim of anti-corruption reformers by questioning whether the gift or reciprocity is understood by the recipient's culture as "corrupt" at all. Salbu explains it thus:

[W]hile all cultures eschew corruption, culture remains a critical differentiator as opinions vary on what conduct falls inside and outside of that label. The problem, then, is not getting the world to agree on whether corruption is morally reprehensible. The immediate problem is that the world is not ready to agree about what comprises corruption.<sup>135</sup>

Given the uncertain understanding of a foreigner about whether the gift/bribe is "corrupt" according to local traditions, Salbu urges the foreigners not to impose our own value systems through law until there is a more developed global consensus on what is a permissible "gift" and what constitutes a corrupt "bribe". He states:

When laws are imposed across borders, there should be considerable transnational value consensus. Otherwise, the imposition threatens to deny respect for legitimate regional value variance. Moreover, the state being imposed upon may resent the intrusion as imperialistic or even menacing, resulting in increased potential for subtle or more palpable retaliation.<sup>136</sup>

One can imagine the utility of such an eloquent lesson in basic cultural anthropology for a naive, parochial American law or business student who is deeply shocked and quick to judge the lack of basic Christian moral values by those depraved (non-white, non-Christian) bribe demanding foreigners. The poor American corporation, in this view, is generally the victim of foreign depravity bordering on blackmail and, facing criminal sanctions at home, the corporate victim is caught between the proverbial rock and hard place. For such a person, isolated and

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134. *Id.* at 237.

135. Salbu, *supra* note 34, at 423-24.

136. Salbu, *Late Twentieth Century*, *supra* note 58, at 227.

ignorant of the cultures and mores of the rest of the world, trusting free markets and corporations, such a cautionary tale serves important pedagogical values as he or she enters the world of real life global business. We have all encountered parochial, overly sheltered students ill-prepared to function in a global business and legal setting.

A major problem with Salbu's cultural anthropology lesson on moral values in gift giving, however, is that our parochial students will not be passive outside observers taking scholarly notes for an academic book on some exotic culture. These students will soon be attempting to transact real life business deals, ensuring their economic and legal viability, across vast cultural differences. Salbu's prescription, tolerance for diverse values, quickly transforms in the pressure cooker of real life business and law, into going along to get along.

The cultural pluralism/tolerance for others lesson could easily transform into intellectual window dressing to avoid the very real unease felt by Americans presented with a clash of cultural values about bribing foreigner officials to do business. Pressured to get the deal done, not wanting to be the "Ugly American," the student abandons his or her ethics altogether. This student, under Salbu's pedagogy, is transformed from one with too many, too narrow, moral values into a lawyer or businessperson who has no values at all except for the bottom line of getting the deal done, bribing with impunity and trying to structure the deals so as not to get caught. Nixon should have just erased the tapes in this cynical, amoral world view. This would not be the preferred outcome for those who are attempting to teach business or legal ethics.

Salbu's pedagogical approach, in attempting to rid ourselves of one type of ugly American, creates in its stead another, arguably even more damaging one. Helms' sanctimonious moral opprobrium is ugly. But so is naive acceptance of the cultural pluralism argument, that it is not only practical, but intellectually, morally, culturally respectful to bribe foreign governments. If one accepts the economic arguments that grand corruption exacerbates poverty, the costs of moral opprobrium cannot outweigh the costs of increasing global poverty. Add to this the ghost of Hastings' racial stereotypes, and it becomes very difficult to complacently accept the cultural pluralist blandishments.

## B. ORIENTALISM

The cultural pluralist vision is often accompanied by a romantic, abstract, utopian view of the foreign cultural exchange in question.<sup>137</sup> Salbu falls prey to this trap. In Salbu's vision, the bribes are "reciprocities," gifts exchanged with lovely rituals between visiting dignitaries and their foreign counterparts. Salbu describes it thus:

Far from seeking to corrupt decision-making processes, gift-giving may include both "exchange rituals," in which a gift-giver chooses to give an item endowed with certain symbolic properties; and "possession rituals," in which the recipient acknowledges these symbolic properties but also personalizes the meaning of the item. In this context, gift-giving supports a social, relationship-building function.<sup>138</sup>

One is led to imagine a charming Japanese tea ceremony complete with kimono-clad geishas, in which the visiting Western foreigner ceremoniously presents an antique jewel encrusted sword to the local Asian official. These are the "reciprocities" endowed with symbolic value of great potentates engaged in diplomatic "possession rituals".

Reality is more sordid. In modern global grand corruption, the "exchange ritual" is more likely to be very large sums of cash electronically transferred through blind trusts through various shell banks around the globe before it comes to rest to a Singapore, Dubai or Swiss numbered secret account in a private bank.<sup>139</sup> The difference between reality and Salbu's imaginary, romantic exchange ritual is very simple. Real "exchange rituals" are performed in the open, with ceremony. Bribes are by definition secret.

Salbu has fallen prey to what the highly respected scholar of inter-cultural relations, Edward Said, describes as the tendency of Western people to project their own romantic, utopian visions, as well as their worst fears, onto the far away, exotic imaginary foreign cultures of the East. "Orientalism,"<sup>140</sup>

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137. SAID, *supra* note 1; SAID, *supra* note 38.

138. Salbu, *Late Twentieth Century*, *supra* note 58, at 236, 249.

139. See, e.g., *U.S. v. Giffen*, 473 F. 3d 30 (2d Cir. 2006), where James H. Giffen, a U.S. lawyer and New York merchant banker, was charged with paying more than 80 million U.S. dollars to the President of Kazakhstan for oil contracts. The money was allegedly laundered through various shell corporations and trusts set up for the benefit of the President of Kazakhstan and his cronies by Giffen at banks around the world.

140. See SAID, *supra* note 1, at 12 ("Indeed, my real argument is that Orientalism is—and does not simply represent—a considerable dimension of modern political-intellectual culture, and as such has less to do with the Orient than it does

Salbu's division of cultures, between those with widespread "gift" giving traditions and the Western/Northern cultures which view these as "bribes" provides a classic example of the dangers of posing binary dichotomies; the "us/them" trap. Or as Said describes it:

I mean to ask whether there is any way of avoiding the hostility expressed by the division, say, of men into 'us' (Westerners) and 'they' (Orientals). For such divisions are generalities whose use historically and actually has been . . . usually towards not especially admirable ends. When one uses categories like Oriental and Western as both the starting and the end points of analysis, research, public policy . . . the result is usually to polarize the distinction . . . and limit the human encounter.<sup>141</sup>

The problem of dividing the world into us/them dichotomies is compounded by the problem of generalizing each "group" into abstraction. This generalization of groups traps the analyst into stereotypes which try to reduce each group to some core or essential characteristics, along the lines of the famous essentialist stereotype that white men can't dance when we know perfectly well that in fact some white men can indeed dance well. Is it that they "can't" or that they won't or shouldn't? And what is "dance"? Or "white" for that matter? Or even, dare we ask "men"?

Edward Said describes the problem of essentializing based on dichotomous group stereotypes more eloquently. "[T]he culturally sanctioned habit of deploying large generalizations by which reality is divided into various collectives: languages, races, types, colors, mentalities, each category being not so much a neutral designation as an evaluative interpretation."<sup>142</sup> Although Said, like Salbu, is concerned primarily with the negative portrayals of non-Western people by folks who agree with Jesse Helms' view of the non-white world, Said also addresses the problem of romantic essentializing which views the "other" culture as possessing some ancient mystical wisdom:

"The principal feature of mythic discourse is that it conceals its own origins as well as those of what it describes. 'Arabs' are presented in the imagery of static, almost ideal types, and neither as creatures with a potential in the process of being realized nor as history being made."<sup>143</sup>

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with 'our' world.") *Id.* at 12; SAID, *supra* note 38.

141. SAID, *supra* note 1, at 45-46.

142. *Id.* at 227.

143. *Id.* at 321.

Representations based on group stereotypes founded on a sharp divide between 'us' and 'them' have a tendency to take on a life of their own, to enter the discussion and in so doing to actually frame the ways we understand and eventually how we act in a particular event. That is, the idea ends up creating the reality originally imagined. This is particularly true where the representations are made with the authority of scholarship, or public policy.<sup>144</sup> It becomes, as Said describes it (paraphrasing Flaubert), an *idée reçue*.

Salbu's portrayal of an idealized "other" world where "exchanging reciprocities" harks back to ancient and traditional customs could indeed create an actual world where lawyers or business people representing MNCs tell themselves that by bribing foreign local government officials they are actually being not only practical, but morally correct, racially tolerant and non-imperialistic.

### C. NORMATIVE REGIMES AND COUNTRY CLUB VALUES

Salbu's anthropology/cultural pluralism thesis has spawned considerable scholarship. One clever variation on Salbu's argument draws from the law and economics literature, arguing that anti-corruption efforts do not need to be framed as a "moral" issue at all. Instead they can be framed as a "normative regime." Emphasizing the socializing effects of group norms, this can roughly be characterized as the country club approach.<sup>145</sup> This approach is not a rebuttal to Salbu, rather it attempts to soften his approach and deflect anti-corruption reform movements away from hard law criminal and SEC sanctions into self-policing, voluntary group "norms" surrounding gift-giving exchanges.<sup>146</sup>

Windsor provides a good example of this approach explaining that "[a] moral regime is based on intrinsic commitment to shared values, while a normative regime is based upon harmonized behavior regardless of motives."<sup>147</sup> The advantage, apparently, of re-framing the issue as "normative" instead of "moral" is that behavior can be modified even in the absence of agreement according to Windsor.<sup>148</sup> Stephan agrees

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144. *Id.* at 94.

145. *See generally* Windsor & Getz, *supra* note 6.

146. *Id.*

147. *Id.* at 769.

148. *Id.* at 735.

with the normative regime rebuttal, arguing that re-framing the issue from a “moral” to a “normative” basis produces indirect pressure to conform based on concerns about good reputation and “observed mutually beneficial behavior (good manners).”<sup>149</sup> Apparently this “normative regime” argument draws from a trend in the law and economics literature to find methods for rectifying the problems of weak legal regimes.<sup>150</sup>

Who is the audience for this argument? The actual players at the table of corruption debates one can envision supporting an attempt to distinguish “moral values” from “social norms” are the dynamic duo of bribe givers and takers themselves. The normative regime approach appears to be attempting to placate (divert? subvert?) the vigor of the very hard law (criminal/SEC sanctions) anti-corruption international movements with soft law, de-regulated, self-policing country club “norms.”

For bribe givers, the current view is too often that non-white, non-Christian cultures are already inherently, irrevocably corrupted, and that practical business requires flexible geographical morality. Peer acceptance within the country club ex-patriot culture of global corporations and their legal servants regarding the necessity of bribing local tyrants to get the job done is commonplace.<sup>151</sup> Will norm development among bribe givers will eventually progress to the point where bribing foreign governments is seen as not acceptable business as usual? Given the amount of money at stake in these global business deals, and the very real pressures on Western capitalists to turn a profit every quarter, reputation or peer pressure alone, in the absence of some real threat of hard law criminal or SEC sanctions, seems unlikely to modify such long-standing and profitable behavior.<sup>152</sup>

The soft-law voluntary normative compliance approach might appeal as well to a citizen of the South bribe taker, who believes that taking a bribe from a rich Western corporation

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149. Paul B. Stephan, *Rationality and Corruption in the Post-Socialist World*, 14 CONN. J. INT'L L. 533, 538 (1999).

150. *Id.* (“Part of the background to the law-and-economics community’s recent interest in norms are earlier studies on the role of ethnically homogenous middlemen in the context of weak legal institutions.”).

151. See Brian C. Harms, *Holding Public Officials Accountable in the International Realm: A New Multi-Layered Strategy to Combat Corruption*, 33 CORNELL INT'L L.J. 159, 169 (2000).

152. See Eric Engle, *Corporate Social Responsibility (CSR): Market-Based Remedies for International Human Rights Violations?* 40 WILLAMETTE L. REV. 103, 120–21 (2004).

serves as reparations, enhancing both personal and national honor. It allows business as usual. The bribe taker would likely not particularly care that giving a bribe might cost the corporation its reputation, its standing as a good global citizen.

In fact, any peer group price potentially paid by the Western corporation might add an extra soupçon of pleasure to a citizen of the South. To get rich is indeed glorious. To get rich while causing your Western partner to abandon his own values, pay tribute to you, make you richer, and potentially lose face with his own peers is better yet. It is an appropriately humbling as well as profitable demonstration to the West of both the cleverness and the superiority of the South culture.

One does not, of course, want one's partner to land in prison, as a matter of common human decency (even if he might secretly view one as a morally depraved pagan "black tyrant"). Absolutely one does not want one's Western corporate partner to lose its import/export license. That would interfere with business. Normative regimes are probably fine, paper tigers, maintaining a good public face. No real harm there. But actually enforcing hard law criminal sanctions is just going too far. That would be moral imperialism because it is interfering with my sovereignty, my ability to take bribes under the table, get rich, and receive humbling tributes from the Western corporation seeking to do business in my country. After all, it is my country. How dare those moral imperialist Western nations pass criminal laws which prevent their corporations from paying me tribute?

Anti-corruption reformers should be very clear that both Salbu's romantic cultural pluralism of ritual exchange gift-giving as well as country club peer pressure of the normative regime critiques are premised on the same notion. Minimizing any type of harsh legal penalties (criminal prosecutions, SEC sanctions or loss of import/export licenses) which might actually impact the bottom line of the global business transactions for both bribe givers and takers is the goal. Both approaches would prefer to replace effective criminal law enforcement with peer group pressure and evolving global village values. In the meantime, it is business as usual.<sup>153</sup>

The question for anti-corruption reformers is whether one believes that a hearts and minds approach directed at bribe givers alone, in the absence of legal and economic penalties, can

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153. Compare *supra* Part II.B with Part II.C.

modify profitable and expanding patterns of systemic global grand corruption. How long will global norm regimes take to develop enough to matter in the real world? How much damage, if any, to the poorest of the poor is actually attributable to global grand corruption in the meantime? How much damage, if any, does global grand corruption cause the rest of us? Can we be patient? Do we trust the dynamic duo of bribe givers and takers, to reform themselves in the absence of effectively enforced hard law sanctions?

Corruption reformers may wish to utilize the new apparent willingness of bribe givers and takers to adopt voluntary, peer group normative regimes as part of a larger strategy.<sup>154</sup> The leading NGO, Transparency International, is using the normative regime tactic to try to persuade the infamously corrupting oil and gas industry and two of their important client states, Nigeria and Kazakhstan, to comply with evolving global norms about grand corruption.<sup>155</sup> It is a truly noble effort. They had better hurry up, because the Chinese and the Indians are out there buying up oil as fast as they can, Russia is selling oil globally, and none of these increasingly powerful South countries enforces bans on bribery of foreign officials on their own increasingly powerful MNCs. It looks like a race to the bottom from here.

I hope you will forgive the cynicism of this grizzled old lawyer, however, if I sound a note of caution here to the corruption reformers. There is a huge amount of money involved in global grand corruption. Name and shame strategies have not been particularly successful in constraining the most egregious international human rights violators, who are in fact shameless. Nor have name and shame strategies been effective over the long term with MNCs violating basic labor or environmental standards.<sup>156</sup>

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154. The current strategy includes local, grassroots reform efforts in the South nations complying with the U.N. Anti-Corruption Convention, as well as effective hard law sanctions actually enforced by OECD nations to restrain their MNCs.

155. Dr. Peter Eigen, founder of the highly respected non-governmental organization Transparency International, recently addressed the oil and gas industry in Houston, Texas, proposing such a normative regime (voluntary and cooperative) initiative. Peter Eigen, *Fighting Corruption in a Global Economy: Transparency Initiatives in the Oil and Gas Industry*, 29 HOUS. J. INT'L L. 327 (2007).

156. See James A. Paul & Jason Garred, *Making Corporations Accountable: A Background Paper for the United Nations Financing for Development Process*, Global Policy Forum (Dec. 2000), available at <http://www.globalpolicy.org/publications/majorpapers.htm> (click on No. 18).



Peer pressure is nice, but grab them by their SEC filings, their import/export licenses or their U.S. corporate tax returns, and their hearts and minds will follow. There is just nothing like a good old fashioned "perp walk" in which a high level multinational corporate oil executive is handcuffed and marched into prison, preferably on live television, to deter the white collar criminal conspiracy of corrupting a foreign government. That is one thing you can be sure the country club crowd notices. Or as we say in China, shoot a monkey to scare a tiger.<sup>157</sup> These are not crimes of passion, they are carefully calculated conspiracies, crimes of greed, and they can be deterred. I am perfectly happy, as a law professor who trains a considerable number of future law enforcement people in the U.S. and in China, to play the role of bad cop, allowing business ethics professors and leaders of the NGOs to maintain their stances as the good cop of soft law normative regimes.

Prosecutors will most likely be able, with proper training, to distinguish between ritual exchange of gifts in the form of banquets or an expensive bottle of scotch or sake, and wiring millions of dollars in cash to a secret private Swiss bank account in the name of the official's brother-in-law's cousin. One assumes the global capitalists and their lawyers possess at least as much common sense. Suspending the import/export license of the Western corporation would, I promise, be noticed by both the Southern and Northern business partners. It would not be business as usual.

#### D. UNIVERSAL VALUES AND EMPIRICAL DATA

There are two major rebuttals to the charges of moral imperialism/lack of globally accepted norms that are already well developed in the current business ethics scholarship. The first argues that the global norm or moral value of condemning bribery is in fact universal. These scholars emphasize that all major religions and ethical systems condemn bribery and corruption. Judge John Noonan's landmark book provides the

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157. I am not advocating capital punishment for bribery in the West, although the Chinese actually do it, so far only to their own citizens. Generally prison terms are thought sufficient in the West to alter corporate practices. Whether the Chinese would execute a foreigner for bribery remains to be seen. "Overseas" Chinese, American Born Chinese (ABCs), or Taiwanese are the most likely candidates for the first executions of "foreigners" for bribery in China. You should have seen the faces of the international corporate lawyers at the Boston Bar Association roundtable on Chinese law when I mentioned that bribery is a capital crime in China.

early leading modern scholarship on this point.<sup>158</sup> After exploring the ancient roots of the condemnation of bribery back to the Code of Hammurabi, Judge Noonan explains that condemnation of bribery is not exclusively a “Christian” value, it is a value shared by the older religions (Hinduism and Judaism) as well as the newer ones (Islam and Buddhism). It is a value shared by both ethical and religious strands of Confucianism and Taoism in Asia. There is a fairly strong case that condemning bribery is a “universal” moral value if one believes that morals are related to religious and ethical traditional teachings.

The second rebuttal involves an empirical approach. If the moral value opposing bribery is already widely shared in non-Western, non-white, non-Christian cultures of developing and transition economies, international corruption reform efforts cannot be rejected solely on the grounds that they constitute moral imperialism. Empirical data is beginning to be developed regarding whether such a broadly shared, contemporary, cross-cultural value about bribery does or does not exist. The empirical approach has great potential for developing carefully targeted and culturally appropriate corruption reform efforts in the interests of local ordinary people in the South by asking directly what citizens of South nations think about bribery and corruption.<sup>159</sup>

Professor Philip Nichols, the leading Western business ethics scholar of corruption reform, together with Professors George Seidel and Matthew Kasdin, have launched a very ambitious project to quantitatively measure contemporary attitudes about corruption and bribery in several very diverse transition economies, specifically Bulgaria, Mongolia and Kazakhstan.

Noting the gap in the primarily theoretical legal literature, Nichols emphasizes the importance of developing empirical data measuring the actual, contemporary perceptions and

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158. NOONAN, *supra* note 37. Judge Noonan’s scholarship on this issue is required reading for anyone interested in the history or the religious and ethical contexts. See also RUSS VERSTEEG, *EARLY MESOPOTAMIAN LAW* (Carolina Academic Press 2000); RUSS VERSTEEG, *LAW IN ANCIENT EGYPT* (Carolina Academic Press 2002); and RUSS VERSTEEG, *LAW IN THE ANCIENT WORLD* (Carolina Academic Press 2002) for discussions of early cases regarding bribery, particularly of judges.

159. See [http://www.transparency.org/policy\\_research/surveys\\_indices/cpi/2007](http://www.transparency.org/policy_research/surveys_indices/cpi/2007). See generally Philip M. Nichols, *The Fit Between to the International Corruption Regime and Indigenous Perceptions of Corruption in Kazakhstan*, 22 U. PA. J. INT’L ECON. L. 863 (2001).

understandings of people in diverse cultures.

An understanding of other attitudes and perceptions is necessary to deal with issues of imperialism, economic efficiency and allocation, and institutional choice. Most interesting is the need for an empirical evaluation of the anecdotal but very persistent notion that corruption is embraced and accepted by some cultures—that it is a normal way of doing business in some cultures.<sup>160</sup>

The empirical surveys were developed and administered by people who were living or teaching in the country. All are set in a specific historical and cultural context. None of these cultures have yet experienced a deep penetration of Western products and mores. Mongolia, for example, did not even have one single McDonald's restaurant as of my latest visit in 2000; most people were wearing traditional clothing, no GAP or Levi's store had opened.<sup>161</sup>

The findings are remarkable. In Bulgaria and Mongolia, the empirical data indicated substantial convergence on local values about bribery, despite the very different cultures, religions and histories of these two nations.<sup>162</sup> Nichols reports that:

[t]he similarity in the understanding of corruption evidenced by the two sets of responses stands out. When presented with the same menu of definitions, respondents on different continents selected almost exactly the same definition of corruption. The probability that two groups would randomly arrange a menu with nine selections in an identical manner is 0.0000027.<sup>163</sup>

Nichols' study reveals that the people surveyed in Kazakhstan believed that corruption was extremely harmful behavior and wished that their government would try to combat

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160. Nichols, *supra* note 159, at 951.

161. See *McDonalds in Mongolia*, MONGOLIA WEB, Mar. 4, 2007, <http://www.mongolia-web.com/content/view/926/2/>; see also GAP Website Store Locator, <http://www.gap.com/customerService/storeLocator.do?mlink=5058,897898,3&clink=897898> (last visited Sept. 9, 2008) (no selection for Mongolia); Levi's Store Locator, [www.ap.levi.com/store\\_locator.asp](http://www.ap.levi.com/store_locator.asp) (last visited Sept. 9, 2008) (no selection for Mongolia); McDonald's Website Store Locator <http://www.mcdonalds.com/> (last visited Sept. 9, 2008) (no selection for Mongolia).

162. While both Bulgaria and Mongolia are economies currently making the transition from Soviet domination, Bulgaria is predominately European Serbian Catholic culture, while Mongolia is an Asian culture primarily practicing Tibetan Buddhism.

163. Philip M. Nichols et al., *Corruption as a Pan-Cultural Phenomenon: An Empirical Study in Countries at Opposite Ends of the Former Soviet Empire*, 39 TEX. INT'L L.J. 215, 241 (2004) (footnote omitted).

it. These results indicate that attempts to change tolerance of widespread corruption are not simple academic musings exported from the West, but that the people who live daily inside these cultures themselves do not accept that bribery is a customary and harmless practice.<sup>164</sup>

Nichols does take issue with Salbu's anecdotal cultural pluralism argument that bribery is part and parcel of some allegedly cultural tradition, at least with respect to Kazakhstan: "Most broadly, the findings do not support a relativistic theory of how people understand corruption. Similarly, these findings do not support the anecdotal claim that corruption is accepted in some cultures or societies."<sup>165</sup>

Although empirical data drawn from relatively small samples in only three countries cannot prove a universally shared global value against bribery and corruption, it does provide some hard evidence to rebut both the romantic cultural relativist ritual exchange vision, as well as the pragmatic business stereotype that "cultures of corruption" in the transition economies are widely accepted by local citizens.<sup>166</sup> Undoubtedly the instruments of empirical data surveys themselves could be refined. Expansion of the survey samples within the population of these three diverse nations would help. One hopes that the empirical projects will find enough funding to expand to other nations beyond these three.

By asking local people in the South directly about bribery, corruption and their effects on ordinary lives, the empirical survey method provides some concrete assurance that global anti-corruption efforts are not hijacked by MNCs seeking to dupe naive global liberals into providing moral cover in order to implement some predatory economic agenda to enhance profits. Local people in the South nations will likely be more sensitive to the differences between culturally appropriate gift giving rituals and outright bribery than Western business or law professors operating as amateur anthropologists from afar. Normally, one hopes, people are unlikely to hold racially or religiously bigoted stereotypes about their own specific race or religion. Empirical surveys of citizens of the South provide the most reliable assurance that in discussing the problems of international bribery, we do not engage in any of the forms of moral imperialism we are warned against by the critics of corruption

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164. Nichols, *supra* note 159, at 951-52.

165. Philip M. Nichols et al., *supra* note 163, at 243 (footnotes omitted).

166. *Id.*

reform efforts.

The empirical surveys provide important rebuttal evidence on the question of whether objections to bribery and corruption are more globally shared, or primarily Western exports. This data is perhaps even more significant in providing a more nuanced and contextual vision of contemporary South citizens. Those moral imperialism critics who do focus on the culture of the South nations<sup>167</sup> employ a vision as if each culture were internally unified. Salbu's vision is of romantic, utopian exotic gift exchangers. Rajagopols' vision is of the unified, undifferentiated South citizens, all of whom are victims of the imperialist North. Their abstract approaches to moral imperialism allow them to ignore possible differences within the citizenry of the developing or transition economy.<sup>168</sup>

The empirical studies disclosed some very important class differences within the citizenry of South nations. Tolerance for bribery and corruption appears higher among the very narrow group of the top elite.<sup>169</sup> Objections to bribery and corruption increase as one moves down the economic strata. Empirical data can identify sub-groups within the society instead of imagining abstract romantic or victim visions of unified utopian cultures.<sup>170</sup> The ideology of a unitary South in the role of victim defending their customary gift giving traditions and resisting the West's moral imperialism crusades crumbles as the empirical data discloses class fissures inside the South culture:

When respondents are sorted on the basis of income a few statistically significant differences do appear. With respect to these few cases, in general it is those with the lower incomes who are less tolerant of bribery. Indeed, in some cases the differences in responses march in observable steps from lower incomes through the higher incomes.<sup>171</sup>

The very top strata of South government officials appear to have a higher acceptance of bribery and corruption than the rest of the country. As Nichols describes it, this top group, of course, is relatively small. Members of this group openly spoke of accepting bribes. Some members of this group spoke of bribes as part of the way that business is conducted in Kazakhstan.

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167. The normative regime approach basically ignores South citizens and culture, focusing instead exclusively on the bribe supply side problem of modifying multinational corporate North behaviors.

168. No statistically significant differences were found due to gender or religion. Nichols, *supra* note 159, at 951-52 (footnotes omitted).

169. *Id.* at 938.

170. *Id.* at 929.

171. *Id.* at 935.

Other members of this group spoke somewhat contemptuously of the proclivity for Western businesses to offer bribes and expressed satisfaction that they were in a position to benefit from this Western behavior.<sup>172</sup>

Nichols reports that he was told by several high-level government officials, including officials in Kazakhstan, that corruption is part of their culture. One high-level Kazakhstani official in particular, praised changes to the foreign investment code of his country because, in his opinion, it made more clear to foreign investors who they should bribe. He too stated that bribery is an accepted part of Kazakhstani culture.<sup>173</sup>

It is not surprising, therefore, that top executives of MNCs believe that bribery is a normal and accepted part of life in, say, Kazakhstan. This is what they are told by their Kazakh business partners, the elite of that South nation.<sup>174</sup> It is very important to point out to business and law students the dangers of relying on such a narrow strata of a given foreign culture in forming opinions about what is, or is not, widely culturally acceptable abroad.

Tolerance for bribery declines as rank and income levels dip. As Nichols describes it, lower level government workers, the backroom economist, proverbial tea lady, or mailroom messenger, observe but do not participate in discretionary decision-making. They do, however, observe the damaging effects of bribery. These lower level workers express “concern and frustration with the effects of what they have witnessed and their desire to change the system in which they work.”<sup>175</sup>

Lower level public employees are more open to corruption reform than higher level officials, and perhaps surprisingly for free market advocates, lower level government employees are substantially more supportive of corruption reform than the private sectors inside the country. “Rather than perceiving corruption to be a manageable problem, [lower level] government employees are more likely than others to find bribery harmful and are more likely than private sector

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172. *Id.* at 944.

173. *Id.* at 866 n.7.

174. See J. Jandosova et al., *Perceptions of Corruption in Kazakhstan by Parliamentarians, Public Officials, Private Business and Civil Society*, SANGE RESEARCH CENTRE, Aug. 2002, at 17 <http://unpan1.un.org/intradoc/groups/public/documents/UNDP/UNPAN011504.pdf>; see also Salbu, *Late Twentieth Century*, *supra* note 58, at 234.

175. Nichols, *supra* note 159, at 945.

employees to support efforts to reform corruption."<sup>176</sup>

Nichols himself seems puzzled by the apparent willingness of lower level government employees to embrace corruption reform, while reform is resisted by the private sector within the country: "These results seem counterintuitive. Government employees are the very persons engaged in public sector corruption, and yet they are more likely to find the behavior harmful and are more likely to support reform efforts [than private sector employees]."<sup>177</sup>

That support for corruption reform is higher among rank and file government workers and lower in the private sector may be a shock for our pragmatic business audience. Business oriented students sometimes believe that too much government is always the problem.

The empirical data developed by Nichols and his colleagues seems to cast doubt on this world view, at least with respect to corruption. The moral divide regarding whether corruption is acceptable or condemned does not appear to be primarily based on public versus private sector employment, any more than it appears to vary based on geography, race, gender or religion. Instead, tolerance for bribery appears to be based on economic rank. Wealthy top elites, whether operating in the public or the private sectors, whether Western or from South nations, appear to believe that bribery is more acceptable, while lower economic classes globally, whether employed in the public or private sectors, believe that corruption is harmful and should be reformed.<sup>178</sup>

While I am suggesting that tolerance for corruption may significantly be an issue of class, rather than one of geography, national origin, race, religion, public versus private sector employment, or economic ideology, I do not wish to overstate the case. The actual data so far is relatively un-developed. Nichols' samples are small, and only from three relatively small economies. The class correlation is significant, but not necessarily dispositive. Other factors may be in play. Additional empirical data on the question of class attitudes toward bribery and corruption, in both the North and South, would be most helpful.

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176. *Id.* at 942.

177. *Id.* at 943.

178. *Id.*

## IV. THE DYNAMIC DUO: BRIBE GIVERS AND TAKERS

## A. A MUTUALLY BENEFICIAL HARMLESS TRANSACTION

The results of the early data do make intuitive sense if one views international bribery as a mutually beneficial transaction between the elites of North and South, the dynamic duo of elite bribe givers and elite bribe takers. Bearing in mind Nichols' admonition against over reliance on anecdotal experience, I will say that viewing international bribery as a partnership between the elite Northern corporate interests and South elite officials with their "private sector" elite relatives is a very realistic version of what I have observed in China. Lawyers advising U.S. corporations doing business in China agree,<sup>179</sup> as do other respected China watchers, such as Andrew White of the University of Melbourne, Australia. White describes the phenomena as a distinct form of "Chinese capitalism," a *guanxi*<sup>180</sup> based rule of relationships, clientelism and corporatism. Importantly, "[w]hat they all share in common is an emphasis on relationships as a substitute for rule of law."<sup>181</sup> Corruption itself, however, is also a significant factor fueling economic growth. White observes that the Chinese Communist Party uses corruption as a form of "bonus" or "incentive" program to encourage greater economic performance by public officials. Thus, public officials who work hard and contribute the most economically may also get the most back in bribes and "facilitation" fees. Public officials also are incentivized to undertake local development projects, and to attract both domestic and foreign investment in those projects, by the

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179. Judith A. Lee and James D. Slear, *Unique Problems with FCPA Compliance in the People's Republic of China*, 16 BUS. L. TODAY 15, 15-16 (2007) (footnotes omitted).

180. Loosely translated as "relationship" or "connections". For insightful discussions of the differences and overlap between the notions of *guanxi* and corruption, see Stanley Lubman, *Looking for Law in China*, 20 COLUM. J. ASIAN L. 1, 71-77 (2006); Randall Peerenboom, *The X-Files: Past and Present Portrayals of China's Alien Legal System*, 2 WASH. U. GLOBAL STUD. L. REV. 37, nn.130 & 134 (2003); Pitman B. Potter, *Guanxi and the PRC Legal System: From Contradiction to Complementarity*, in SOCIAL CONNECTIONS IN CHINA: INSTITUTIONS, CULTURE AND THE CHANGING NATURE OF GUANXI 179, 188 (Thomas Gold et al. eds., 2002); see also Elizabeth Spahn, *As Soft As Tofu: Consumer Product Defamation on the Chinese Internet*, 39 VAND. J. TRANSNAT'L L. 865, 899 (2006).

181. Andrew White, *The Paradox of Corruption as Antithesis to Economic Development: Does Corruption Undermine Economic Development in China and Indonesia and Why are the Experiences Different in Each Country?*, 8 ASIAN-PAC. L. & POL'Y J. 1, 29 (2006).



opportunity to benefit from corrupt payments they will receive. While misallocation of scarce resources and an incoherent distribution according to competing local interests, rather than fundamental market principles, may distort the economy in the long run, corruption does push the economy forward in the short run.

Partly as a result of enthusiastic economic development efforts by local officials who stand to gain from increased rent-seeking opportunities, and partly due to a "lemming effect" by foreign investors, much of the economic growth in China is attributed to foreign investors who are flocking to invest there, despite the rampant corruption. In the past, many foreign investors lacked sufficient information with which to make a well-reasoned and informed decision about investing in China. They invested despite the risks and difficulties involved in navigating a corrupt and unpredictable landscape. But it has also been observed that ignorance, more recently, may not be the only excuse.<sup>182</sup>

White's thoughtful description of the story of the dynamic duo of bribe givers and bribe takers paints a realistic, if relatively benign, picture of the mutually beneficial transaction as viewed by the parties themselves: Officials tolerate or even encourage corruption to subsidize the costs of government, with bribes serving as a form of bonus or incentive to counteract very low government salaries. Foreign businesses are lured into the risky practice, hypnotized by the fictitious promise of access to a 1.3 billion person market. They are reassured by their Chinese elite counterparts that bribery is the traditional customary practice.<sup>183</sup> Perhaps the foreign business person studied ethics in school with a Salbu-influenced cultural relativist, or Stephens and his free-the-market normative regimes. Or maybe they come from a lefty, liberal arts background which views virtually any American value with sophomoric cynicism. Everybody they know (among the elites of North and South) is giving and taking bribes.

No one gets hurt unless there is a criminal prosecution in the United States. Business thrives in this version of the story bribe givers and bribe takers tell themselves and each other. The Chinese and their U.S. business partners are thriving. Shanghai's stock market is booming, Chinese people have more

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182. *Id.* at 29–30.

183. *Id.*

jobs, and Americans can buy more stuff more cheaply. A classic win-win, once we get past those ridiculous Puritanical moral values about bribery and all that American legal over-regulation.

If their premise is correct, that no one gets hurt, then perhaps we should leave our Western scruples about bribery, as well as the legal regulation, at home? Systemic corruption clearly does not deter foreign investment in China,<sup>184</sup> nor does it appear to significantly impede economic growth there.<sup>185</sup> MNCs are able to function very well in China; a little *guanxi* accompanied by some very fat bribes to higher level Party members. High level Party members and their relatives get rich. Money trickles down to ordinary Chinese, and above all the regime is stable and harmonious. Americans can buy everything they want, cheaply. China pays for the war in Iraq by buying up U.S. Treasury Bonds cheaply with its trade surplus and undervalued currency. U.S. corporations with substantial operations in China are very profitable. Everybody is happy.

#### B. IS ANYONE GETTING HURT? THE TOXIC TOOTHPASTE PROBLEM

The problem is in the premise. Is anyone actually getting hurt by the dynamic duo of foreign bribe givers and domestic bribe takers in China? Let's start with the self-interest of American consumers. Toxic toothpaste, contaminated milk, lead paint on easily swallowed small parts in children's toys, fake pharmaceuticals, and poisonous pet foods are just some of this year's costs of the culture of corruption between the elite bribe givers of the U.S. corporations and their elite bribe taking counterparts in China.

A major reason many American businesses prefer to do business in China<sup>186</sup> is as much to avoid those pesky legal

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184. IMF Transcript of an Economic Forum, *Foreign Direct Investment in China: What Do We Need to Know?*, Mar. 2, 2002, <http://www.imf.org/external/np/tr/2002/tr020502.htm>; Yokun Huang, Dir., World Bank China Program, Speech at the Asian Investment Conference: Realizing China's Potential (Aug. 20, 2000) (transcript available at <http://go.worldbank.org/DHW11TN940>). China is the leading recipient of foreign direct investment after the United States. YASHENG HUANG, *SELLING CHINA: FOREIGN DIRECT INVESTMENT DURING THE REFORM ERA 6* (Cambridge Univ. Press 2003).

185. White, *supra* note 182, at 1. *But see* HUANG, *supra* note 184.

186. I am not a big fan of the current favorite book purporting to explain contemporary China to the American business and journalist communities, *China, Inc.* The author spent about six weeks there and relies mostly on secondary sources.

regulations about product safety, labor and environmental standards as it is to take advantage of low labor costs there.<sup>187</sup> China has a “favorable regulatory regime,” meaning if you, or more likely your Taiwanese/Hong Kong agent or sub-contractor, bribe the relevant Chinese officials, there is no regulatory regime actually enforced. Legal rules on paper are systemically and routinely ignored with a little red envelope stuffed with cash. Or more likely the payment will be wired to a private bank in Singapore or Switzerland. As long as you have the right relationships (with the Chinese elites), law-on-paper does not matter. It is a free marketer’s dream until the toxic toothpaste problems cause public relations nightmares, or worse, some American lawyer sues.<sup>188</sup> Or prosecutes. The Western corporation is shocked to discover that safety standards are not being enforced in China. Shocked. Dismayed. They had no idea.<sup>189</sup>

Some U.S. corporations really are trying hard to engage in meaningful compliance supervision for product safety, labor and environmental standards over products manufactured in China and other nations with weak legal regimes (high levels of corruption) such as Mexico, Malaysia, and India. This is not a purely Chinese problem by any means. It is a Herculean task, expensive and immensely difficult. Things do really fall between the cracks, despite one’s best efforts.

Corporate compliance is a growth industry for law and business students from both North and South nations seeking to enter international business. But for every MNC which takes compliance seriously (providing direct access to the CEO rather than the COO or CFO, including power to yank a contract, and independent third party inspections) there are others only too

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TED C. FISHMAN, *CHINA, INC.: HOW THE RISE OF THE NEXT SUPERPOWER CHALLENGES AMERICA AND THE WORLD* (Scribner 2005). I do highly recommend a less well known book, *Mr. China*, written by a British/American ex-patriot with more than twenty-five years experience living and doing business throughout China, not just in the coastal cities. TIM CLISSOLD, *MR. CHINA: A MEMOIR* (Harper Business 2005).

187. See Shan, *supra* note 107, at 656.

188. See Rick Weiss, *Tainted Chinese Imports Common*, WASHINGTONPOST.COM, May 20, 2007, at A1; see also Emily Friedman, *Toy Recall Has Parents Wondering ‘What’s Next?’*, ABC NEWS, Apr. 14, 2007, <http://abcnews.go.com/business/consumer/story?id=3479020&page=1>.

189. Mattel Press Release, Aug. 2, 2007, <http://www.shareholder.com/mattel/news/20070801-258085.cfm> (press release about toxic toys); Eric Lipton, *Mattel Chief Apologizes for Flawed Toy Imports*, N.Y. TIMES, Sept. 12, 2007, available at <http://www.nytimes.com/2007/09/12/business/12cnd-toys.html>.

happy to let compliance slide with a wink and a nod. Too many MNCs still have lovely compliance policies on paper, but no effective internal corporate enforcement controls which might interfere with profits. Let the factory do its own inspections. That is just the way business has always been done by those foreigners—why look a very profitable gift horse in the mouth? Don't rock the boat; be practical.

If the culture of mutually beneficial corruption between the elites of North and South is potentially harmful to American/European consumers, one would think that would be sufficient to stiffen popular support for international corruption reform. Once the soccer moms figure out that their dead children or pets were killed very literally by global corruption, I actually pity the MNCs. They are all afraid, with reason, of American soccer moms. Politicians and law enforcement professionals will take note. Even if they do not, the dreaded plaintiffs' bar trial attorneys will. Product liability class actions are every MNC's nightmare.

Exporting nations with high levels of corruption and weak (highly corrupted) legal regimes should be very afraid of American consumer response to systemic poisonings of their pets, their children, and their pharmaceutical taking ill relatives, due to an organized conspiracy to save money, increase profits and bribes. The Chinese government seemed initially to think that retaliatory strikes against American products and threats of a trade war would cause the U.S. government to tone down product safety criticism in the U.S. media.<sup>190</sup> The U.S. government of course cannot control American media reports critical of Chinese products, or consumer soccer moms and their product liability lawyers from suing about the product safety of imports. The event has the makings of a genuine global grassroots uprising once ordinary folks figure out what's going on.

Suppose, hypothetically, that we cared not only about ourselves and the safety of other Americans, but we also cared about the one billion people living in China who are desperately poor. They are not participating much in the glorious headlong dash to wealth of the elites in the sophisticated coastal cities. They are much more likely to consume toxic toothpaste or fake

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190. *China Says Some U.S. Goods Didn't Meet Safety Standards*, N.Y. TIMES, June 9, 2007, at C4. Within a few weeks the tone shifted as China acknowledged safety hazards in some of its products, David Barboza, *China Vows Food-Safety Changes*, N.Y. TIMES, June 30, 2007, at C1.

pharmaceuticals than their U.S. counterparts.<sup>191</sup> Suppose we cared about the factory workers sewing our cheap clothes in Mexico or Malaysia? Suppose we cared about the vast population in India who are not profiting from outsourcing our customer relations, telecoms, data and software industries?<sup>192</sup> Or the Nigerian village which is not profiting from oil riches, and had its water supply contaminated?<sup>193</sup> Or the Peruvian Indians who were poisoned by mercury attributable to a Colorado based multi-national gold mining operation which then escaped liability by bribing the Peruvian judiciary?<sup>194</sup> Suppose we had global ethics.

Are ordinary Chinese content with the culture of corruption espoused by Chinese elites and their Western business partners? Do they accept the culture of corruption as part of their Confucian tradition, exotic ritual reciprocities of mutual gift-giving between elites; an extension of *guanxi*? Do they resent Western efforts to control systemic bribery of their Chinese government by Western corporations as foreign interference in their ancient and honorable civilization? How do ordinary Chinese people, the backroom economist, the tea lady, the mailroom messenger, the rural farmer, the construction worker, the small Chinese entrepreneur experience this culture of mutually beneficial corruption of the elites? Is our non-elite Chinese citizen benefiting from the culture of corruption as jobs and foreign investment pour into China? Or is he too being hurt?

There is no abstract utopian simple right or wrong answer here. Like our American consumer, many ordinary Chinese citizens do benefit from global trade. It does produce cheaper goods for (American) consumers, more jobs for (Chinese) workers, more money for the new Chinese consumers to

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191. See, e.g., *Nicaragua Seizes Chinese Toothpaste*, N.Y. TIMES ONLINE, May 28, 2007, at A6 reporting shipments of contaminated toothpaste, believed to have killed 51 people in Panama, were seized. See also, David Barboza, *For 2 Chinese Kids, Ban of a Drug Came Too Late*, N.Y. TIMES, July 13, 2007, at A10; David Barboza, *When Fakery Turns Fatal*, N.Y. TIMES, June 5, 2007, at C1 (fake baby milk formula killed dozens of rural Chinese children).

192. See Amy Waldman, *More 'Can I Help You?' Jobs Migrate From U.S. to India*, N.Y. TIMES, May 11, 2003, § 1, at 4.

193. Norimitsu Onishi, *Nigeria Combustible as South's Oil Enriches North*, N.Y. TIMES, Nov. 22, 1998, § 1, at 1.

194. Lisa J. Laplante & Suzanne A. Spears, *Out of the Conflict Zone: The Case for Community Consent Processes in the Extractive Sector*, 11 YALE HUM. RTS. & DEV. L. J. 69, 103-05 (2008).

spend.<sup>195</sup> Many ordinary people in China, even those outside of the Golden Coast, are in fact much better off than they were under socialist economics; Mao's Great Leap Forward's massive famines followed by the holocaust of the Cultural Revolution.<sup>196</sup> There is no famine today in China, which makes ordinary Chinese people really a lot better off.<sup>197</sup> Like our American consumer, however, our Chinese citizen is also in danger of being harmed by toxic or contaminated products. But the potential harm for Chinese citizens in a culture of bribery, which is technically illegal but widespread in practice, has additional dimensions of danger not easily perceived by those of us in the West.<sup>198</sup>

One very thoughtful and concrete contemporary analysis is by Chinese scholar, Xin Frank He. He, educated at Peking University and Stanford, and now based at City University of Hong Kong, provides for Western people a critically important window into how the culture of elite corruption actually impacts lower level people inside China.<sup>199</sup> The key factor to watch here is erratic and selective enforcement by Chinese officials of very strict laws-on-paper in a cultural context in which laws-on-paper are routinely ignored in actual business practices based on *guanxi* relationships, reciprocities and outright bribes.

He's thesis is that erratic and selective enforcement of laws on paper increases opportunity and market value for bribe takers.<sup>200</sup> This thesis should be very significant to business and economics foreign audiences doing business in China. In addition, and perhaps even more importantly for anyone who aspires to good global ethics, he identifies the subtle way in which selective and erratic law enforcement re-enforces and solidifies authoritarian power by the local elites over the less powerful.<sup>201</sup>

Like Nichols, He uses an empirical approach, based on a small scale study of rural migrants to the outer suburbs of

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195. Robert J. Samuelson, *China's Trade Bomb*, WASH. POST, May 9, 2007, at A17.

196. See generally YUAN GAO, *BORN RED: A CHRONICLE OF THE CULTURAL REVOLUTION* (Stanford Univ. Press 1987).

197. See Sheryl WuDunn, *Beijing Journal; A Rotund Shape No Longer Means Good Fortune*, N.Y. TIMES, Aug. 27, 1991, at A4 (discussing the growing number of overweight children in China).

198. He, *supra* note 41, at 142-43

199. *Id.* at 121-22.

200. *Id.* at 138.

201. *Id.* at 137.

Beijing.<sup>202</sup> For international legal audiences, insert “foreign business” where He describes “rural migrants” and the political dynamics of bribery culture in an authoritarian regime become shockingly clear. The use of sporadic clean up campaigns is used as a tool to reinforce centralized power while allowing a quick return to business as usual.<sup>203</sup> This should be of immediate and real concern to American audiences worried about product safety of imports, as the Chinese government currently assures the United States that a major crackdown on Chinese safety standards is now underway.<sup>204</sup> These Chinese government crackdowns do not produce lasting change, but rather operate to reinforce centralized control among power holders and increase the market value of the bribes themselves while allowing a return to business as usual fairly quickly.

He’s study involves rural migrants in China who come to the large and economically prosperous cities from the impoverished countryside seeking work as construction laborers, domestic servants, restaurant staff, or factory workers. In this particular study, rural migrants establish flea-market type entrepreneurial stalls to sell clothing. Chinese peasants flocking into the cities seeking work in vast numbers are sometimes referred to as the “floating population.” The problem arises because until recently migration by peasants into the cities was carefully controlled by the government through an internal passport type registration system (*hukou*). Most of the rural people seeking work did not have the correct documents to live and work in the cities. As undocumented workers, they are vulnerable to various shake-down schemes from legal city residents, especially landlords, and of course from police, health care providers, education officials and other government workers in the cities.<sup>205</sup>

This study of erratic and selective law enforcement over rural migrant entrepreneurs unveils the larger context of law-in-action inside China: “[S]poradic law enforcement campaigns

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202. *Id.* at 123.

203. *Id.* at 137.

204. See *Legislation to Improve Consumer Product Safety for Children: Hearing on H.R. 2474, H.R. 1699, H.R. 814, and H.R. 1721 Before Subcomm. on Commerce, Trade, and Consumer Protection, 110th Cong. (2007); Consumer Product Safety Modernization Act of 2007, H.R. 4040, 110th Cong. (2007) (introduced by Comm. on Energy & Commerce and a hearing is proposed for Nov. 6, 2007); see also David Barboza, China Suspends Exports from 750 Toy Makers*, N.Y. TIMES, Nov. 2, 2007, at C3.

205. He, *supra* note 41, at 123–30.

adopted as a way of law enforcement in combating migrants shed light on similar campaigns used for many other purposes: for example, the anti-crime campaign, the recent campaign against unregistered internet cafes, and the campaign against illegal publishing businesses.”<sup>206</sup>

The central device used for surviving inside China is what Xin Frank He terms “legal collusion,” in which parties work out a *modus vivendi* enabling each to survive and profit under a legal regime of very strict law-on-paper routinely ignored as long as bribes are paid combined with erratic and selective law enforcement.<sup>207</sup> Note that the collusion involves both public officials and private landlords:

My fieldwork investigation indicates that “legal collusion” was one of the most important strategies employed by migrant entrepreneurs to overcome the hostile legal regulation and law enforcement campaigns. The key to legal collusion is the collaborative relationship between migrant entrepreneurs and local Beijing business entities or bureaucracies. In legal collusion, migrant entrepreneurs paid rents to locals, in exchange for licenses and protection. Both sides benefited from the collaboration; migrants entered the garment market with the protection of local allies, while locals gained extra income.<sup>208</sup>

The legal collusion of collaborative (bribe based) relationships to avoid strict law-on-paper should sound very familiar to Western corporations doing business in China. The sporadic “strike hard” clean up reform campaigns which periodically interrupt business are followed by loosening of enforcement efforts and a return to business as usual. He concludes that erratic and selective law enforcement reflects the different economic interests of local and central government officials.

For upper-level government, such as the Beijing municipal government and the central state, the primary concern is to maintain social stability and the legitimacy of those in power; these concerns lead to the promulgation of laws restricting migration in the first place. Lower-level governments, such as district governments, are concerned more about their immediate interests—what they can extract from the migrant economy—and thus resist sustained enforcement of the law against migrants.<sup>209</sup>

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206. *Id.* at 124.

207. *Id.*

208. *Id.* at 129–30 (footnotes omitted).

209. *Id.* at 137.



Closer examination of law enforcement reveals not a unitary public versus private mechanism, but rather competing interests inside of government, and creative legal collusion with some levels of government by both legal and illegal business enterprises.<sup>210</sup> Hopes that the Chinese government can regulate its toothpaste and toy manufacturing standards are not realistic, once one understands better how the regulatory culture actually operates. This is not a romantic ritual exchange of "reciprocities," and normative peer pressure is not likely to reform it. Both illegal acts tolerated via bribery and reform efforts/campaigns to correct illegal activity are deployed to reinforce centralized authoritarian control.<sup>211</sup>

Because lower level government officials are "stake holders" in the illegal enterprise, they cannot be relied upon to implement any tightening of law enforcement. In essence, the grass roots local law enforcement officials are business partners with the illegal enterprise. Applying He's analysis to our problem of international business bribery, the safety, environmental, or labor standards which exist on paper in formal law are routinely ignored by the business which has paid off the local enforcement officials. Dependent or at least accustomed to this source of income, the local official in essence becomes a profit-sharing partner with the business and will certainly not bite the hand that is feeding him. Thus the central government needs to send in a squad of law enforcers from the regional or central government to enforce any crackdown. The central government deployment cannot be sustained permanently, however, so the locals just lie low until the enforcement campaign passes. Then it is back to business as usual.<sup>212</sup>

This dual-play by local "versus" central government in the context of a crackdown has another very important effect, which may not be as obvious to observers in the West who are not

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210. *Id.*

211. *Id.* at 137-38.

212. Sporadic campaigns can also be looked at more cynically as tacit agreements between lower-level and upper-level governments resulting in both getting what they desire. In so doing, the upper-level government maintains social order. Campaigns indicate that the upper-level government is making efforts to enforce the law. To some extent, campaigns in Zhejiang Village pacified the potential resentment of some locals toward migrants and thus enhanced the government's popularity. On the other hand, the lower-level government continued to realize material benefits [bribes] from the migrant economy with only a temporary interruption every now and then. *Id.* at 138.

accustomed to the subtle ways in which cultures enduring systemic corruption operate. Periodic crackdowns forcefully remind the bribe-payers of the fragility of their position. When the crackdown is over, and it's back to business as usual, the local bribe-takers are in a position to demand a higher cut. Periodic and sporadic enforcement crackdowns actually increase the rent seeking opportunities and value for bribe takers.<sup>213</sup>

For Western observers we might describe this as a good cop/bad cop strategy. The benefits to upper level government officials include both direct and indirect costs. Lower level officials do not need to be paid as much by the government since bribes can be relied on to enhance earnings. If earning levels fall too low, a temporary interruption in bribe income via the crackdown campaign can be deployed with the expectation that bribe levels will be resumed at higher levels once the crackdown is over.

In addition, high level officials are the direct beneficiaries of bribe based income as lower officials pass through some portion of their bribe profits up the chain of command to ensure they can retain their lucrative positions, or perhaps even be promoted. Thus the regime of strict law-on-paper with little or no actual enforcement seriously interrupting bribe based income is deployed. Sporadic crackdowns do not in any way actually reform such a system. The net result of sporadic crackdown is to enhance the cycle of corruption and reinforce authoritarian control:

In this sense, the law has specific functions in maintaining a hierarchical social order, despite its ineffectiveness at first glance. Because of the law, the traditionally advantageous position of locals is confirmed; migrants, on the other hand, continue to suffer. The law is ultimately used as an instrument to maintain a hierarchical order, through campaigns and legal collusion. It strengthens an existing hierarchical relationship, reinforces the division between migrants and locals, and reinforces the structure of social order. The law is not just a direct, naked instrument for the state to achieve its goal. Instead, it has become a very sophisticated regime in balancing various interests

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213. *Id.* at 140–141. The sporadic campaign, therefore, may be regarded as a deliberate tactic of upper and lower levels of governments to maximize their own interests at the expense of migrants. The upper-level governments have created a social condition where legal collusion can be expected. The degree of legal collusion is controlled by the sporadic campaign strategy: this prevents collusion from getting worse, but there are reasons—for instance, economic benefits that the locals get from the migrants—not to let it get better. The upper level governments thus act as a kind of accomplice to locals in exploiting migrants. *Id.* at 142.

and maintaining social order.<sup>214</sup>

Delete “rural migrant” and insert “foreign business” and there you have it. Not from a Western rule of law human rights foreign ‘moral imperialist’ like me, but from a highly educated, honest and thoughtful Chinese scholar with a deep understanding and genuine concern regarding his own culture. We are a very long way from Salbu’s romantic version of “reciprocal exchange rituals,” or Rajagopol’s simplistic vision of a unitary victimized South.

Foreign business and legal players know that the “contributions” to local Party leaders and officials are required in order to be able to continue doing business.<sup>215</sup> Law-on-paper tends to be very strict, with many fine points to each regulation. Without the right relationships, actual enforcement would cause serious difficulties to any business. The mechanisms vary, and the results are predictable. Often the mechanism is an official requesting the company to contribute to a local charitable purpose, the proceeds of which somehow disappear. Another favorite device is the foreign corporation buying a very nice new luxury car, and then promptly re-selling it as a “used” car to the local official at rock bottom prices (or a nominal lease amount). “Scholarships” for the precious one child of the official to study in the U.S. or Europe are also popular. Inspection or training trips for the official and his entourage to the corporate headquarters, with lengthy stopovers in Las Vegas, Monaco or Macau, for a little gambling and shopping are also very common devices. Expensive call girls are *de rigueur*, as is shark fin soup.

As lower level officials are able to increase the market value of the bribes, assisted by periodic and sporadic central government crackdowns, the amount of money available increases. Lower level officials who wish to retain their positions, or perhaps even be promoted, must themselves “develop relationships” with higher level officials, often via the all important “gift giving.” Thus the increased market values of bribes, enhanced through sporadic crackdowns, trickles up and eventually back to the very central government officials who ordered the crackdown in the first place.

Obviously wealthy MNCs provide much deeper pockets to target than subsistence level rural Chinese migrants with their

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214. *Id.* at 144.

215. David Barboza, *Charges of Bribery in Chinese Bank Deal*, N.Y. TIMES, Nov. 29, 2006, at C1.

flea-market garment stalls. The amount of money and other valuable goods available from MNCs is well beyond what local Chinese entrepreneurs could possibly provide. Targeting MNCs who are seeking not only lower labor costs but also weaker environmental, product safety or labor enforcement regimes is the obvious strategy for local as well as central government officials and Party members. Thus encouraging foreign, as opposed to domestic, investment will personally and directly benefit the local elites.

Given these potentially very personally lucrative opportunities for officials and ranking Party members to receive bribes from MNCs, Chinese national economic policy has developed a legal and financial credit regime in which foreign corporations receive much more favorable treatment than domestic Chinese private enterprises.<sup>216</sup> Professor Yasheng Huang of the Massachusetts Institute of Technology, in his landmark book *Selling China*,<sup>217</sup> has extensively analyzed the negative economic impacts of the policies favoring foreign direct investment on the ability of domestic Chinese private entrepreneurs to develop competition. It turns out that demands for foreign bribes do not deter foreign direct investment.<sup>218</sup> Rather because foreign MNC investors can and do pay much higher bribes than local businesses, the national government has developed a legal and credit system that favors the foreigners over the locals.

The reality is that local private companies in China cannot match the bribing power of the foreigners. Some very resilient and adaptable Chinese private entrepreneurs have now devised a method for obtaining status as "foreign direct investment" companies by giving away for free a substantial equity stake to Hong Kong or Taiwanese interests, in order to take advantage of the foreigner-favorable legal and credit regime.<sup>219</sup> Unless local entrepreneurs actually give away substantial equity stakes in their business, domestic business is priced out.<sup>220</sup> Foreign bribes have artificially driven up the market value of purchasing cooperation from enforcement officials.<sup>221</sup> The result is that domestic Chinese economic development is strangled at birth.

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216. See HUANG, *supra* note 184, at 122–28.

217. See *id.* at 3.

218. See *id.* at 313.

219. *Id.* at 37–38.

220. *Id.*

221. *Id.* at 38.

The promise of global capitalism, that the rising tide will eventually lift all boats, is directly subverted by foreign bribery of local officials. High value foreign bribes ensure no domestic entrepreneurs will ever be able to realistically compete. Economic progress through capitalism cannot, under this system, lead eventually to increased political reform. The vast amount of money poured into the system by foreign MNC bribery of local officials ensures the status quo by reinforcing the power of the local elites over their less powerful countrymen. My concern, our concern, as Western people is the part where we insert "foreign" into this dynamic. I am not suggesting regime change from the outside. Chinese people are very clever, they have survived longer than any other continuous human civilization, and I have every confidence that they will find a way to work through their current problems. Our concern as Western people is that it is the role of our own multi national corporations in bribing foreign officials that is directly exacerbating poverty as well as reinforcing authoritarian political control in a major and fast developing economy.

## V. SUGGESTIONS FOR FURTHER ANALYSIS

This is not primarily a problem of Chinese culture. I write about China as one example, because that is where I spent the most time abroad, and because I follow that academic literature. Those who focus on Mexico, or Nigeria, or Russia, or Indonesia or Argentina can say whether the Chinese/foreign business bribery story is more, or less, applicable. I suspect the erratic deployment of reform campaigns in cultures with high levels of corruption and weak legal regimes operates to reinforce control by the group in power while resuming bribes-as-usual business from wealthy MNCs simultaneously strangles domestic enterprise competition in settings other than China.

Only through further concrete research can we determine whether the insights gleaned from Nichols' empirical work, or Professor Xin Frank He's analysis of the political implications of a culture of bribery combined with sporadic crackdown campaigns, or Professor Yasheng Huang's analysis of the negative impact of foreign bribery on the development of domestic enterprises, are of value in a larger discussion about international bribery and corruption problems in an increasingly global economy. The careful examination of specific, local examples and careful surveys of local opinion are

by far the most promising approaches to determining the extent to which bribery and corruption are perceived by local populations as serious problems or merely the U.S. once again forcibly exporting its own values. Such research is expensive and difficult.<sup>222</sup> Obtaining funding for these approaches should be a major priority.

One problem with the empirical approach, however, aside from finding enough funding to actually expand it, is that some of the most serious foreign corruption issues arise in cultures that are also under autocratic regimes. The lack of political freedom makes it “sensitive” (as the Chinese would term it) to conduct surveys of any kind in China, even on topics as far removed from politics as food preferences.<sup>223</sup> The topic of corruption itself is especially politically “sensitive” in China<sup>224</sup> after “the incident” at Tiananmen Square in 1989 as well as continuing widespread public demonstrations about corrupt Chinese officials. Access to the internet is very strictly monitored, filtered and censored.<sup>225</sup> We are not going to be able to safely follow an empirical strategy measuring attitudes about corruption inside China in the foreseeable future. I suspect that other authoritarian regimes with very high levels of both censorship and corruption, such as Saudi Arabia, may have similar restrictions. Most developing economy nations, however, do not have censorship regimes as strict as China or Saudi Arabia, so that a very large global audience of business and law students could potentially participate in internet based corruption/bribery surveys, such as those developed by Nichols

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222. Rose-Ackerman’s most recent book has a number of very substantive economics articles on the local effects of corruption in a wide variety of nations. INTERNATIONAL HANDBOOK ON THE ECONOMICS OF CORRUPTION (Susan Rose-Ackerman ed., Edward Elgar Publ’g 2006).

223. A diplomatic skirmish broke out in Chengdu, China a few years ago when a visiting American Fulbright professor tried to conduct a student survey about teaching methods. Although her Party monitor initially cleared the survey, higher up Party members later objected. Vigorously. Business people in China report that any attempt to survey consumer preferences is very tightly monitored by the Party.

224. The only topic I have ever been asked not to teach in China by my various Party monitors is United States and international corruption laws. Corruption is still a very “sensitive” topic there. Instead, the Party monitor suggested I teach about the United States and international trend toward recognizing gay marriage. Gay marriage is a much less sensitive topic than corruption in China. This article is not intended to single out Chinese culture or the political regime for a challenge. It is intended to place the very difficult issue of corruption in a global context. The problem of corruption is shared by all human organizations, throughout human history.

225. Spahn, *supra* note 180, at 868–70.

and his colleagues.<sup>226</sup>

Like murder and rape, corruption is an ugly problem facing every human culture throughout history. Ignoring these nasty issues, however, is not advisable when training the next generation of skilled business people and lawyers who will have to deal first hand with the problems of international bribery. Perhaps Nichols and his colleagues could be persuaded to lead a global project if appropriate funding and political support could be found from the many foundations or international organizations attempting to address systemic international business corruption issues.

## VI. CONCLUSION

A global “culture of corruption” has indeed arisen. It is not a far away exotic foreign problem, limited to the developing and transition economies of the South. It directly affects the safety of ordinary consumers throughout the world who depend on imports from a wide spectrum of MNCs doing business in countries with high levels of corruption and weak legal regimes.<sup>227</sup> It directly undermines environmental reform technology and clean up efforts globally.<sup>228</sup> It frustrates efforts to achieve very basic human rights.<sup>229</sup> Bribery skews purchasing decisions making a mockery of any hope of a rational market. If the economists are to be believed, bribery significantly exacerbates the growing global gap between the unimaginably rich and the desperately poor.<sup>230</sup>

My thesis is that international bribery presents a situation in which the elites from the MNCs of the North nations work together with their elite business partners in the South. There are “kleptocrats” in the corporate legal corridors of the North as well as in the governments of the South. It is not a problem of geographic, race, or religious morality as much as it is a problem of class. This problem cannot be rectified with rational

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226. See *supra* Part III.D. & accompanying notes.

227. See *supra* Part IV.B. & accompanying notes.

228. See *FAQs: Causes & Consequences of Corruption*, ANTI-CORRUPTION RES. CTR., <http://www.u4.no/helpdesk/faq/faqs1.cfm#30> (last visited Sept. 9, 2008).

229. *Id.*

230. See Bill Rodgers, *Experts Say Corruption Hinders Global Economic Development*, VOA NEWS, Aug. 2, 2008, available at <http://www.voanews.com/burmese/archive/2006-08/2006-08-02-voa4.cfm>; see also Abelardo L. Aportadera, *Corruption and Poverty*, 1 MINDANAO L.J. 100, 100 (2007), available at <http://www.philjol.info/index.php/MLJ/article/viewFile/320/295>.

economic studies documenting the damage alone. A hearts and minds approach is required which reaches business and legal professional elites in both North and South, and which helps clarify our understanding that soft approach normative regime changes standing alone could not possibly deter such personally lucrative patterns of business. Hard law legal intervention is required against bribe givers with due attention to the dangers of authoritarian government-reinforcing impact of selective and sporadic enforcement campaigns in weaker legal regimes of the South as well as the dangers of selective enforcement patterns favoring particular corporate players in or favored allies of the North.

It is ethically appropriate, and perhaps even ethically required given how devastating the impacts of global corruption appear to be, for stronger legal regimes in the developed economies of the North to discipline our own MNCs' role in the dynamic duo of bribe givers and bribe takers. I am suggesting here vigorous hard law criminal enforcement remedies on the supply-side of the North's MNCs bribe givers. Some nations of the North are in fact already taking responsibility to discipline our own corporate citizens.<sup>231</sup> We should be very cautious in giving an academic or scholarly imprimatur to any charge of "moral imperialism" which is not carefully substantiated with specific facts and which undermines the will to address these problems realistically.

The stories we tell ourselves, our children, our law and business students and apprentices, to justify our actions giving and taking bribes must be explicitly discussed and carefully analyzed in an academic and scholarly setting. In order for practical solutions to be developed we must discuss the issues frankly and realistically. Those of us whose job it is to educate the children and apprentices of the elites of both North and South, particularly in the crucial professions of business and law, must take up this challenge.

We should not permit some vague liberal discomfort about American "unilateral moral imperialism" to be used in deterring us from analyzing the problems any more than we should join Jesse Helms in his sanctimony. Taking up this challenge will require self-reflection, intellectual honesty and moral courage. We're probably going to have to learn some economics.

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231. Rick Stouffer, *Federal Act Exposed Bribery in Corporations*, PITTSBURGH TRIB.-REV., Feb. 24, 2008, available at [http://www.pittsburghlive.com/x/pittsburghtrib/business//s\\_553984.html](http://www.pittsburghlive.com/x/pittsburghtrib/business//s_553984.html).



The place to begin is by carefully listening to what ordinary, lower economic strata people in both public and private sectors, smaller local entrepreneurs, and brave scholars in the cultures most negatively impacted by global grand corruption have to say. These are the voices of people who are most directly hurt; these are the voices most likely to be lost in the elite professional discourses of international law and business.

We can move beyond the old binary oppositions of us/them if we so choose, but not by ignoring the devastation wrought by international grand corruption bribery, and also not by ignoring the problems of moral imperialism. If we choose to think “contrapuntally” with people from various geographies, races, religions, genders, and classes, we may find surprising and perhaps even realistic, workable connections. Edward Said, in concluding his book *Culture and Imperialism*, addresses the potential for human connections beyond the old dichotomies of us/them. He says:

No one today is purely *one* thing. Labels like Indian, or woman, or Muslim, or American are not more than starting-points, which if followed into actual experience for only a moment are quickly left behind. Imperialism consolidated the mixture of cultures and identities on a global scale. But its worst and most paradoxical gift was to allow people to believe that they were only, mainly, exclusively, white, or Black, or Western, or Oriental. Yet just as human beings make their own history, they also make their cultures and ethnic identities. . . . **Survival in fact is about the connections between things. . . . It is more rewarding—and more difficult—to think concretely and sympathetically, contrapuntally, about others than only about ‘us.’** But this also means not trying to rule others, not trying to classify them or put them in hierarchies, above all, not constantly reiterating how ‘our’ culture or country is number one (or *not* number one, for that matter). For the intellectual there is quite enough of value to do without *that*.<sup>232</sup>

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232. SAID, *supra* note 38, at 336 (emphasis in bold added).