

The Esoteric Question of Whether Corruption Violates Human Rights and the Real-World Practice of Compliance

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Corruption inflicts extraordinary damage on and presents significant challenges to society, people, and the planet. In response, polities around the world have knit together a global anticorruption regime, a network of local laws, treaties, arbitral rules, and administrative regulations. Although styled as universal and as aimed at corruption, this article's analysis of the regime finds that it aims squarely at bribery, and that imposes the greatest burden on individual business firms. Individual business firms must create effective programs to prevent people associated with those firms from participating in bribery. The lively debate among legal scholars over whether or not corruption violates human rights may seem to have little to do with the important practicalities of developing effective anticorruption programs. This article finds, however, an important connection. The most effective anticorruption programs require development of organizational cultures that guide people toward compliance. Organizational culture consists of norms and rules for making decisions and acting. The debate over corruption and human rights reflects two competing frameworks for ethical decision-making. Frameworks are akin to norms and rules, thus resolution of the debate could strongly influence how business firms construct cultures. Unfortunately, however, the two positions in this debate seem irreconcilable. This article identifies the as-yet unacknowledged danger that contemplation of an irreconcilable debate might introduce uncertainty into a firm's organizational culture. This article does not conclude that business firms should eschew contemplation of the debate, but instead suggests that firms rely on other moral or social justifications, and flex their "ethical muscles" by developing creative anticorruption programs.

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For scholars who study either subject, the ongoing debate over whether corruption does or does not violate human rights is fascinating.¹ The debate explores the frontiers of the definition of rights and assignment of duties, and asks difficult questions about causality and distance from harm. The two sides of the debate mirror the deep contestation in the field of business ethics between the use of consequentialist frameworks and rights-based frameworks.² The debate also touches on one of the most pernicious issues of these times—corruption.³ To a practitioner who has taken on the task of controlling corruption, however, this debate might seem esoteric and irrelevant.⁴ What, they might ask, does this debate have to do with actually controlling corruption?

This article offers an answer to that question. An easy answer would suggest that the resolution of the debate could shape the way in which laws are crafted and enforced. That answer is easy, but irrelevant. As this article will explain, those laws have already been crafted, and they have been crafted in a way that places most of the burden on individual business firms.⁵ Business firms are tasked with creating effective programs to prevent acts of corruption by associated persons. Interestingly, the most effective means of doing so seems to be the cultivation of a strong ethical culture. A culture

¹ The debate is described *infra* Part III.B.

² As discussed *infra* Part III.A.

³ The harms associated with corruption are discussed *infra* Part I.B.

⁴ See Franklin E. Zimring, *Is There a Remedy for the Irrelevance of Academic Criminal Law?*, 64 J. LEGAL EDUC. 5, 5 (2014) (criticizing legal academia as irrelevant because it fails to address pressing issues in the real world); see also SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, AM. BAR ASS'N, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT – AN EDUCATIONAL CONTINUUM: REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 5 (1992) (“Practitioners tend to view much academic scholarship as increasingly irrelevant to their day-to-day concerns, particularly when compared with the great treatises of an earlier era.”).

⁵ *Infra* Part II.

consists of the mores, norms, and spoken and unspoken rules for making decisions about actions and behaviors.⁶

Therein lies the practical significance of the esoteric debate. The opposing positions in the debate mirror important but incompatible frameworks to guide decisionmaking about matters such as compliance with legal and ethical rules. To the extent that the debate could be resolved, that resolution could provide powerful guidance to business firms as they integrated a framework into their organization's culture. On the other hand, if—as seems more likely—the debate cannot be resolved, then the debate could reduce the clarity with which members of a business firm understand and think about these issues. That, in turn, could reduce the effectiveness of what should be the most effective tool in effectuating compliance with anticorruption laws and regulations. The esoteric debate, in other words, poses an unrecognized threat to the practicalities of controlling corruption through laws and regulations.

This article weaves together two strands, both related to corruption. The first describes the global anticorruption regime, a widespread tapestry of laws and regulations that encompasses local law as influenced by international treaty, international arbitration, and local and transnational administrative rules.⁷ The second strand analyzes the debate over whether corruption violates human rights, a debate that ponders the consequential connection between corruption and articulated human rights, and asks whether other rights might be implicated.⁸ These two strands come together in a discussion of compliance, and the role that organizational culture should play.⁹ The article warns of the danger posed by the lack of clarity attendant to the debate, and concludes that rather than attempting to leverage frameworks from resolution of the debate, business firms and society would be better served by creative and entrepreneurial thinking of rules and norms that do not rely on that contestation.¹⁰

Before weaving those strands and reaching that conclusion, this article begins by defining corruption and discussing the harms associated with it.¹¹ Those harms are many.

I. CORRUPTION AND SOCIETAL DAMAGE

The word “corruption” avails itself of many meanings.¹² Any meaningful discussion, therefore, must begin by establishing how that word will be

⁶ See *infra* notes 247–49 and accompanying text (explaining organizational culture).

⁷ See *infra* Part II.

⁸ See *infra* Part III.

⁹ See *infra* Part IV.A.

¹⁰ See *infra* Parts IV.B–C.

¹¹ See *infra* Part I.

¹² See Samuel Issacharoff, *On Political Corruption*, 124 HARV. L. REV. 118, 121–26 (2010) (discussing the many meanings of the word “corruption”).

used. This section starts with a definition of corruption, and goes on to describe damage caused by corruption.

A. A Definition of Corruption

The broadest use of the word “corruption” refers to something that once worked but now no longer works. When, for example, a computer program stops functioning, people refer to the program as “corrupted.”¹³ People also use the word to describe a morally impure and ethically condemnable state of existence.¹⁴ Thus, an unscrupulous, selfish person is described as corrupt, and an innocent country mouse that becomes a venal city rat has been corrupted.

Though common, these usages are so broad as to be of little use to those who must think of the social phenomenon with some degree of precision.¹⁵ Over the last thirty years, therefore, policymakers, business managers, and scholars have developed a more precise definition to circumscribe the phenomenon that they study or work to control.¹⁶ That definition is:

The abuse or misuse of authority or trust for personal reasons rather than the reasons for which authority or trust was conferred.¹⁷

This definition draws a line between corrupt behavior and behaviors that seem similar. For example, a manager might promote the child of the Chief Executive Officer of a publicly traded firm, because the child of the Chief Executive Officer has performed with an extraordinary degree of competence and diligence. That would not be corrupt, because although authority

¹³ See *Corrupted File*, PC MAG, <https://www.pcmag.com/encyclopedia/term/corrupted-file> (last visited Nov. 17, 2022) (defining the phrase “corrupted file”).

¹⁴ See Laura S. Underkuffler, *Markets, Morality, and the Maintenance of Government*, 27 CORNELL J.L. & PUB. POL’Y 601, 604 (2018) (arguing that corruption is “a deeply moral notion”).

¹⁵ See Liz Campbell, *Corruption by Organised Crime – A Matter of Definition?*, 69 CURRENT LEGAL PROBS. 115, 120–22 (2016) (discussing difficulties presented by broad definitions).

¹⁶ See Régis Bismuth, Jan Dunin-Wasowicz & Philip M. Nichols, *The Transnationalization of Anti-Corruption Law: An Introduction and Overview*, in *THE TRANSNATIONALIZATION OF ANTI-CORRUPTION LAW* 1, 1 (Régis Bismuth, Jan Dunin-Wasowicz & Philip M. Nichols eds., 2021) (discussing the explosion in activity and research in corruption over the last thirty years).

¹⁷ See Bernadette Atuahene & Timothy R. Hodge, *Stategraft*, 91 S. CAL. L. REV. 263, 295 (2018) (“A widely agreed-upon definition of corruption is ‘the abuse of an entrusted power for private gain’”); Matthew S. Erie, *Anticorruption as Transnational Law: The Foreign Corrupt Practices Act, PRC Law, and Party Rules in China*, 67 AM. J. COMPAR. L. 233, 239 (2019) (“Classical definitions hold corruption to be the abuse of public office for private gain.”); Hana Ivanhoe & Zulaikha Aziz, *Combating Corruption to Counter Conflict: Proposals for In-Country Reform and International Community Intervention*, 38 BERKELEY J. INT’L L. 355, 359 (2020) (“A common definition of corruption invoked among international institutions and the international civil society community is some iteration of the *misuse abuse of public office or entrusted power for private gain*.”); Sung Hui Kim, *The Last Temptation of Congress: Legislator Insider Trading and the Fiduciary Norm Against Corruption*, 98 CORNELL L. REV. 845, 897 (2013) (“under most modern definitions, corruption involves an abuse of trust”).

exists, it has not been abused or misused. On the other hand, if the child were promoted without regard to competence but instead simply because the Chief Executive Officer directed that they be promoted, then the existing authority and trust would be abused, and the act would be considered corrupt.¹⁸ Similarly, if a purchasing agent awarded a contract to a family friend, who regularly exchanged holiday gifts, because the friend offered a superior product at the most competitive price, the act would not be corrupt, whereas the award of a purchasing contract *because* a supplier regularly sent gifts would constitute misuse of authority for personal reasons rather than the reasons for which authority had been granted.¹⁹

This definition also narrows the consideration of corruption because it does not include every form of immoral or dysfunctional behavior. An associate at a law firm who misplaces a comma might egregiously damage their firm, but their mistake does not implicate misuse or abuse of authority or trust, let alone misuse or abuse for personal reasons.²⁰ Their behavior lacks competence, and thus deserves criticism, but does not fall within the general definition of corruption. Similarly, a university dean who intentionally submits false data to ranking bodies *solely* for the purpose of making their university appear better in the eyes of others has abused power and trust, but not for personal reasons, and thus their behavior does not fall within this definition.²¹ Their behavior certainly is not ethical, nor legal, and deserves condemnation as well as study, but under different lenses than corruption.

There are many forms of corruption. These forms include nepotism, embezzlement, theft, and bribery.²² Bribery occupies the center stage in discussions of corruption, is the most frequently encountered form of corruption by business managers, and is the focus of much of the research

¹⁸ A recent case of nepotism involved not the hiring of officers' children, but instead the hiring of potential clients' children by investment bank JP Morgan in China, purely for purposes of securing those clients rather than due to any skills or competencies possessed by those children. See Kevin Y. Wang, *Valuable Nepotism: The FCPA and Hiring Risks in China*, 49 COLUM. J.L. & SOC. PROBS. 459, 474–75 (2016) (describing the case).

¹⁹ Drawing this distinction has real-world consequences. Ironically, given his own prolific corruption, Ferdinand Marcos of the Philippines once forbade the acceptance of any gifts whatsoever by government officials, including holiday gifts from family members. See Philip M. Nichols, *Multiple Communities and Controlling Corruption*, 88 J. BUS. ETHICS 805, 809 (2009) (discussing the absurdity and irony of Marcos' gift edict).

²⁰ Punctuation errors can have damaging consequences for clients, as described in Melissa C. Santos et al., *Punctuation Pitfalls: Commas and Periods Kill Patents*, NAT'L L. REV., July 22, 2021, <https://www.natlawreview.com/article/punctuation-pitfalls-commas-and-periods-kill-patents>.

²¹ Moshe Porat, then-Dean of Temple University's business school, committed just such an act between 2014 and 2018, for the purposes of improving the ranking of the school to which he was loyal; he was later convicted of fraud and wire fraud. Alyssa Lukpat, *Former Temple U. Dean Found Guilty of Faking Data for National Rankings*, N.Y. TIMES (Nov. 29, 2021), <https://www.nytimes.com/2021/11/29/us/temple-university-moshe-porat-fraud.html>.

²² See WORLD BANK, HELPING COUNTRIES COMBAT CORRUPTION: THE ROLE OF THE WORLD BANK 8–9 (1997), <http://www1.worldbank.org/publicsector/anticorrupt/corruptn/corruptn.pdf> (noting behaviors encompassed by this definition of corruption).

discussed in this section.²³ In general, however, the harmful effects of corruption inure to all forms.

B. *Effects of Corruption*

The Foreword to the United Nations Convention Against Corruption begins with a succinct but devastating summary of the effects of corruption:

Corruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organized crime, terrorism and other threats to human security to flourish.²⁴

The assertion that corruption “leads to violations of human rights” foreshadows the debate described in this article.²⁵ The “corrosive effects” of corruption, however, merit attention before describing that debate. The first of these is interference with governance.

1. Corruption Interferes with Governance

Corruption interferes with governance in many ways. As defined in this article, corruption by its very nature severs the relationship between those who confer authority or trust and those who exercise power. Corruption “undermines the very legitimacy of democratic government. If payoffs are a routine part of life, ordinary people will despair of the very idea that they, together with their fellow citizens, can control their destinies through the democratic rule of law.”²⁶ This is as true of private sector governance, for example, the governance of a publicly-traded corporation, as it is of political governance.²⁷

Economic decisions demonstrate the disconnection caused by corruption. Not all economic decisions can, or should, be made in the context of a market, but even in non-market societies many of the most important decisions are made in market-like contexts involving competing choices.²⁸ In a transparent and competitive setting, economic decisions are made on the basis of the cost of the good or service and how well that good or service

²³ See MICHAEL JOHNSTON, SYNDROMES OF CORRUPTION: WEALTH, POWER, AND DEMOCRACY 20–21 (2005) (lamenting the myopic focus on bribery).

²⁴ Kofi A. Annan, *Foreword* to U.N. OFF. ON DRUGS & CRIME, UNITED NATIONS CONVENTION AGAINST CORRUPTION, at iii, iii, U.N. Sales No. V.04-56160 (2004).

²⁵ See *infra* Parts III.B–C.1.

²⁶ Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 694 (2000).

²⁷ See Bernard S. Black & Anna S. Tarassova, *Institutional Reform in Transition: A Case Study of Russia*, 10 SUP. CT. ECON. REV. 211, 230 (2003).

²⁸ See generally Amartya Sen, *The Moral Standing of the Market*, 2 SOC. PHIL. & POL'Y 1 (1985).

satisfies the needs of the decision-maker.²⁹ Producers, therefore, have a strong incentive to use the resources they control to produce high quality goods and services at low costs.³⁰

In a corrupted system, on the other hand, decisions are made not on the basis of the quality and price of goods or services, but instead on the basis of the quality of a bribe (or other personal interest).³¹ Producers, therefore, have a strong incentive to use the resources they control to produce high quality bribes.³² Any resources that producers put into the goods or services are “wasted,” because the quality of the goods and services does not matter: the skewed decision-making process rewards those who satisfy the self-interests of the decision-makers rather than the needs of their constituencies.³³ The distortion of consumption decisions is merely illustrative; corruption distorts policy decisions in the same way.³⁴

Any respectable system of governance, public or private, should share the objective of making decisions in the best interest of its constituency. When decision-makers use their authority to further their own interests, they patently ignore this objective. The interests of a constituency and decision-makers may overlap, but such overlap is purely coincidental. It is of little wonder, then, that corruption severely diminishes trust.³⁵ This is true of politics, business organizations, and other organizations.³⁶ Indeed, studies and surveys from around the world consistently identify corruption as a leading contributor to mistrust of governance and institutions.³⁷

²⁹ See Mark B. Bader & Bill Shaw, *Amendment of the Foreign Corrupt Practices Act*, 15 N.Y.U. J. INT'L L. & POL'Y 627, 627 (1983).

³⁰ *Id.*

³¹ Cf. Shouyoung Shi & Ted Temzelides, *A Model of Bureaucracy and Corruption*, 45 INT'L ECON. REV. 873, 874–76 (2004).

³² Cf. *id.* at 876.

³³ See René Véron et al., *Decentralized Corruption or Corrupt Decentralization? Community Monitoring of Poverty-Alleviation Schemes in Eastern India*, 34 WORLD DEV. 1922, 1925 (2006) (warning of “less effective and less well targeted” decisions).

³⁴ See A. Cooper Drury, Jonathan Kriekhaus & Michael Lusztig, *Corruption, Democracy, and Economic Growth*, 27 INT'L POL. SCI. REV. 121, 123 (2006) (“[P]olicymakers may promote initiatives . . . not to satisfy social need, but because such projects increase opportunities for bribes.”).

³⁵ See Susan Rose-Ackerman, *The Political Economy of Corruption*, in CORRUPTION AND THE GLOBAL ECONOMY 31, 45 (Kimberly Ann Elliott ed., 1997) (describing the erosion of trust by corruption).

³⁶ See Black & Tarassova, *supra* note 27, at 230 (discussing degradation of trust in the private sector); Ivanhoe & Aziz, *supra* note 17, at 363 (discussing degradation of trust in government and government institutions); Patty Zakaria, *Is Corruption an Enemy of Civil Society? The Case of Central and Eastern Europe*, 34 INT'L POL. SCI. REV. 351, 363–64 (2012) (finding that corruption diminishes trust in civil society and civic organizations).

³⁷ See, e.g., Nancy Zucker Boswell, *Combating Corruption: Focus on Latin America*, 3 SW. J.L. & TRADE AMS. 179, 184 (1996); Cheryl W. Gray & William W. Jarosz, *Law and the Regulation of Foreign Direct Investment: The Experience from Central and Eastern Europe*, 33 COLUM. J. TRANSNAT'L L. 1, 28 (1995); Ji-Young Kim, “Bowling Together” Isn't a Cure-All: The Relationship Between Social Capital and Political Trust in South Korea, 26 INT'L POL. SCI. REV. 193, 199 (2005); Natalia Melgar, Maximo Rossi & Tom W. Smith, *The Perception of Corruption*, 22 INT'L J. PUB. OP. RSCH. 120, 120 (2009).

2. Corruption is Associated with Profound Harms to Individuals and Society

Empirical research conducted over the last twenty years has found a multitude of ways in which corruption inflicts profound damage on individual persons, as well as on society in general. Corruption negatively affects health and wellbeing, and education. On the other hand, corruption increases poverty and crime, and contributes to environmental degradation.

Corruption is associated with lower levels of health, among all age groups and genders.³⁸ Corruption is associated with higher rates of infant mortality— “rates in countries with high corruption, for example, could be almost twice as high as in countries with low corruption, holding other factors constant.”³⁹ Higher levels of corruption are associated with lower life expectancies.⁴⁰ Corruption seriously reduces the quality of care for those with illnesses or who are aging.⁴¹

Corruption negatively affects education.⁴² Corruption profoundly affects access to education, as well as the quality of the education provided.⁴³ Corruption is related to poor test outcomes, limited acquirement of knowledge, and higher failure rates.⁴⁴ School “dropout rates” in countries with higher levels of corruption “could be five times as high” as in countries with

³⁸ See Margot I. Witvliet, *Sick Regimes and Sick People: A Multilevel Investigation of The Population Health Consequences of Perceived National Corruption*, 18 TROPICAL MED. & INT'L HEALTH 1240, 1244 (2013) (reporting findings and noting that “lower social status groups seem to fare slightly worse”).

³⁹ Sanjeev Gupta, Hamid R. Davoodi & Erwin R. Tiongson, *Corruption and the Provision of Health Care and Education Services*, in GOVERNANCE, CORRUPTION AND ECONOMIC PERFORMANCE 245, 265 (George T. Abed & Sanjeev Gupta eds., 2002); see Oguzhan Dincera & Ozgur Teomanb, *Does Corruption Kill? Evidence From Half a Century Infant Mortality Data*, 232 SOC. SCI. & MED. 332, 335–36 (2019) (finding a significant relationship between corruption and infant mortality, robust over a long period of time, in Turkey).

⁴⁰ See Monica Violeta Achim, Viorela Lăgia Văidean & Sorin Nicolae Borle, *Corruption and Health Outcomes Within an Economic and Cultural Framework*, 21 EUR. J. HEALTH ECON. 195, 200 (2020) (finding a strong correlation between corruption and life expectancy).

⁴¹ See Roni Factor & Minah Kang, *Corruption and Population Health Outcomes: An Analysis of Data From 133 Countries Using Structural Equation Modeling*, 60 INT'L J. PUB. HEALTH 633, 640 (2015) (discussing the “complex” relationship between corruption and healthcare); Rita Remeikienė et al., *Links Between Corruption and Quality of Life in European Union*, 7 ENTREPRENEURSHIP & SUSTAINABILITY ISSUES 2664, 2671 (2020) (reporting findings on corruption’s degradation of healthcare).

⁴² Remeikienė et al., *supra* note 41, at 2671.

⁴³ See Mohamed Dridi, *Corruption and Education: Empirical Evidence*, 4 INT'L J. ECON. & FIN. ISSUES 476, 489 (2014) (finding that “a one point increase in the corruption index is associated with a decrease in the secondary school enrollment rates of about 10 percentage points” and finding the quality of education is negatively affected).

⁴⁴ See Benjamin Kamga Fomba, Dieu Ne Dort Fokam Talla & Paul Ningaye, *Institutional Quality and Education Quality in Developing Countries: Effects and Transmission Channels*, 13 J. KNOWLEDGE ECON. 6 (Jan. 10, 2022), <https://link.springer.com/content/pdf/10.1007/s13132-021-00869-9.pdf> (reporting findings).

lower levels.⁴⁵ Not surprisingly, corruption leads to higher rates of illiteracy.⁴⁶

Corruption has a “quantitatively important” effect on poverty.⁴⁷ “An increase of one standard deviation in the growth rate of corruption . . . is associated with a decline in income growth of the bottom 20 percent of the population of 1.6 percentage points per year.”⁴⁸ Corruption negatively affects overall economic growth, an effect independent of corruption’s negative effect on inward investment and other relationships.⁴⁹ Corruption distorts the distribution of even stunted economic growth; “[t]he magnitude of the effect of corruption on income inequality is considerable.”⁵⁰

Corruption is associated with environmental degradation.⁵¹ Countries that experience more corruption emit more carbon dioxide and other pollutants, regardless of income level.⁵² Countries that reduce corruption, on the other hand, also enjoy reduced emission of pollutants.⁵³ The “presence of corruption impedes the renewable energy implementation process.”⁵⁴ At middle and low income levels, countries that have higher levels of corrup-

⁴⁵ Gupta, Davoodi & Tiongson, *supra* note 39, at 265.

⁴⁶ Daniel Kaufmann, *Corruption Matters*, FIN. & DEV., Sept. 2015, at 20, 22.

⁴⁷ Sanjeev Gupta, Hamid Davoodi & Rosa Alonso-Terme, *Does Corruption Affect Income Inequality and Poverty?*, 3 ECON. GOVERNANCE 23, 37 (2002).

⁴⁸ *Id.* at 36–37.

⁴⁹ See Mushfiq Swaleheen, *Economic Growth with Endogenous Corruption: An Empirical Study*, 146 PUB. CHOICE 23, 38 (2011) (reporting findings and discussing direct and indirect effects of corruption on economic growth); see also Josef C. Brada et al., *National Levels of Corruption and Foreign Direct Investment*, 47 J. COMPAR. ECON. 31, 47 (2019) (finding “quite large” negative effects of corruption on foreign direct investment).

⁵⁰ Gupta, Davoodi & Alonso-Terme, *supra* note 47, at 30; see Eric M. Uslaner, *Corruption and Inequality*, 9 CESIFO DICE REP. 20, 20 (2011) (“The link between inequality and corruption seems compelling. Corruption is exploitive.”).

⁵¹ See Satish Krishnan, Thompson S.H. Teo & Vivien K.G. Lim, *Examining the Relationships Among e-Government Maturity, Corruption, Economic Prosperity and Environmental Degradation: A Cross-Country Analysis*, 50 INFO. & MGMT. 638 (2013) (finding a relationship between corruption and environmental degradation, and noting other research consistent with their finding).

⁵² See Muhammad Haseeb & Muhammad Azam, *Dynamic Nexus Among Tourism, Corruption, Democracy and Environmental Degradation: A Panel Data Investigation*, 23 ENV'T, DEV. & SUSTAINABILITY 5557, 5571 (2021) (finding a relationship between corruption and higher CO₂ emissions, particularly in lower-income countries); Tajul Ariffin Masron & Yogeewari Subramaniam, *The Environmental Kuznets Curve in the Presence of Corruption in Developing Countries*, 25 ENV'T SCI. & POLLUTION RES. 12491, 12499–501 (2018) (finding a significant relationship with pollution at all income levels, and observing that the interaction between pollution and other effects of corruption “exacerbate[s] environmental degradation”).

⁵³ See Simplicia A. Asongu & Nicholas M. Odhiambo, *Governance, CO₂ Emissions and Inclusive Human Development in Sub-Saharan Africa*, 38 ENERGY EXPL. & EXPLOITATION 18, 26–28 (2019) (discussing the effects on CO₂ emission of controlling corruption).

⁵⁴ Avik Sinha, *Impact of Corruption in Public Sector on Environmental Quality: Implications for Sustainability in BRICS and Next 11 Countries*, 232 J. CLEANER PROD. 1379, 1387 (2019).

tion consume more carbon fuels, and obtain less of their energy from renewable sources.⁵⁵

Corruption enables a host of crimes that debase life. Corruption, for example, “is a very important, and near-completely avoidable, determinant of traffic fatalities.”⁵⁶ Corruption facilitates the trafficking of drugs and of human beings.⁵⁷ Alarmingly, people who have experienced bribery “are more likely to think it is acceptable for a man to beat his wife and children under certain circumstances.”⁵⁸ Corruption also has a complex relationship with terrorism: it creates public discontent that erupts as terrorism, generates funding for terrorist organizations, and creates means of hiding money later used by terrorist organizations.⁵⁹ Corruption also undermines attempts to combat terrorism.⁶⁰

Corruption, understandably, engenders substantial dissatisfaction with and mistrust of government.⁶¹ Dissatisfaction and mistrust erode support for critical political, social, and market reforms.⁶² Even in Sweden, one of the least corrupt countries in the world, perceptions of corruption reduce support

⁵⁵ See *id.* at 1387 (discussing ways in which corruption affects energy sourcing); Anthony Amoah et al., *Corruption: Is It a Bane to Renewable Energy Consumption in Africa?*, 163 ENERGY POL’Y 112854, at 6 (2021) (reporting findings in middle and low income countries).

⁵⁶ Nejat Anbarci, Monica Escaleras & Charles Register, *Traffic Fatalities and Public Sector Corruption*, 59 KYKLOS 327, 338 (2006).

⁵⁷ See Ivan Velasquez Gomez, *The Capture of the State of Guatemala*, 38 BERKELEY J. INT’L L. 348, 349 (2020) (describing how corruption “enable[s] lucrative illicit schemes like drug trafficking, human trafficking, trafficking of contraband, and money laundering”); Peter Reuter & Letizia Paoli, *How Similar Are Modern Criminal Syndicates to Traditional Mafias?*, 49 CRIME & JUST. 223, 243 (2020) (describing the corrupt relationships between Mexican government officials and drug trafficking organizations).

⁵⁸ Robert Gillanders & Lisa van der Werff, *Corruption Experiences and Attitudes to Political, Interpersonal, and Domestic Violence*, 35 GOVERNANCE 167, 176 (2022).

⁵⁹ See Anas AlQudah, *The Mechanism of Control of Corruption and the Rule of Law: Mediating the Effect of Culture on Terrorism Financing*, 22 J. MONEY LAUNDERING CONTROL 498, 511 (2019); Nahil Boussigal & Malek Ghdamsi, *The Corruption-Terrorism Nexus: A Panel Data Approach*, 8 INT’L J. ECON. & FIN. 111, 112–13 (2016) (describing three relationships between corruption and terrorism); see also Gillanders & van der Werff, *supra* note 58, at 174 (“People who have experienced bribery are 7% more likely to express the view that violence can be justified for political ends.”). AlQudah also finds that controlling corruption effectively negates cultural factors that would motivate the financing of terrorist organizations. AlQudah, *supra* note 59, at 511.

⁶⁰ *Id.*; Philip M. Nichols, *Defense Firms’ Duties to Society When Presented with an Opportunity to Pay a Bribe*, in ETHICAL DILEMMAS IN THE GLOBAL DEFENSE INDUSTRY 239, 249–50 (Daniel Schoeni & Tobias Vestner eds., 2023).

⁶¹ See Tima T. Moldogaziev & Cheol Liu, *Public Sector Corruption and Perceived Government Performance in Transition*, 34 GOVERNANCE 475, 498 (2021) (finding “statistically significant evidence that corruption will have a negative association with perceived levels of organizational performance, both at local and central government levels”).

⁶² See Simeon Djankov, Elena Nikolova & Jan Zilinsky, *The Happiness Gap in Eastern Europe*, 44 J. COMPAR. ECON. 108, 109 (2016) (noting that the reaction to corruption endangers reform).

for democracy.⁶³ In particular, “systemic corruption undermines the rule of law, which is crucial for democracy and a market economy.”⁶⁴

Greater amounts of experience with corruption lead to increased levels of anxiety.⁶⁵ Similarly, people who live with corruption experience less happiness than those who live with less corruption.⁶⁶ Research on differences in levels of overall happiness in Western and Eastern Europe attributes the lower levels of happiness in Eastern Europe not to particular policies but instead to differing experiences with corruption.⁶⁷ Similarly, “[t]he higher the level of corruption, the lower the reported subjective well-being. The substantive effect of corruption on well-being is sizable.”⁶⁸

3. Corruption Disadvantages Business Firms

Corruption has a complicated relationship with the wellbeing of individual business firms. In the short run, in particular instances, corruption might confer a competitive advantage on a business firm.⁶⁹ Over time, however, corruption imposes costs on and damages the cohesiveness of individual business firms.⁷⁰

In the post-colonial 1960s, some scholars and policy-makers claimed with little evidence that the payment of bribes facilitated the conduct of business, by making the formation of business relationships faster and less costly.⁷¹ In the post-Cold War 2000s, however, scholars have applied more

⁶³ Jonas Linde & Gissur Ó Erlingsson, *The Eroding Effect of Corruption on System Support in Sweden*, 26 GOVERNANCE 585, 595–96 (2013).

⁶⁴ Dana Neacsu, *Social Services and Mutual Aid in Times of Covid-19 and Beyond: A Brief Critique*, 25 HUM. RTS. BRIEF 28, 37 (2021); see Ewa Mahr, *Local Contestation Against the European Union Rule of Law Mission in Kosovo*, 39 CONTEMP. SEC. POL’Y 72, 87 (2017) (reporting that the failure of rule of law implementation programs to control corruption “was the most important reason for” local resistance to rule of law in Kosovo).

⁶⁵ See Robert Gillanders, *Corruption and Anxiety in Sub-Saharan Africa*, 17 ECON. GOVERNANCE 47, 68 (2016) (reporting findings in Africa and noting robustness of the connection).

⁶⁶ See Qiang Li & Lian An, *Corruption Takes Away Happiness: Evidence from a Cross-National Study*, 21 J. HAPPINESS STUD. 485, 494 (2020) (reporting a significant relationship and concluding that “reducing corruption must be helpful in increasing people’s feeling of happiness”); Margit Tavits, *Representation, Corruption, and Subjective Well-Being*, 41 COMPAR. POL. STUD. 1607, 1623 (2008) (finding a strong negative relationship between corruption and happiness).

⁶⁷ Simeon Djankov, Elena Nikolova & Jan Zilinsky, *The Happiness Gap in Eastern Europe*, 44 J. COMPAR. ECON. 108, 109 (2016).

⁶⁸ Tavits, *supra* note 66, at 1623.

⁶⁹ See Philip M. Nichols, *Corruption as an Assurance Problem*, 19 AM. U. INT’L L. REV. 1307, 1326 (2004) (discussing the competitive advantage conferred in the absence of collective action).

⁷⁰ See Philip M. Nichols, *The Business Case for Complying with Bribery Laws*, 49 AM. BUS. L.J. 325, 334–52 (2012) (describing direct and indirect costs and other damage to individual business firms).

⁷¹ See, e.g., SAMUEL P. HUNTINGTON, *POLITICAL ORDER IN CHANGING SOCIETIES* 59–71 (photo. Repr. 2006) (1968) (arguing that bribery can speed up economic development); David H. Bayley, *The Effects of Corruption in a Developing Nation*, 19 W. POL. Q. 719, 719 (1966) (arguing that bribery is a step in economic development). Even today, some scholars perpetuate the discredited argument or refer to bribes as “speed money” or “grease payments.” See

rigorous methodologies and find that over time corruption actually renders the formation of business relationships slower and more expensive. Daniel Kaufmann and Shang-Jin Wei, for example, developed a dynamic model, which recognizes that bribe payments are part of an endogenous relationship between bribe demanders and bribe payers.⁷² Their model predicted that bribe-paying firms would be less competitive than firms in the same jurisdiction that did not pay bribes.⁷³ Kaufmann and Wei then turned to a large database collected by the World Bank, and found that their model actually described the real world—firms that pay bribes spend more money and more time interacting with government than firms that do not pay bribes.⁷⁴ Following Kaufmann and Wei, several studies have explored the costs imposed on business firms by corruption. Regardless of databases used, regional focus, focus on endemically corrupt regions or industries, or size of the firms, every study has come to the same conclusion: business firms that pay bribes spend more time and more money interacting with governments than firms that do not pay bribes.⁷⁵ Bribe-paying business firms have more difficulty raising and accessing capital.⁷⁶ Such behavior also reduces the rate of growth of a business firm, and is associated with lower productivity.⁷⁷

David Mills & Robert Weisberg, *Corrupting the Harm Requirement in White Collar Crime*, 60 STAN. L. REV. 1371, 1379 (2008) (recounting argument that bribery speeds up productive transactions); see also Amy L. Chua, *The Paradox of Free Market Democracy: Rethinking Development Policy*, 41 HARV. INT'L L.J. 287, 310 (2000) (using the slang term).

⁷² Daniel Kaufmann & Shang-Jin Wei, *Does “Grease Money” Speed Up the Wheels of Commerce?* 5–6 (Int'l Monetary Fund, Working Paper No. 00/64, 2000), <https://www.imf.org/en/Publications/WP/Issues/2016/12/30/Does-Grease-Money-Speed-Up-the-Wheels-of-Commerce-3524>. Previous models had treated corruption as exogenous to the relationship between bribe payers and receivers, and thus analyzed each transaction statically. *Id.* at 3.

⁷³ *Id.* at 7.

⁷⁴ *Id.* at 19.

⁷⁵ See, e.g., Jay Pil Choi & Marcel Thum, *The Dynamics of Corruption with the Ratchet Effect*, 87 J. PUB. ECON. 427, 428 (2003) (measuring increases in bribe demands over time); Alejandro Gaviria, *Assessing the Effects of Corruption and Crime on Firm Performance: Evidence from Latin America*, 3 EMERGING MKTS. REV. 245, 267 (2002) (using a different model, applied to data from Latin American business firms); Donato De Rosa, Nishaal Goo-roochurn & Holger Görg, *Corruption and Productivity: Firm-Level Evidence*, 235 JAHRBÜCHER FÜR NATIONALÖKONOMIE UND STATISTIK 115, 134 (2015) (testing alternative hypotheses, and finding that even in highly corrupt settings not paying bribes imposes no costs while paying bribes imposes costs and time delays); Jakob Svensson, *The Cost of Doing Business: Firms' Experiences with Corruption*, in UGANDA'S RECOVERY: THE ROLE OF FARM, FIRMS, AND GOVERNMENT 319, 319–20 (Ritva Reinikka & Paul Collier eds., 2001) (using fine-grained data from Uganda).

⁷⁶ See Bhanu Pratap Singh Thakur et al., *Corruption and Firm Value: Evidence from Emerging Market Economies*, 57 EMERGING MKTS. FIN. & TRADE 1182, 1192 (2021) (finding “a significant negative relationship between corruption and firm value”); Barkat Ullah, *Financial Constraints, Corruption, and SME Growth in Transition Economies*, 75 Q. REV. ECON. & FIN. 120, 130 (2020) (finding that corruption reduces access to financing); Nirosha Hewa Wel-lalage, Stuart Locke & Helen Samujh, *Firm Bribery and Credit Access: Evidence from Indian SMEs*, 55 SMALL BUS. ECON. 283, 300–01 (2020) (finding that the payment of bribes reduces small and medium-sized business firms' access to financing).

⁷⁷ See Hasan Faruq, Michael Webb & David Yi, *Corruption, Bureaucracy and Firm Productivity in Africa*, 17 REV. DEV. ECON. 117, 127–28 (2013) (finding that corruption decreases productivity in firms in Africa); Raymond Fisman & Jakob Svensson, *Are Corruption and*

II. THE GLOBAL ANTICORRUPTION REGIME

As could be expected of a problem as insidious as corruption, the problem has generated widespread response. The responses have evolved over time, and are relatively uncoordinated, but largely involve law or institutions similar to law.⁷⁸ Rather than a unified body of laws administered by a single agency, this body of rules and laws manifests itself locally, in international dispute resolution, and in administrative rules and procedures of international bodies.⁷⁹

Elizabeth Spahn argues that these laws and rules must be understood dynamically and interactively, as a framework of ubiquitous, overlapping, far-reaching rules in which “[e]nforcement competition mixed with enforcement cooperation play the central roles.”⁸⁰ This network of rules may fairly be—and often is—called the global anti-corruption regime.⁸¹

One cannot gainsay the sincerity of the various actors who contribute to this regime in combatting corruption in general. As discussed in the next three subsections of this article, however, the thrust of the regime has one sharp point—control of bribery—and that sharp point is aimed squarely at business firms.

A. *Local Law*

Every polity in the world prohibits the bribery of its own officials.⁸² Vatican City, arguably the smallest country in the world by area, criminal-

Taxation Really Harmful to Growth? Firm-Level Evidence, 83 J. DEV. ECON. 63, 73 (2007) (finding that corruption inhibits firm growth in Uganda); De Rosa, Gooroochurn & Görg, *supra* note 75, at 135 (finding that the payment of bribes reduces productivity in European firms); Ullah, *supra* note 76, at 130 (finding that corruption inhibits firm growth).

⁷⁸ Global anti-corruption efforts encompass initiatives other than law, including, for example, education. See Underkuffler, *supra* note 14, at 607.

⁷⁹ As with other large-scale criminal prosecutions, ad hoc cooperation occurs on a case-by-case basis. See Kai Ambos, *The Current State and Future of Comparative Criminal Law – A German Perspective*, 24 UCLA J. INT’L L. & FOREIGN AFFS. 9, 18 (2020) (noting cooperation in prosecution of white collar and financial crimes). International bodies, such as an International Anticorruption Court, have been proposed, but none yet exist. See Benjamin Dearden, *From an International Anti-Corruption Court to Anti-Corruption Commissions: How the Global Push for Corruption Accountability Can Learn from the Atrocity Prevention/Accountability Movement*, 29 WILLAMETTE J. INT’L L. & DISP. RESOL. 25, 27–28 (2022) (discussing a proposal for an International Anticorruption Court).

⁸⁰ Elizabeth Spahn, *Multijurisdictional Bribery Law Enforcement: The OECD Anti-Bribery Convention*, 53 VA. J. INT’L L. 1, 43 (2012).

⁸¹ See Sean J. Griffith & Thomas H. Lee, *Toward an Interest Group Theory of Foreign Anti-Corruption Laws*, 2019 U. ILL. L. REV. 1227, 1232 (2019) (attempting an economic analysis of motives for a global anticorruption regime); Hannah Harris & Justine Nolan, *Learning from Experience: Comparing Legal Approaches to Foreign Bribery and Modern Slavery*, 4 CARDOZO INT’L & COMP. L. REV. 603, 608 (2021) (discussing and describing the international anticorruption regime); David Hess, *Business, Corruption, and Human Rights: Towards a New Responsibility for Corporations to Combat Corruption*, 2017 WIS. L. REV. 641, 655 (2017) (referring to the “global anti-corruption regime”).

⁸² Nichols, *supra* note 70, at 326.

izes bribery, as does Russia, inarguably the largest.⁸³ So too does every country of every size between.

Laws prohibiting the bribery of officials of other countries are of more recent vintage. Indeed, many scholars single out the enactment of the United States' Foreign Corrupt Practices Act, which they wrongly identify as the lone law prohibiting transnational bribery, as the beginning of the global anticorruption regime.⁸⁴ Although labelled in such a way as to suggest it encompasses all forms of corruption, the Act actually only prohibits the payment of transnational business bribes as well as the creation of hidden pools of money that could be used to fund those bribes.⁸⁵ This focus is repeated throughout the anticorruption regime.

When amending the Foreign Corrupt Practices Act in 1988, Congress instructed the Executive Branch to "pursue the negotiation of an international agreement, among the members of the Organization of Economic Cooperation and Development" that would require those jurisdictions to also prohibit the payment of transnational bribes in business transactions.⁸⁶ It is not clear whether the United States' leadership or the convergence of the end of the Cold War and concomitant bribery scandals contributed to the conclusion of such international agreements. What is very clear is the conclusion of several international agreements requiring nations to prohibit the payment of bribes in transnational business transactions. The first of these was the Inter-American Convention Against Corruption, promulgated by the Organization of American States in 1996.⁸⁷ The Inter-American Treaty requires members of the Organization of American States to criminalize transnational bribery, and also requires signatories to cooperate with one another in the investiga-

⁸³ See 1983 CODE c.1386 (Vatican City) ("A person who gives or promises something so that someone who exercises a function in the Church will do or omit something illegitimately is to be punished with a just penalty; likewise, the one who accepts such gifts or promises."); Federal'nyy Zakon o Protivodeystvii Korruptsii [Federal Law on Corruption Counteraction], SOBRANIE ZAKONODATEL'STVA ROSSII?SKOI? FEDERATSII [ZF RF] [Russian Federation Collection of Legislation] 2008, No. 273-FZ, preamb. ("The present Federal law prescribes the underlying principles of corruption counteraction, legal and organizational bases for the preventing and fighting of corruption, minimization and (or) elimination of the corruption offences consequences."). Some scholars argue that the Sovereign Order of Malta is a country smaller than Vatican City. See Emma Allen & Mario Prost, *Ceci N'Est Pas un État: The Order of Malta and the Holy See as Precedents for Deterritorialized Statehood?*, 31 REV. EUR. COMPAR. & INT'L ENV'T L. 171, 175 (2022) (reviewing arguments about the Sovereign Order of Malta's status as a state).

⁸⁴ See, e.g., Christian R. Martinez, *The Curious Case of Lawrence Hoskins: Evaluating the Scope of Agency Under the Anti-Bribery Provisions of the FCPA*, 53 COLUM. J.L. & SOC. PROBS. 211, 212 & n.2 (2020) (describing the Foreign Corrupt Practices Act as "revolutionary"). Although often described as the only law of its kind when enacted, see, e.g., *id.* at 212 n.2, the United States' Foreign Corrupt Practices Act existed alongside a Swedish law that also prohibited transnational bribery, see Michael Bogdan, *International Trade and the New Swedish Provisions on Corruption*, 27 AM. J. COMPAR. L. 665, 668 (1979).

⁸⁵ See Bruce W. Klaw, *A New Strategy for Preventing Bribery and Extortion in International Business Transactions*, 49 HARV. J. ON LEGIS. 303, 306 (2012).

⁸⁶ Foreign Corrupt Practices Act Amendments of 1988, 15 U.S.C. § 5003(d).

⁸⁷ Inter-American Convention Against Corruption, Mar. 29, 1996, S. TREATY DOC. NO. 105-39 (1998), O.A.S.T.S. B-58. ["Inter-American Convention"].

tion, apprehension, and prosecution of persons and entities that pay bribes.⁸⁸ Pursuant to the Inter-American Convention, transnational bribery soon became illegal throughout almost the entirety of the Western Hemisphere.⁸⁹

Even though the Organization of American States' Convention was the first, most scholars recognize the Organization of Economic Cooperation and Development's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions,⁹⁰ promulgated shortly after the Inter-American Convention, as having transformed the legal landscape with respect to corruption.⁹¹ The OECD requires members to criminalize transnational bribery and to cooperate with one another in the investigation and prosecution of bribery cases.⁹² The OECD Convention fundamentally changed the business environment; members of the Organization of Economic Cooperation and Development—the “rich democracies club”—account for more than sixty percent of global domestic product, are involved in more than three quarters of all international trade and investment transactions around the world, and provide more than ninety-five percent of developmental aid.⁹³

The OECD Convention and the Inter-American Convention do not, however, constitute the totality of international agreements requiring members to criminalize transnational bribery. The African Union, the Council of Europe, and the European Union have each agreed to similar requirements.⁹⁴ More recently, the United Nations has promulgated a Convention Against Corruption, which requires signatories to criminalize transnational bribery.⁹⁵ Few of the more than 140 countries that have signed the United Nations Convention have so far enacted the laws required therein, but the require-

⁸⁸ Developments in the Law – International Criminal Law, *Corporate Liability for Violations of International Human Rights Law*, 114 HARV. L. REV. 2025, 2032 (2001).

⁸⁹ Gideon Mark, *Private FCPA Enforcement*, 49 AM. BUS. L.J. 419, 501 (2012).

⁹⁰ Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Nov. 21, 1997, S. TREATY DOC. NO. 105-43 (1998) [“OECD Convention”].

⁹¹ David Hess and Thomas Dunfee describe the OECD Convention as the “most significant advancement in the fight against corruption and the strongest demonstration of its universal condemnation.” David Hess & Thomas Dunfee, *Fighting Corruption: A Principled Approach: The C2 Principles (Combating Corruption)*, 33 CORNELL INT'L L.J. 593, 602 (2000).

⁹² Margaret Ryznar & Samer Korkor, *Anti-Bribery Legislation in the United States and United Kingdom: A Comparative Analysis of Scope and Sentencing*, 76 MO. L. REV. 415, 421 (2011).

⁹³ *Our Global Reach*, OECD, <https://www.oecd.org/about/members-and-partners/> (last visited Nov. 19, 2022); *Organization for Economic Co-operation and Development (OECD)*, OFF. OF THE U.S. TRADE REP., <https://ustr.gov/trade-agreements/wto-multilateral-affairs/oecd> (last visited Nov. 19, 2022).

⁹⁴ African Union, Convention on Preventing and Combating Corruption, July 1, 2003, 43 I.L.M. 5; Council of Europe, Criminal Law Convention on Corruption, Jan. 27, 1999, E.T.S. No 173; Convention on the Fight Against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union, 1997 O.J. (C 195) 2.

⁹⁵ United Nations Convention Against Corruption, arts. 15–20, Oct. 31, 2003, 2349 U.N.T.S. 41.

ments imposed by the United Nations and other Conventions will act to increase the number of countries that criminalize transnational bribery.⁹⁶

The requirements imposed by these agreements on signatory countries translate into requirements and prohibitions imposed on business firms. “Although the conventions set out general international standards, each member state is expected to unilaterally legislate and enforce its own national anti-bribery laws.”⁹⁷ More than fifty countries have done so by outlawing the payment of bribes to foreign government officials.⁹⁸ Local laws prohibiting the payment of bribes to foreign officials, therefore, form a ubiquitous segment of the regulatory environment of business.

B. Arbitration

The regulatory regime in which business firms operate does not consist only of domestic criminal laws. Business firms enter into commercial relationships with one another as well as with governments. Arbitral bodies resolve the vast majority of disputes that arise in the context of these relationships.⁹⁹ Allegations of bribery “are the leading ground for invoking the principle” in arbitration that any given contract should not be enforced on public policy grounds.¹⁰⁰

The non-enforcement of contracts tainted by bribery has a long history in arbitration. In 1963, Judge Gunnar Lagergren observed that:

Whether one is taking the point of view of good governance or that of commercial ethics it is impossible to close one’s eyes to the probable destination of amounts of this magnitude, and to the destructive effect thereof on the business pattern with consequent impairment of industrial progress. Such corruption is an international evil; it is contrary to good morals and to international public policy common to the community of nations.¹⁰¹

⁹⁶ See Elizabeth K. Spahn, *Implementing Global Anti-Bribery Norms: From the Foreign Corrupt Practices Act to the OECD Anti-Bribery Convention to the U.N. Convention Against Corruption*, 23 *INT’L & COMPAR. L. REV.* 1, 11–12 (2013).

⁹⁷ Matt A. Vega, *The Sarbanes-Oxley Act and the Culture of Bribery: Expanding the Scope of Private Whistleblower Suits to Overseas Employees*, 46 *HARV. J. ON LEGIS.* 425, 435 (2009).

⁹⁸ Nichols, *supra* note 70, at 362.

⁹⁹ Christopher Drahozal and Richard Naimark estimate that almost ninety percent of international business contracts contain clauses referring disputes to arbitration. Christopher R. Drahozal & Richard W. Naimark, *Commentary*, in *TOWARDS A SCIENCE OF INTERNATIONAL ARBITRATION: COLLECTED EMPIRICAL RESEARCH* 57, 59 (Christopher R. Drahozal & Richard W. Naimark eds., 2005).

¹⁰⁰ Gordon Kaiser, *Corruption in the Energy Sector: Criminal Fines, Civil Judgments, and Lost Arbitrations*, 34 *ENERGY L.J.* 193, 201 (2013).

¹⁰¹ ICC Case No. 1110, Award Opinion of Judge Lagergren, ¶ 20 (1963), reprinted in 10 *ARB. INT’L* 282, 294 (1994) (hereinafter “Award”). Judge Lagergren was far from a fringe judge and in fact had a sterling career as a jurist: he presided over the Court of Appeal for Western Sweden, administered the Royal Court of Sweden as Marshall of the Realm, served as a judge on the European Court of Human Rights, and presided over the Iran-U.S. Claims

Business firms that pay bribes, therefore, according to Judge Lagergren “have forfeited any right to ask for assistance of the machinery of justice.”¹⁰² This line of arbitral thought, in other words, denies even access to arbitration to business firms that have paid bribes.¹⁰³

More recently, relying on the principle that agreements to arbitrate are separable from otherwise unenforceable contracts, arbitral bodies have heard disputes in which bribery is alleged.¹⁰⁴ Access to arbitration has not inured to the benefit of bribe-paying firms. The prevailing doctrine has been most forcefully articulated by the arbitration panel in *World Duty Free Company Ltd v. Republic of Kenya*:

[B]ribery is contrary to the international public policy of most, if not all, States or, to use another formula, to transnational public policy. Thus, claims based on contracts of corruption or on contracts obtained by corruption cannot be upheld by this Arbitral Tribunal.¹⁰⁵

In other words, arbitral panels will extend their jurisdiction over disputes, but if bribery is proven to exist then the contract at issue is held to be voidable.¹⁰⁶ Arbitration tribunals will not uphold contracts tainted by bribery.¹⁰⁷

Arbitration tribunals contribute in other ways to the work of the global anticorruption regime.¹⁰⁸ Arbitration tribunals, for example, investigate and rule upon allegations of corruption in any transaction in dispute, and often automatically do so when “red flags” are present.¹⁰⁹ Tribunals may, in fact, investigate the possibility of corruption on their own initiative; if they fail to investigate and the occurrence of bribery is found in later proceedings, a tribunal’s decision may legally be set aside by a national court.¹¹⁰

Tribunal. See Florian Grisel, *Competition and Cooperation in International Commercial Arbitration: The Birth of a Transnational Legal Profession*, 51 *LAW & SOC’Y REV.* 790, 802–03 (2017).

¹⁰² Award, *supra* note 101, at ¶ 23, 10 *ARB. INT’L* at 294.

¹⁰³ See Michaela Halpern, *Corruption as a Complete Defense in Investment Arbitration or Part of a Balance*, 23 *WILLAMETTE J. INT’L L. & DISPUTE RES.* 297, 303 (2016).

¹⁰⁴ J. Gillis Wetter, *Issues of Corruption Before International Arbitral Tribunals: The Authentic Text and True Meaning of Judge Gunnar Lagergren’s 1963 Award in ICC Case No. 1110*, 10 *ARB. INT’L* 277, 278 (1994).

¹⁰⁵ *World Duty Free Co. v. Republic of Kenya*, ICSID Case No. ARB/00/7, Award, ¶ 157 (Oct. 4, 2006) [<http://perma.cc/V33X-NH82>].

¹⁰⁶ Matt Reeder, *Estop That! Defeating a Corrupt State’s Corruption Defense to ICSID BIT Arbitration*, 27 *AM. REV. INT’L ARB.* 311, 312–14 (2016).

¹⁰⁷ W. Laurence Craig, *Conflict and Cooperation: The Arbitrator’s Mission and the Application of Law in International Commercial Arbitration*, 21 *AM. REV. INT’L ARB.* 243, 276 (2010).

¹⁰⁸ See Catherine A. Rogers, *Secrecy and Transparency in Dispute Resolution: Transparency in International Commercial Arbitration*, 54 *KAN. L. REV.* 1301, 1332 (2006).

¹⁰⁹ See Lucinda A. Low, *Methodologies for Proving Corruption in Arbitration: Uses and Limitations of Red Flags*, in *THE TRANSNATIONALIZATION OF ANTI-CORRUPTION LAW* 399, 404–11 (Régis Bismuth, Jan Dunin-Wasowicz & Philip M. Nichols eds., 2021) (describing nature and use of red flags).

¹¹⁰ Bernardo Cremades & David Cairns, *Transnational Public Policy in International Arbitral Decision-Making: The Cases of Bribery, Money Laundering, and Fraud*, in *ARBITRA-*

As with treaties requiring the criminalization of transnational bribery, and the laws implementing those requirements, the arbitral rules focus on business, and business firms. The same is true of administrative rules and processes.

C. Administrative Rules and Processes

Administrative rules and processes also contribute to the makeup of the global anticorruption regime. National governments and international organizations alike promulgate rules that punish business firms for engaging in bribery. Interestingly, while governments usually punish public officials for demanding or accepting bribes, the focus of international organizations remains pointed solely at business firms.¹¹¹

At the national level, many countries have rules that prohibit a person or business firm that has engaged in bribery from entering into further business relationships with that government.¹¹² The federal government of the United States, the central government of China, and the European Union each also debar bribe-paying businesses and persons from any government relations or business.¹¹³ These rules are often overlooked by legal scholars but must be taken into account by transnational business firms: the federal government of the United States claims to be the largest purchaser of goods and services in the world, while the Chinese government and that of the European Union also constitute enormous potential buyers of products and services.¹¹⁴

TION, MONEY LAUNDERING, CORRUPTION AND FRAUD 65, 67 (Kristine Karsten & Andrew Berkeley eds., 2003).

¹¹¹ See Jeffrey R. Boles, *The Two Faces of Bribery: International Corruption Pathways Meet Conflicting Legislative Regimes*, 35 MICH. J. INT'L L. 673, 680–87 (2014). The Organization of Economic Cooperation and Development notes, however, that even though most states criminalize the demand or acceptance of bribes, in cases prosecuted by international organizations very few government officials are prosecuted even when business firms are found liable for paying bribes. See OECD, FOREIGN BRIBERY ENFORCEMENT: WHAT HAPPENS TO THE PUBLIC OFFICIALS ON THE RECEIVING END? 7–8 (2018).

¹¹² Debarment “is commonly employed by victims [of corruption] that are national government agencies.” DICK THORNBURGH, RONALD L. GAINER & CUYLER H. WALKER, REPORT CONCERNING THE DEBARMENT PROCESSES OF THE WORLD BANK 3 (2002) [<http://perma.cc/V3RZ-79NC>].

¹¹³ Federal Acquisitions Regulations System – Causes for Debarment, 48 C.F.R. § 9.406-2; Tong Xinchao, *Chinese Procurement Law: Current Legal Frameworks and a Transition to the World Trade Organization’s Government Procurement Agreement*, 17 TEMP. INT’L & COMP. L.J. 139, 163–64 (2003); Council Directive 2004/17/EC, 2004 O.J. (L 134); Council Directive 2004/18/EC, sec. 2, arts. 45, 1(b) O.J. (L 134).

¹¹⁴ See COMM’N TO THE EUR. PARLIAMENT, THE COUNCIL & THE CT. OF AUDITORS, CONSOLIDATED ANNUAL ACCOUNTS OF THE EUROPEAN UNION FOR THE FINANCIAL YEAR 2021 17 (2022) (reporting operating expenditures of _268.3 billion), https://ec.europa.eu/info/publications/annual-accounts-2021_en; Gil Lan, *American Legal Realism Goes to China: The China Puzzle and Law Reform*, 51 AM. BUS. L.J. 365, 366 (2014) (noting that China is the second largest economy behind the United States); U.S. Small Bus. Admin., *SBA’s Role in Government Contracting*, SBA (2015) [<http://perma.cc/E325-DJQH>] (claiming that “[t]he U.S. government is the largest single purchaser of goods and services in the world”).

International organizations also promulgate rules that target bribery by business firms. The World Bank Group, for example, which consists of the International Bank for Reconstruction and Development, the International Finance Corporation, the International Development Association, the International Centre for Settlement of Investment Disputes, and the Multilateral Investment Guarantee Agency, investigates claims of bribery in any project that involves one of its bodies.¹¹⁵ The Integrity Vice Presidency division of the World Bank actively investigates and holds hearings on such claims.¹¹⁶ If bribery is found to have occurred, then the responsible person or firm is placed on an embargo list and may not become involved in any project involving the World Bank Group.¹¹⁷ The International Monetary Fund and each of the Regional Development Banks have similar processes, and maintain similar lists; reciprocal agreements among these institutions result in cross-debarment.¹¹⁸ Debarment from projects in which international financial institutions participate can constitute serious punishment for bribe-paying firms; the international financial institutions participate in a significant number of projects involving developing and emerging countries.¹¹⁹

Administrative rules and procedures powerfully contribute to the legal environment in which business firms operate. Indeed, these rules “have not been without effect on business practices,” and once again focus the global anticorruption regime on business firms.¹²⁰

D. Business Firms Must Also Be Proactive

While the thrust of the global anticorruption regime facially consists of a prohibition of the payment of bribes by transnational business firms, firms actually face an additional requirement. Firms must proactively create and implement comprehensive programs designed to prevent those bribe payments.

The most explicit directive to do so issues from the United Kingdom’s Bribery Act.¹²¹ The Bribery Act’s jurisdiction extends to any business firm incorporated in or conducting business in the United Kingdom, which effectively encompasses a significant portion of transnational business firms.¹²²

¹¹⁵ See Pascale Hélène Dubois, *Domestic and International Administrative Tools to Combat Fraud & Corruption: A Comparison of US Suspension and Debarment with the World Bank’s Sanctions System*, 2012 U. CHI. LEGAL F. 195, 216–34 (2012) (describing the process).

¹¹⁶ See *id.* at 218–26 (describing the Integrity Vice Presidency).

¹¹⁷ Sope Williams, *The Debarment of Corrupt Contractors from World Bank-Financed Contracts*, 36 PUB. CONT. L.J. 277, 278 (2007).

¹¹⁸ Dubois, *supra* note 115, at 232.

¹¹⁹ See Jeehye You, *Legislative Reform of the Kaesong Industrial Complex in North Korea*, 29 UCLA PAC. BASIN L.J. 36, 67 (2011) (describing enormity of projects).

¹²⁰ Paul D. Carrington, *Qui Tam: Is False Claims Law a Model for International Law?*, 2012 U. CHI. LEGAL F. 27, 40 (2012).

¹²¹ Bribery Act 2010, c. 23 (UK) [Bribery Act].

¹²² “[A]nother of the innovations of the Bribery Act was to create a very wide, extra-territorial jurisdiction in relation to bribery offences, in particular under” the sections dealing

The United Kingdom enacted the Bribery Act in 2010, in response to criticism by the Organization for Economic Cooperation and Development, which found the United Kingdom's laws inadequate under the Anti-Bribery Convention.¹²³

The Bribery Act has largely supplanted the United States' Foreign Corrupt Practices Act as the baseline law to which transnational firms must adhere.¹²⁴ The Act creates four criminal offenses. Two of these are simply recalibrations of domestic bribery, and the third criminalizes the payment of bribes to foreign officials.¹²⁵

The fourth newly created criminal offense has had the most impact on the business environment: a business firm incurs criminal liability if it fails to prevent the payment of bribes for business purposes.¹²⁶ The stark language of the Act makes clear that this provision specifically targets business firms:

A relevant commercial organisation¹²⁷ (“C”) is guilty of an offence under this section if a person (“A”) associated with C bribes another person intending –

(a) to obtain or retain business for C, or

(b) to obtain or retain an advantage in the conduct of business

for C.¹²⁸

Conversely, the Bribery Act creates an affirmative defense:

with adequate programs to prevent bribery. Eoin O’Shea, *Criminal Liability and the Politics of Enforcement*, BUTTERWORTHS J. INT’L BANKING & FIN. L., Feb. 2016, at 1, 2.

¹²³ See F. Joseph Warin, Charles Falconer & Michael S. Diamant, *The British are Coming!: Britain Changes Its Law on Foreign Bribery and Joins the International Fight Against Corruption*, 46 TEX. INT’L L.J. 1, 4 (2010) (describing genesis of the Bribery Act).

¹²⁴ See Rachel Brewster & Christine Dryden, *Building Multilateral Anticorruption Enforcement: Analogies Between International Trade & Anti-Bribery Law*, 57 VA. J. INT’L L. 221, 255 n.232 (2018) (“The new U.K. law is generally considered as strong (if not stronger) than the FCPA.”); Jon Jordan, *The Adequate Procedures Defense Under the UK Bribery Act: A British Idea for the Foreign Corrupt Practices Act*, 17 STAN. J.L. BUS. & FIN. 25, 28 (2011) (“The Bribery Act . . . has been viewed as a broader and tougher foreign anti-bribery law than its United States’ counterpart, the Foreign Corrupt Practices Act.”); Steven R. Salbu, *Mitigating the Harshness of FCPA Enforcement Through a Qualifying Good-Faith Compliance Defense*, 55 AM. BUS. L.J. 475, 528 (2018) (describing “the U.K. Bribery Act” as “more rigorous and wide-reaching than the FCPA”).

¹²⁵ See Nick Kochan, *The UK Bribery Act: Britain’s New Legal Landscape*, 28 CRIM. JUST. 46, 47–48 (2013) (describing adjustments); Warin, Falconer & Diamant, *supra* note 123, at 23 (describing changes).

¹²⁶ See Salbu, *supra* note 124, at 528 (contrasting liability for failure to prevent with the defense of having created an effective program); Warin, Falconer & Diamant, *supra* note 123, at 36 (describing penalties).

¹²⁷ The Act defines a commercial organization as “(a) a body which is incorporated under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere), (b) any other body corporate (wherever incorporated) which carries on a business, or part of a business, in any part of the United Kingdom, (c) a partnership which is formed under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere), or (d) any other partnership (wherever formed) which carries on a business, or part of a business, in any part of the United Kingdom.” Bribery Act, *supra* note 121, § 7(5).

¹²⁸ *Id.* § 7(1).

it is a defence for C to prove that C had in place adequate procedures designed to prevent persons associated with C from undertaking such conduct.¹²⁹

Thus, the Bribery Act creates a powerful incentive for business firms to create and implement programs to control bribery within their firms.¹³⁰

The British Ministry of Justice has promulgated a guideline outlining in broad strokes the characteristics of anti-bribery programs that will shield a business firm from liability.¹³¹ These guidelines are “intended to help commercial organisations of all sizes and sectors understand what sorts of procedures they can put in place to prevent bribery.”¹³² The Ministry organizes these guidelines around six principles. The first of these is proportionality: that the “procedures to prevent bribery by persons associated with it are proportionate to the bribery risks it faces and to the nature, scale and complexity of the commercial organisation’s activities.”¹³³ The second requires commitment from leaders: that “[t]he top-level management of a commercial organisation (be it a board of directors, the owners or any other equivalent body or person) are committed to preventing bribery.”¹³⁴ The third involves risk assessment: that the firm “assesses the nature and extent of its exposure to potential external and internal risks of bribery on its behalf by persons associated with it.”¹³⁵ The fourth requires due diligence: the firm must “appl[y] due diligence procedures, taking a proportionate and risk based approach, in respect of persons who perform or will perform services for or on behalf of the organisation, in order to mitigate identified bribery risks.”¹³⁶ The fifth has to do with the communication of programs: the firm must “seek[] to ensure that its bribery prevention policies and procedures are embedded and understood throughout the organisation through internal and external communication, including training.”¹³⁷ The sixth and last imposes an ongoing requirement to monitor: that the firm “monitors and reviews procedures designed to prevent bribery by persons associated with it and makes improvements where necessary.”¹³⁸ Throughout, the program and procedures must be “clear, practical, accessible, effectively implemented and enforced.”¹³⁹

¹²⁹ *Id.* § 7(2).

¹³⁰ See Poonam Puri & Andrew Nichol, *The Role of Corporate Governance in Curbing Foreign Corrupt Business Practices*, 53 OSGOODE HALL L.J. 164, 195 (2015) (analyzing incentives to proactively create an effective program to control bribery).

¹³¹ See Salbu, *supra* note 124, at 529 (describing the guidelines).

¹³² MINISTRY OF JUST., THE BRIBERY ACT 2010 GUIDANCE 6 (2011).

¹³³ *Id.* at 21.

¹³⁴ *Id.* at 23.

¹³⁵ *Id.* at 25.

¹³⁶ *Id.* at 27.

¹³⁷ *Id.* at 29.

¹³⁸ *Id.* at 31.

¹³⁹ *Id.* at 21.

No British court has yet explicated the requirements of an adequate corruption control program within a business firm.¹⁴⁰ One British jury has, however, found a firm's program to be inadequate.¹⁴¹ *Regina v. Skansen Interiors Limited* considered a small contracting firm that paid bribes to secure a contract in London.¹⁴² A new CEO discovered the bribes, reported the bribes to government agencies, and ordered the firm to cooperate fully in the government investigation and also to implement a program to prevent further bribery.¹⁴³ Despite its cooperation, the government criminally charged the firm for failure to prevent bribery.¹⁴⁴ The firm claimed that it had in fact created and implemented the appropriate anti-bribery program for a business firm of its size, by engendering a corporate culture that promoted honesty and discouraged the payment of bribes.¹⁴⁵ Despite evidence supporting these claims, a jury convicted Skansen Interiors for failing to create and implement a viable program.¹⁴⁶

Skansen Interiors sends a "stark" message to business firms.¹⁴⁷ Business firms must implement anti-bribery programs: "The *only* defence available to a corporation when identifying bribery in its operations is to ensure that it has in place adequate anti-bribery procedures."¹⁴⁸ These programs must be specifically designed to control bribery; business firms "can no longer simply rely on general financial safeguards and must put specific anti-bribery and anti-corruption policies in place in order to avoid being held liable for their employees' misconduct."¹⁴⁹ Prosecutors seem to take the lack

¹⁴⁰ See Michal Asoulin, *R v Skansen Interiors Limited*, *Southwark Crown Court* (2018), SCHINDLERS (Aug. 7, 2018), <http://www.schindlers.co.za/news/r-v-skansen-interiors-limited-southwark-crown-court-2018/>.

¹⁴¹ See Annabel Reoch, *UK Bribery Act First Contested Failure-to-Prevent Case*, FCPA BLOG (Mar. 25, 2018, 1:18 PM), <http://www.fcpablog.com/blog/2018/3/15/annabel-reoch-uk-bribery-act-first-contested-failure-to-prev.html>.

¹⁴² Polly Sprenger & Jason Williamson, *First Convictions for Corporate Bribery Target Construction and Property*, LEXOLOGY (Mar. 14, 2018), <https://www.natlawreview.com/article/first-convictions-corporate-bribery-target-construction-and-property>. The bribes were domestic commercial bribes.

¹⁴³ *Id.*

¹⁴⁴ Ben Lucas, *Skansen Was Charged with Bribery in UK Despite Self-Reporting*, *Former CEO Says*, MLEX Mkt. Insight (Mar. 15, 2018), <https://mlexmarketinsight.com/insights-center/editors-picks/anti-bribery-and-corruption/europe/skansen-was-charged-with-bribery-in-uk-despite-self-reporting,-former-ceo-says>.

¹⁴⁵ Omar Qureshi, Iskander Fernandez & Amy Wilkinson, *The Jury Is Out on Compliance in the First Test of the Bribery Act's Adequate Procedures Defence*, COMPLIANCE & ENFORCEMENT (Mar. 15, 2018), https://wp.nyu.edu/compliance_enforcement/2018/03/15/the-jury-is-out-on-compliance-in-the-first-test-of-the-bribery-acts-adequate-procedures-defence/.

¹⁴⁶ *Id.*

¹⁴⁷ Reoch, *supra* note 141, at 3. Michal Asoulin reinforces this point: "This case provides companies with the message that adequate anti-bribery and corruption procedures are required for all companies, of any size and operating locally or otherwise." Asoulin, *supra* note 140, at 2.

¹⁴⁸ Sprenger, *supra* note 142, at 3 (emphasis added).

¹⁴⁹ Asoulin, *supra* note 140, at 2.

of an adequate program quite seriously.¹⁵⁰ Programs that will survive such scrutiny will probably be those that are designed to deal with the risks faced by a business firm, and that are clearly and meaningfully communicated to persons associated with the firm.¹⁵¹

The United States' Foreign Corrupt Practices Act, although not as robust as the United Kingdom's Bribery Act, remains a vital component in the global anti-corruption regime.¹⁵² The Foreign Corrupt Practices Act does not criminalize the failure to implement adequate anti-bribery provisions, nor does it allow for the affirmative defense of actually creating and implementing those programs.¹⁵³ Nonetheless, the manner in which cases have been handled does offer strong incentives to implement such programs. Most investigations pursuant to the Foreign Corrupt Practices Act do not result in trials but instead are resolved through Non-Prosecution Agreements or Deferred Prosecution Agreements.¹⁵⁴ The existence of an effective compliance program constitutes a critical factor used in deciding whether to defer or decline prosecution.¹⁵⁵

If an investigation pursuant to the Foreign Corrupt Practices Act does proceed to trial and the business firm is found liable, that firm will still be better off if it has created and implemented an anti-bribery program.¹⁵⁶ The federal sentencing guidelines in the United States explicitly "offer incentives to organizations to reduce and ultimately eliminate criminal conduct by providing a structural foundation from which an organization may self-police its

¹⁵⁰ See Qureshi, Fernancez & Wilkinson, *supra* note 145 (analyzing prosecutors' motives, including "sending a message").

¹⁵¹ See Asoulin, *supra* note 140, at 3 ("companies should take care in implementing clear and well-communicated policies which are properly documented and up-to-date"); Sprenger, *supra* note 142, at 4 ("adequate procedures mean having appropriate policies in place and ensuring they are communicated to staff").

¹⁵² See Priya Cherian Huskins, *FCPA Prosecutions: Liability Trends to Watch*, 60 STAN. L. REV. 1447, 1447–48 (2008) (describing robust enforcement).

¹⁵³ See Warin, Falconer & Diamant, *supra* note 123, at 28. Steve Salbu criticizes the United States for not offering the affirmative defence. See Salbu, *supra* note 124, at 529–30.

¹⁵⁴ Mike Koehler, *Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcement*, 49 U.C. DAVIS L. REV. 497, 515 (2015).

¹⁵⁵ See Ryan D. McConnell, Jay Martin & Charlotte Simon, *Plan Now or Pay Later: The Role of Compliance in Criminal Cases*, 33 Hous. J. INT'L L. 509, 531 (2011) (describing the role of compliance programs in determinations of prosecutors); Joseph W. Yockey, *FCPA Settlement, Internal Strife, and the "Culture of Compliance"*, 2012 WIS. L. REV. 689, 706 (2012) ("Though cooperation generally remains the prerequisite to obtaining a DPA or NPA, regulators also stress that they are more likely to offer leniency to firms with a strong 'culture of compliance.'").

¹⁵⁶ See Kevin J. Smith, *The Foreign Corrupt Practices Act: Set Aside the Moral and Ethical Debates, How Does One Operate Within this Law?*, 45 HOFSTRA L. REV. 1119, 1134 (2017) (to avoid "enormous fines to the temporary or permanent exclusion from federal procurement contracting . . . businesses should enact a detailed compliance program"); see also McConnell, Martin & Simon, *supra* note 155, at 531 (analyzing fines and finding that the existence of compliance programs reduces the size of a penalty).

own conduct through an effective compliance and ethics program.”¹⁵⁷ The existence of an effective compliance program may substantially reduce the fine imposed on a convicted business firm.¹⁵⁸ The sentencing guidelines apply to all business misconduct, but the U.S. Department of Justice has noted its diligence in taking the existence of effective programs into account in cases involving bribery.¹⁵⁹

The global anti-corruption regime is complex and still unfolding; it defies simple explanation. One easily identifiable theme that has existed since its nascence, however, is the centrality of prohibiting business firms from paying bribes. More recently, the regime seems to demand that business firms create meaningful and effective programs to preclude participation in corruption by persons associated with the firm. The seemingly esoteric debate over whether corruption violates human rights directly affects how business firms will accomplish that task.

III. A DEBATE ABOUT HUMAN RIGHTS

Before describing the ongoing debate over whether corruption violates human rights, it is worth reviewing the tensions between rights theories and consequentialist theories of applied ethics, the two dominant normative frameworks within the field of business ethics. In many ways, the debate over whether corruption violates human rights mirrors those tensions.

A. *The Tension Between Rights Theories and Consequentialist Theories*

Brian McElwee describes “a well-rehearsed picture of the terrain of normative ethics in recent times,” in which “two main systemic ethical theories, or families of theories, consequentialism and deontology, held sway.”¹⁶⁰ These bodies have undergone centuries of refinement, and merit explanation well beyond the capacity of this article. For the purposes of this article, I will describe them sufficiently to support an understanding of the tension between the two.

Rights theories seek to identify those rights that are due to a person (or plant or animal), and to derive rules for behavior from the correlative duties attached to those rights.¹⁶¹ For example, people around the world generally agree that other than in particular circumstances, a person has a right to stay

¹⁵⁷ U.S. SENT’G GUIDELINES MANUAL ch. 8, introductory cmt. (U.S. SENT’G COMM’N 2004).

¹⁵⁸ See *id.* § 8C2.5(f).

¹⁵⁹ See U.S. DEP’T OF JUST., CRIM. DIV., THE FRAUD SECTION’S FOREIGN CORRUPT PRACTICES ACT ENFORCEMENT PLAN AND GUIDANCE 7–8 (2016).

¹⁶⁰ Brian McElwee, *The Rights and Wrongs of Consequentialism*, 151 PHIL. STUD. 393, 393 (2010).

¹⁶¹ See Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1541–42 (1993) (explaining correlative duties).

alive.¹⁶² This creates in others a correlative duty to not kill others, again other than in particular circumstances.¹⁶³ Duties may be negative, like the proscription against killing others, but may also express themselves as duties to protect and duties to fulfill those rights.¹⁶⁴ A polity, for instance, generally has a duty to protect the lives of individual persons within its jurisdiction from threat and predation by others.¹⁶⁵ Gun violence in the United States illustrates these two different obligations. The United States has a duty *to protect* people within its jurisdiction from death caused by those who have procured weapons, and also has a duty *to not kill* people within its jurisdiction by means of its own armed police officers.¹⁶⁶ The duty to fulfill a human rights obligation requires polities to “take positive action to facilitate the enjoyment of basic human rights,” perhaps through “domestic measures and legislation.”¹⁶⁷ Thus, for example, the serious threat to life posed by climate change might obligate nations to reform legal systems in ways that account for treaty obligations related to the environment.¹⁶⁸

Consequentialist theories, on the other hand, attempt to predict the outcome of actions, and seek to minimize or maximize particular consequences.¹⁶⁹ A utilitarian consequentialist, for example, seeks to create the greatest good for the greatest number of people, and thus evaluates the appropriateness of an action based on the extent to which it will contribute or detract from the creation of collective good.¹⁷⁰

¹⁶² See Nancy K. Rhoden, *Litigating Life and Death*, 102 HARV. L. REV. 375, 387–88 (1988) (“it is generally agreed that all humans have a right to life”).

¹⁶³ See Marcus Schulzke & Amanda Cortney Carroll, *Corrective Justice for the Civilian Victims of War: Compensation and the Right to Life*, 21 J. INT’L REL. & DEV. 372, 382 (2018) (“Because the right to life is a general right to not be harmed by others, it creates a correlative duty for every other person to avoid harming the right-bearer.”).

¹⁶⁴ See Regina T. Jefferson, “*Let Them Eat Cake*”: *Examining United States Retirement Savings Policy Through the Lens of International Human Rights Principles*, 31 HARV. HUM. RTS. J. 63, 69–70 (2018) (“there is now a recognized duty for governments to respect and protect human rights as well as to promote and fulfill them”).

¹⁶⁵ See U.N. Hum. Rts. Comm., General Comment No. 36: On Article 6 of the International Covenant on Civil and Political Rights, On the Right to Life, ¶ 26, U.N. Doc. CCPR/C/GC/36 (Sept. 3, 2019) (calling on countries to “take appropriate measures to address the general conditions in society that may give rise to direct threats to life or prevent individuals from enjoying their right to life with dignity”).

¹⁶⁶ See Leila Nadya Sadat & Madaline M. George, *Gun Violence and Human Rights*, 60 WASH. U.J.L. & POL’Y 1, 53, 55 (2019) (describing criticism of the United States for arguably violating each duty).

¹⁶⁷ Off. of the High Comm’r for Hum. Rts., *International Human Rights Law*, UNITED NATIONS, <https://www.ohchr.org/en/instruments-and-mechanisms/international-human-rights-law> (last visited Oct. 26, 2022).

¹⁶⁸ See Jennifer M. Mohamed, *Silent Spring + 55: The Human Right to a Clean Environment*, 42 ENVIRONS: ENV’T L. & POL’Y J. 35, 38 (2018) (arguing that “humankind has arrived at another proverbial [policy and law] fork-in-the-road” related to the threats to “a state’s duty to protect, respect, and fulfill the human right to life” posed by climate change).

¹⁶⁹ MARTIN E. SANDBU, *JUST BUSINESS: ARGUMENTS IN BUSINESS ETHICS* 63 (2011).

¹⁷⁰ See Alejandro Miranda, *Consequentialism, the Action/Omission Distinction, and the Principle of Double Effect: Three Rival Criteria to Solve Vital Conflicts in Cases of Necessity*, 62 AM. J. JURISPRUDENCE 209, 212–16 (2017) (describing utilitarianism).

Several challenges bedevil the implementation of a consequentialist framework. Understanding what is meant by and what contributes to “good,” for example, has occupied philosophers for centuries.¹⁷¹ Measurement presents difficulties, particularly when utility remains so poorly understood.¹⁷² Predicting the outcome of any given action also presents challenges.¹⁷³

Rights theories and consequentialist theories lie in tension with one another. The two theories respond to questions regarding ethical or social acts quite differently. Rights theories ask if a negative duty forbids the act, or a duty to protect or fulfill requires the act.¹⁷⁴ If not, then an entity may choose to engage or not engage in the act.¹⁷⁵ Consequentialist theories, on the other hand, always direct whether an actor should or should not engage in an act: if the act maximizes then the actor must do it, if not, then the actor must not.¹⁷⁶ Both frameworks often require an actor to behave in ways that society might describe as monstrous, but do so in diametrically opposite manners: rights frameworks sometimes require sacrificing the communal good to protect an individual,¹⁷⁷ whereas consequentialist frameworks sometimes sacrifice the individual for the communal good.¹⁷⁸

Although many theorists have tried to reconcile the two bodies of theories, in their basic form they lie in tension with one another. That tension forms an interesting background against which to consider the debate about whether corruption violates human rights.

¹⁷¹ See Jeanne L. Schroeder, *The Midas Touch: The Lethal Effect of Wealth Maximization*, 1999 WIS. L. REV. 687, 696–700 (1999) (discussing the difficulty, and the damage introduced to the calculation by substituting wealth maximization for utility).

¹⁷² See J.S. NELSON & LYNN A. STOUT, BUSINESS ETHICS: WHAT EVERYONE NEEDS TO KNOW 36 (2022) (describing difficulties).

¹⁷³ See Bernward Gesang, *Utilitarianism and Heuristics*, 55 J. VALUE INQUIRY 705, 705 (2020) (“The criticism has always been made that such calculations of expected utility are too demanding in an epistemic sense and are overly elaborate in their actual execution.”).

¹⁷⁴ SANDBU, *supra* note 169, at 111–12.

¹⁷⁵ See Waheed Hussain, *Corporations, Profit Maximization and the Personal Sphere*, 28 ECON. & PHIL. 311, 323 (2012) (describing “a personal sphere in which we are allowed to pursue any goals, plans and projects we choose, even if these are not optimal from an impartial point of view”).

¹⁷⁶ See NELSON & STOUT, *supra* note 172, at 36 (“if you determine that the net outcome for society is higher under one scenario than the other, then you are bound to make that moral choice”); SANDBU, *supra* note 169, at 102 (noting that in a consequentialist framework “private purposes have no special claim except insofar as fulfilling them makes the overall outcome better”).

¹⁷⁷ See SANDBU, *supra* note 169, at 139 (describing instances and noting that “keeping one’s hands clean cannot always come above avoiding horrific outcomes”).

¹⁷⁸ See NELSON & STOUT, *supra* note 172, at 36–37 (using slavery as an example); SANDBU, *supra* note 169, at 95–96 (“The problem is that utilitarianism is quite happy to sacrifice one for the many *without further justification.*”).

B. The Debate About Human Rights

A debate between Anne Peters and Kevin Davis aptly illustrates the debate over the extent to which corruption violates human rights. Peters argues for considering corruption a violation of human rights. She notes, first, that in some cases corruption involves a clear violation of a negative duty, for example, when public schools deny an education to students who do not pay bribes.¹⁷⁹ Peters acknowledges that “the key question then is whether persons who are affected directly or indirectly are sufficiently individualized to be qualified as ‘victims,’ and that question must be examined in each scenario and cannot be answered in the abstract.”¹⁸⁰ Peters also identifies causation as “[a] key problem for determining human rights violations through corrupt conduct.”¹⁸¹ This too requires determination on a case-by-case basis.¹⁸²

More broadly, Peters suggests that many instances of corruption implicate clearly identified rights, such as education, or health, or freedom.¹⁸³ Politics have an obligation to protect individuals from others who would transgress these rights, and a duty to create the legal or political mechanisms to effectuate these rights. Peters argues that enacting and implementing anticorruption laws helps to satisfy these obligations.¹⁸⁴ Peters also points to specific human rights obligations created through accession to international conventions, and argues that even though the treaties themselves do not mention anticorruption laws, the fact that many states cannot possibly meet their obligations without enacting anticorruption laws effectively imposes on those countries a human rights obligation to control corruption.¹⁸⁵

Davis counters with the unspoken half of Peters’ argument regarding specific acts of corruption: “corruption does not *necessarily* lead to human rights violations.”¹⁸⁶ Davis concedes that in some instances corruption clearly violates duties not to infringe human rights, and that in many instances corruption affects identifiable human rights.¹⁸⁷ Affecting, however, does not always constitute a violation. Davis points out that despite Peters’ careful explication of rules and doctrine regarding causation, “any connec-

¹⁷⁹ Anne Peters, *Corruption as a Violation of International Human Rights*, 29 EUR. J. INT’L L. 1251, 1255 (2018). The Universal Declaration of Human Rights enshrines access to healthcare and education as basic human rights. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), arts. 25–26 (Dec. 10, 1948).

¹⁸⁰ Peters, *supra* note 179, at 1256.

¹⁸¹ *Id.* at 1267.

¹⁸² Peters reviews the scant judicial examination of causation in instances of corruption, *id.* at 1267–68, doctrines regarding causality, *id.* at 1269–71, and cases of causation by omission, *id.* at 1271.

¹⁸³ *Id.* at 1256–57.

¹⁸⁴ *Id.* at 1260.

¹⁸⁵ *Id.* at 1260–67.

¹⁸⁶ Kevin E. Davis, *Corruption as a Violation of International Human Rights: A Reply to Anne Peters*, 29 EUR. J. INT’L L. 1289, 1289 (2019) (emphasis added).

¹⁸⁷ *Id.* at 1290.

tion between corruption and diminution of human rights are contingent rather than necessary.”¹⁸⁸ Myriad factors affect public policy and the allocation of funds and other resources; thus, it can never really be determined whether rights-respecting policies or measures would or still would not have been adopted in the absence of corruption.¹⁸⁹

With respect to Peters’ argument that the failure to adopt anticorruption measures constitutes a human rights violation, Davis essentially offers two rejoinders. Explicitly, he returns to his observations regarding causation: “The indeterminate nature of the connection between corruption and human rights violations means that failure to adopt anti-corruption policies is not automatically a violation of a state’s responsibility to protect and fulfill human rights.”¹⁹⁰ Implicitly, he points out that no human rights organization has found a human rights-based obligation to enact such measures.¹⁹¹

A solid and growing body of empirical research demonstrates the connection between corruption and degradation of human life and the life of this planet. Peters and Davis do not contest that fact. Instead, they argue over whether we should therefore consider corruption a violation of human rights. Peters says yes, “corruption affects the recognized human rights as they have been codified by the UN human rights covenants.”¹⁹² Davis says that while some instances of corruption might constitute human rights violations, the complex issue of causality means that “analysis of whether corruption violates human rights must be careful and context-specific.”¹⁹³

C. Two Examples

Davis calls for close examination of discrete cases of corruption. This may prove useful in illustrating the difficulties in determining whether corruption violates human rights. This article turns to two well-documented cases of corruption, Merck & Co.’s use of ghostwriters, and Walmart’s bribery of local officials in Teotihuacan.

1. Merck & Co.’s Vioxx

Teachers of business ethics often use Roy Vagelos and the firm he led, Merck & Co., as an exemplary illustration of a socially responsible business.¹⁹⁴ When researchers at the firm discovered that ivermectin (branded as

¹⁸⁸ *Id.* at 1291.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 1292–93.

¹⁹² Peters, *supra* note 179, at 1256.

¹⁹³ Davis, *supra* note 186, at 1291.

¹⁹⁴ See Rebecca E. Wolitz, *A Corporate Duty to Rescue: Biopharmaceutical Companies and Access to Medications*, 94 *IND. L.J.* 1163, 1196 (2019) (describing the program as “well known”); see also DAVID BOLLIER, KIRK O. HANSON & STEPHANIE WEISS, *MERCK & CO., INC.: ADDRESSING THIRD-WORLD NEEDS (A)* (Harv. Bus. Case Study No. 991021, 1991).

Mectizan), a drug developed to treat parasites in animals, also cured river blindness in humans, Vagelos ordered the development and production, as well as transportation and free distribution of the drug even though the millions of sufferers of river blindness could not pay to receive the drug.¹⁹⁵

Unfortunately, Merck & Co. also provides an illustrative, and chilling, example of corruption. After Vagelos retired, Merck developed rofecoxib, an anti-inflammatory drug trade-named Vioxx, which Merck described as a “miracle drug” because it was less likely to cause gastrointestinal damage than other anti-inflammatory drugs.¹⁹⁶ Clinical trials conducted under Merck’s supervision did find that Vioxx caused less gastrointestinal damage, but also found that it significantly increased the risk of cardiovascular illness and death.¹⁹⁷ Merck responded to the findings of danger to patients with unethical and illegal behavior, including concealment of information, submission of misleading reports to regulatory agencies, and a fierce campaign to intimidate independent researchers.¹⁹⁸ Merck violated laws and social rules, but it is not clear that these actions fell within the definition of corruption.¹⁹⁹ Lying, deceiving, and intimidating do not themselves involve abuse or misuse of authority or trust.²⁰⁰

¹⁹⁵ See Joni Lawrence et al., *Growth, Challenges, and Solutions over 25 Years of Mectizan and the Impact on Onchocerciasis Control*, PLoS NEGLECTED TROPICAL DISEASES, May 14, 2015, at 1, 1 (2015) (describing the program created by Merck). As Rob Hughes notes, “It was far from clear, at the times Merck made these two decisions, that developing or donating ivermectin would be financially good for the company.” Robert C. Hughes, *Exploitation, Deontological Constraints, and Shareholder Theory*, 17 GEO. J.L. & PUB. POL’Y 1007, 1016 (2019).

¹⁹⁶ See Harvey Berman, *How Vioxx Exposed Conflicts of Interest at the Food and Drug Administration and The New England Journal of Medicine*, 75 FOOD & DRUG L.J. 552, 553 (2020) (describing Merck’s advertising campaign).

¹⁹⁷ See Ryan Abbott, *Big Data and Pharmacovigilance: Using Health Information Exchanges to Revolutionize Drug Safety*, 99 IOWA L. REV. 225, 285 (2013) (discussing studies); Berman, *supra* note 196, at 568–69 (describing Merck’s knowledge of the effects of Vioxx).

¹⁹⁸ See Berman, *supra* note 196, at 555–59 (describing in depth a misleading study by Merck); Alexander Lyon, “Putting Patients First”: *Systematically Distorted Communication and Merck’s Marketing of Vioxx*, 35 J. APPLIED COMM. RSCH. 376, 383–92 (2007) (reporting and analyzing Merck’s miscommunication and intimidation campaigns); Bruce M. Psaty & Richard A. Kronmal, *Reporting Mortality Findings in Trials of Rofecoxib for Alzheimer Disease or Cognitive Impairment: A Case Study Based on Documents from Rofecoxib Litigation*, 299 J. AM. MED. ASS’N 1813, 1814–16 (2009) (explaining the misleading nature of Merck’s reports). Berman concludes that “[t]he entire Vioxx chronicle was marked by misrepresentations and obfuscations that lead to death and compromised cardiac health for thousands of patients.” Berman, *supra* note 196, at 572.

¹⁹⁹ See Lyon, *supra* note 198, at 380 (“Merck’s communication practices involving Vioxx provide a recent case of unethical processes.”); Press Release, Dept. of Justice, U.S. Pharmaceutical Company Merck Sharp & Dohme to Pay Nearly One Billion Dollars Over Promotion of Vioxx® (Nov. 22, 2011), <https://www.justice.gov/opa/pr/us-pharmaceutical-company-merck-sharp-dohme-pay-nearly-one-billion-dollars-over-promotion> (reporting criminal and civil penalties imposed on Merck). It remains unclear whether Merck bribed or otherwise induced government officials to misuse their powers.

²⁰⁰ See Philip M. Nichols, *What is Organizational Corruption?*, in HANDBOOK OF BUSINESS AND CORRUPTION: CROSS-SECTORAL EXPERIENCES 3, 19 (Michael Afländer & Sarah Hudson eds., 2017) (noting that not all dysfunctional behaviors fall within the definition of corruption).

Merck did, however, participate in corruption through its use of ghostwriters.²⁰¹ Merck repeatedly presented ghostwritten articles as legitimate research in scholarly articles.²⁰² Scholarly articles matter because government approval of a drug does not itself translate into consumption; pharmaceutical firms must convince healthcare providers to prescribe the drug. Scholarly articles in respected scientific journals provide the foundations for such marketing.²⁰³ Merck produced about twenty “scholarly” papers, using carefully cultivated data, each written to play up the efficacy of Vioxx while downplaying or even denying associated risks.²⁰⁴ In order to give these papers the veneer of independence, as well as to satisfy the requirements of high-quality journals, Merck induced respected scholars to claim authorship of these articles. Merck procured the services of these scholars through a range of benefits, ranging from simply paying them large sums of money to providing them with the opportunity to claim authorship of a scholarly article.²⁰⁵ These papers were not, however, written by independent scholars but were instead drafted by staff at Merck; some of these “scholarly research” papers were even written by staff from Merck’s marketing department.²⁰⁶

Ghostwriting clearly falls within the definition of corruption. Universities and research centers grant substantial authority to their scholars and entrust them to use the universities resources in order to conduct research for the purposes of contributing to the body of knowledge.²⁰⁷ Academia in general involves substantial amounts of trust; tenure shields an academic from punishment for the expression of ideas, with the understanding that the aca-

²⁰¹ See Christine D. Galbraith, *Dying to Know: A Demand for Genuine Public Access to Clinical Trial Results Data*, 78 MISS. L.J. 705, 773–74 (2009) (describing the practice of ghostwriting).

²⁰² See Eugene McCarthy, *A Call to Prosecute Drug Company Fraud as Organized Crime*, 69 SYRACUSE L. REV. 439, 452 (2019) (describing Merck’s use of ghostwriters).

²⁰³ See Chung-Lin Chen, *Assessing Potential Legal Responses to Medical Ghostwriting: Effectiveness and Constitutionality*, 5 J.L. & BIOSCI. 84, 88 (2018) (describing purpose of ghostwriting); Liza Vertinsky, *Pharmaceutical (Re)Capture*, 20 YALE J. HEALTH POL’Y L. & ETHICS 146, 189–90 (2021) (arguing that pharmaceutical firms shape markets through ghostwriting).

²⁰⁴ See Eugene McCarthy, *The Pharma Barons: Corporate Law’s Dangerous New Race to the Bottom in the Pharmaceutical Industry*, 8 MICH. BUS. & ENTREPRENEURIAL L. REV. 29, 65 (2018) (noting that the putative authors of these articles had little knowledge of the studies).

²⁰⁵ See Catherine D. DeAngelis & Phil B. Fontanarosa, *Impugning the Integrity of Medical Science: The Adverse Effects of Industry Influence*, 229 J. AM. MED. ASS’N 1833, 1833–34 (2008).

²⁰⁶ Joseph S. Ross, Kevin P. Hill, David S. Egilman & Harlan M. Krumholz, *Guest Authorship and Ghostwriting in Publications Related to Rofecoxib: A Case Study of Industry Documents from Rofecoxib Litigation*, 229 J. AM. MED. ASS’N 1800, 1802–06 (2008).

²⁰⁷ The American Association of University Professors’ 1915 Declaration of Principles, still embraced by the Association, proclaims that the function of a university is “[t]o promote inquiry and advance the sum of human knowledge.” AM. ASS’N OF UNIV. PROFESSORS, 1915 DECLARATION OF PRINCIPLES 4 (1915), https://aaup-ui.org/Documents/Principles/Gen_Dec_Princ.pdf.

dem will use that freedom to freely and honestly express ideas.²⁰⁸ As the American Association of University Professors states:

Institutions of higher education are conducted for the common good and not to further the interest of either the individual teacher or the institution as a whole. The common good depends upon the free search for truth and its free exposition. . . . Freedom in research is fundamental to the advancement of truth.²⁰⁹

Ghostwriting subverts both authority and trust. A scholar who places their name on a ghostwritten article uses the resources of the university or research center, particularly the powerful but fragile resource consisting of the university's reputation, not to contribute to the general body of knowledge but instead to enrich themselves. Such scholars similarly abuse the trust inherent to tenure; rather than openly and honestly expressing ideas, such scholars simply parrot the carefully scripted words of the pharmaceutical firm, again to enrich themselves.

The corrupt rollout of Vioxx inflicted substantial damage. Merck & Co. distributed Vioxx for five years, during which Vioxx caused tens and perhaps hundreds of thousands of deaths.²¹⁰ One witness, testifying at a later legislative hearing, compared the damage caused by Vioxx to “two to four jumbo jets” full of passengers “dropping out of the sky every week.”²¹¹

2. Walmart in Mexico

Walmart's corrupt activities in Mexico, particularly in Teotihuacan, present another illustration. Walmart's own investigation of these activities hid Walmart's wrongdoing from public view, but a subsequent Pulitzer Prize-winning investigation by the New York Times uncovered substantial corruption.²¹²

²⁰⁸ See James J. Fishman, *Tenure and Its Discontents: The Worst Form of Employment Relationship Save All of the Others*, 21 PACE L. REV. 159, 179–81 (describing academic tenure as a “social contract”).

²⁰⁹ AM. ASS'N OF UNIV. PROFESSORS, 1940 STATEMENT OF PRINCIPLES ON ACADEMIC FREEDOM AND TENURE 14 (1970), <https://www.aaup.org/file/1940%20Statement.pdf> (footnote omitted).

²¹⁰ See McCarthy, *supra* note 202, at 452–53 (“In the end, Vioxx killed, at best, more Americans (60,000) than the Vietnam conflict and, at worst, more Americans (500,000) than World War II.”).

²¹¹ FDA, *Merck and Vioxx: Putting Patient Safety First? Before the S. Comm. on Finance*, 108th Cong. 2 (2004) (statement of David J. Graham, Assoc. Dir. for Sci., Off. of Drug Safety, Ctr. for Drug Evaluation & Rsch., FDA, Dept. of Health & Hum. Serv.), <https://www.finance.senate.gov/imo/media/doc/111804dgttest.pdf>.

²¹² See Amy Deen Westbrook, *Does the Buck Stop Here? Board Responsibility for FCPA Compliance*, 48 U. TOL. L. REV. 493, 509–11 (2017) (describing the cover up); David Barstow, *Vast Mexico Bribery Case Hushed Up by Wal-Mart After Top-Level Struggle*, N.Y. TIMES, Apr. 21, 2012, at A01 (describing cover up and investigation).

Walmart undertook a global expansion program, which included Mexico.²¹³ Walmart attempted to construct stores rapidly, in order to establish a customer base before competitors could establish themselves. To facilitate rapid construction, Walmart de Mexico turned to *gestores*, persons who act as intermediaries with Mexican bureaucracies.²¹⁴ Many *gestores* perform legitimate functions, but some *gestores* also act as intermediaries for bribery.²¹⁵ Walmart de Mexico used *gestores* for the latter purpose, paying at least twenty-four million U.S. dollars in bribes to local bureaucrats throughout Mexico.²¹⁶ Walmart paid these bribes to avoid time-consuming reviews of construction applications by government agencies, to evade environmental regulations, and to secure exceptions to zoning regulations.²¹⁷

The ancient city of Teotihuacan tempted Walmart. Several million people visit Teotihuacan each year, located about eighty kilometers northeast of Mexico City and connected by a multilane freeway.²¹⁸ Walmart's analysis suggested that a location on the main road from the freeway, almost adjacent to the pyramid complex, could profitably take advantage of these traffic flows.²¹⁹

Teotihuacan, however, is deeply embedded in the cultural identity of Mexico.²²⁰ Teotihuacan encompasses one of the largest temple and pyramid complexes in Mesoamerica, as well as innumerable dwellings and other

²¹³ Walmart also paid bribes in at least China, Brazil, and India. See Press Release, Dept. of Justice, Walmart Inc. and Brazil-Based Subsidiary Agree to Pay \$137 Million to Resolve Foreign Corrupt Practices Act Case (June 20, 2019), <https://www.justice.gov/opa/pr/walmart-inc-and-brazil-based-subsidiary-agree-pay-137-million-resolve-foreign-corrupt> (describing bribery scheme).

²¹⁴ See Nicola Faith Sharpe, *Empowering the Corporate Ethics and Compliance Function*, 2019 U. ILL. L. REV. 1321, 1349 (describing Walmart's use of *gestores* to facilitate rapid growth in Mexico).

²¹⁵ See Jason S. Coomer, *A Mexican Gestor That Bribes a Government Official on the Behalf of a Multinational Corporation Can Be the Basis of a Foreign Corrupt Practices Violation and SEC Whistleblower Reward Lawsuit*, TEX. LAWS. BLOG (Apr. 2012), <https://www.texaslawyers.com/coomer/mexicogestorescontractbribeblawyer.htm> (describing legal uses of *gestores* and warning of potential bribery).

²¹⁶ Barstow, *supra* note 212; David Barstow, *The Bribery Aisle: How Wal-Mart Used Payoffs to Get Its Way in Mexico*, N.Y. TIMES, Dec. 18, 2012, at A01.

²¹⁷ Mike Koehler, *Foreign Corrupt Practices Act Enforcement as Seen Through Wal-Mart's Potential Exposure*, 7 WHITE COLLAR CRIME REP., Sept. 21, 2012, at 1–2.

²¹⁸ See Ana M. López, *Number of Visitors to the Archeological Site of Teotihuacán, Mexico from 2009 to 2020*, STATISTA (Sep. 20, 2021), <https://www.statista.com/statistics/1052828/teotihuacan-archaeological-site-visitors> (reporting visits and location).

²¹⁹ See David Barstow & Alejandra Xanic von Berkrab, *How Wal-Mart Used Payoffs to Get Its Way in Mexico*, N.Y. TIMES (Dec. 17, 2012), <https://www.nytimes.com/2012/12/18/business/walmart-bribes-teotihuacan.html> (“Wal-Mart calculated it would attract 250 customers an hour”).

²²⁰ See Israel Tonatiuh Lay Arellano & José Antonio González Zarandona, *Violación al Patrimonio Cultural en Teotihuacán y Cuernavaca, México*, 33 APUNTES: REVISTA DE ESTUDIOS SOBRE PATRIMONIO CULTURAL 37, 49 (2020) (“Teotihuacán, en este sentido, es un patrimonio que todos los mexicanos Identifican Como Parte de las Culturas Prehispánicas que habitaron el territorio mesoamericano antes de la conquista de América por los españoles.”).

structures from the past.²²¹ The site is of incalculable scientific and cultural value.²²² Understandably, therefore, building regulations in Teotihuacan prohibit the construction of large retail outlets, especially in proximity to the pyramid complex.²²³

Walmart responded to these regulations by bribing a local government official to alter the regulatory map to no longer prohibit construction on the proposed site.²²⁴ After reviewing “tens of thousands of documents” and “interviewing scores of government officials and Wal-Mart employees,” the New York Times investigators found that this subversion of local governance fit into a pattern:

Wal-Mart de Mexico was not the reluctant victim of a corrupt culture that insisted on bribes as the cost of doing business. Nor did it pay bribes merely to speed up routine approvals. Rather, Wal-Mart de Mexico was an aggressive and creative corrupter, offering large payoffs to get what the law otherwise prohibited. It used bribes to subvert democratic governance – public votes, open debates, transparent procedures. It used bribes to circumvent regulatory safeguards that protect Mexican citizens from unsafe construction. It used bribes to outflank rivals.²²⁵

The story of Walmart’s corrupt activities in Mexico ends far less dramatically than that of Merck. Despite lingering local resentment, the Walmart store in Teotihuacan continues to operate, part of a network of stores that, despite its genesis in widespread corruption, continues to generate significant revenues for Walmart.²²⁶ Walmart has adopted some structural changes to enhance its compliance with anticorruption laws.²²⁷

3. What Do These Examples Illustrate?

These cases richly illustrate the difficulty in determining whether corruption itself violates human rights. The scholars who allowed Merck to distribute ghostwritten articles in their names acted corruptly. The prescription of Vioxx killed tens of thousands of people, and caused many more to suffer

²²¹ See Deborah L. Nichols, *Teotihuacan*, 24 J. ARCHAEOLOGICAL RSCH. 1, 3–23 (2016) (describing the extensive site).

²²² See *id.* at 38–39 (discussing the importance of research at Teotihuacan).

²²³ See Barstow & von Berktrab, *supra* note 219 (describing the process and the rules).

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ See Arin Ali, *Walmart Owns Most of the Supermarkets in Mexico*, VISUAL CAPITALIST (Mar. 30, 2022), <https://www.visualcapitalist.com/cp/walmart-owns-most-of-the-supermarkets-in-mexico/> (“Walmart’s revenue in Mexico gives it a 68% market share within the country’s supermarket industry”); Jane Bussey, *Wal-Mexico: Wal-Mart’s Biggest Success*, INT’L LAB. RTS. F. (Jan. 25, 2006), <https://laborrights.org/in-the-news/wal-mexico-wal-marts-biggest-success/> (discussing tensions and reasons people use the Walmart store in Teotihuacan).

²²⁷ See Veronica Root Martinez, *Complex Compliance Investigations*, 120 COLUM. L. REV. 249, 269–70 (2020) (describing some changes).

ill health. Health and life are both widely agreed upon human rights. The scholars involved in ghostwriting, therefore, contributed to actions that affected rights. It is tempting, therefore, to conclude that the scholars' corrupt activities violated the human rights of the dead and the afflicted.

Kevin Davis's questions about causality, however, cast doubt on this conclusion. The scholars' corruption contributed to the prescription of Vioxx, but to what extent did the ghostwritten articles stand out among other possible factors?

Scholars who lend their names to ghostwritten articles have aroused enough ire among other scientists to lead to wholesale changes in standards of publication and calls for personal liability for fraud.²²⁸ Few courts of law, however, have addressed the causal contributions of faked marketing by pharmaceutical firms, and those few cases do not conclusively answer this question. In *Strom ex rel. United States v. Scios, Inc.*, a court considered a motion by the defendants to dismiss prosecution under the False Claims Act.²²⁹ The United States claimed, in essence, that false marketing by the defendants induced thousands of physicians to wrongly prescribe the drug Natreacor, and thus Scios and Johnson & Johnson were liable for payment claims filed to the U.S. government under its Medicare program.²³⁰ The false marketing engaged in by the defendants included ghostwritten articles.²³¹ The court did not discuss the liability of individuals who engaged in ghostwriting, but did address the defendants' claims that the prosecution failed to deal with the thousands of prescriptions individually to determine causality—resonant with Davis's observation that for purposes of determining human rights violations causality must be examined on a case-by-case basis.²³² The court neither agreed nor disagreed, and ruled instead that the prosecution had charged with enough specificity to provide the defendants with an understanding of how they may have violated the law and what was needed to defend themselves.²³³ The court, seemingly commenting on the burden facing the prosecution in an actual trial on the facts, noted the immense effort in listing them "one-by-one" and that "there may indeed be factual disputes as to which claims, if any, were the result of Defendants' fraudulent activity."²³⁴ The court, ultimately, seemed to agree with Davis, leaving open for our purposes the question of the extent to which the corrupt scholars who contribute to Vioxx deaths may have violated human rights.

²²⁸ See Chen, *supra* note 203, at 92 (discussing responses to ghostwriting); Simon Stern & Trudo Lemmens, *Legal Remedies for Medical Ghostwriting: Imposing Fraud Liability on Guest Authors of Ghostwritten Articles*, PLoS MED., Aug. 2011, at 1, 2–4 (describing changes and outlining case for liability).

²²⁹ *Strom v. Scios, Inc.*, 676 F. Supp. 2d 884, 885 (N.D. Cal. 2009).

²³⁰ *Id.* at 885, 887.

²³¹ *Id.* at 888–89.

²³² *Id.* at 893.

²³³ *Id.* 893–94.

²³⁴ *Id.* at 894.

Causality in the case of Walmart's bribery in Teotihuacan seems much clearer. Walmart paid bribes directly to a local government official, and that official permitted Walmart to circumvent socially constructed rules meant to protect an area of incalculable cultural value. Questions regarding human rights, however, remain.

Walmart did not endanger health. Walmart instead diminished the public's enjoyment of its cultural heritage, and severed the relationship between society and a government official. Although serious, it is not *as* clear as it is with health and life that these transgressions involve human rights. With respect to cultural heritage, Janet Blake argues that cultural self-determination is a basic right, and because cultural heritage forms a critical component of cultural identity, it therefore by extension is a human right.²³⁵ A broad consensus has arisen around this and similar arguments, but the notion of cultural heritage as a human right is still evolving.²³⁶ Indeed, while the United Nations' Human Rights Council adopted a resolution calling on nations "to respect, promote and protect the right of everyone to take part in cultural life, including the ability to access and enjoy cultural heritage"²³⁷ it also called upon other organs within the United Nations to take on the issue, a call not yet completely heeded.²³⁸

With respect to severing the link between the people of Teotihuacan and their government, several eminent scholars have condemned this very aspect of corruption. Raj Kumar, for example, long ago argued that "[w]hen the government engages in corrupt activities, it is abusing power, disrespecting law and thereby violating the human rights of its citizenry."²³⁹ Kumar's explanation of the violation, essentially rearticulates the connection between corruption and disruption to the enjoyment of more clearly articulated rights: "Corruption violates human dignity as it hinders the proper fulfillment of other basic rights."²⁴⁰ And while Peters identifies several political rights enumerated within the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights that are affected by corruption,

²³⁵ JANET BLAKE, *INTERNATIONAL CULTURAL HERITAGE LAW* 275–77 (1st edn. 2015).

²³⁶ See Emily Behzadi, *Destruction of Cultural Heritage as a Violation of Human Rights: Application of the Alien Tort Statute*, 73 RUTGERS U.L. REV. 525, 529–30 (2021) (discussing the evolving consensus regarding cultural heritage and human rights).

²³⁷ Human Rights Council Res. 33/20, U.N. Doc. A/HRC/RES/33/20, at 2 (Sept. 30, 2016).

²³⁸ *Id.* at 3–4.

²³⁹ C. Raj Kumar, *Corruption and Human Rights: Promoting Transparency in Governance and the Fundamental Right to Corruption-Free Service in India*, 17 COLUM. J. ASIAN L. 31, 53 (2003).

²⁴⁰ *Id.* at 52; see C. Raj Kumar, *Corruption, Good Governance, and Development: Challenges for Promoting Access to Justice in Asia*, 16 MICH. ST. J. INT'L L. 475, 501 (2008) (arguing for recognition of corruption as a human rights violation because "corruption violates the integrity of the political system and neither allows for the protection of human rights, the promotion of human freedoms, nor the development of democracy").

the right to a relationship with one's government free from corruption is not specifically listed.²⁴¹

D. Corruption and Human Rights

Thus the debate lies. Corruption clearly affects the enjoyment of human rights. Does it do so, however, in a manner that itself constitutes a violation of human rights? Our instincts and intuitions push us in that direction, but when pressed to explain the precise manner in which corruption violates precise rights, we return to the general consequences of corruption.

It should be noted that the protagonists in this illustrative debate, as well as other notable commentators, ultimately may care less about the intellectual answer to this question than they do about its practical effect. Peters, who advocates a human rights approach to corruption control, acknowledges that “[t]he demonstration of an actual violation is difficult in terms of both legal argument and proof” but concludes that “[b]y contributing to a change of the frame of reference and by opening up new options for monitoring and litigation, the human rights perspective can usefully complement the criminal law approach to litigation.”²⁴² Davis, who doubts that corruption constitutes a human rights violation, agrees that the human rights approach “will make a valuable contribution to anti-corruption law and policy.”²⁴³ Cecily Rose, who seems to doubt that corruption universally violates human rights, expresses her resistance in terms of the utility of using the “limited” vocabulary of human rights to “describe[e] the harms that result from corruption” and the concomitant “weakening of the fabric” of the global anticorruption regime.²⁴⁴ Andrew Spalding, who constructs a right to corruption-free government from Locke’s political reasoning, advocates doing so because it could revive prosecution for human rights violations in U.S. federal courts.²⁴⁵ David Hess reports on the interaction between corruption and human rights, and suggests that knowledge of that interaction might motivate business firms to invest more time in and commitment to anticorruption programs.²⁴⁶

It should also be noted that each of these commentators, except David Hess, evaluates corruption and corruption control from the perspective of the state, and of society. Only Hess analyzes the question at the level of individual business firms, and he does so from the perspective of a connection between corruption and rights, rather than from the perspective of the debate

²⁴¹ See Peters, *supra* note 179, at 1256–57 (describing political rights).

²⁴² *Id.* at 1287.

²⁴³ Davis, *supra* note 186, at 1296.

²⁴⁴ Cecily Rose, *The Limitations of the Human Rights Approach to Corruption*, 65 INT’L & COMPAR. L.Q. 405, 438 (2017).

²⁴⁵ Andrew Brady Spalding, *Corruption, Corporations, and the New Human Right*, 91 WASH. U. L. REV. 1365, 1403–09 (2014).

²⁴⁶ Hess, *supra* note 81, at 679.

itself. The lack of scholarly attention is worrisome because, as discussed, the weight of the global anticorruption regime lies on individual business firms. How a business firm responds to questions of whether corruption violates human rights could deeply affect the manner in which it attempts to respond to the demands of the global regime.

IV. COMPLIANCE AND THE QUESTION

It is here that the two strands in this article join. In the realm of legal practice and corruption control, the world has created a global anticorruption regime. Although grandiloquent in name, the global corruption regime actually focuses its attention on bribery, and for the most part requires business firms to not pay bribes and to create internal programs that effectively prevent people associated with the firm from paying bribes. In the more esoteric realm of legal and ethical theories, scholars debate the nature of corruption with respect to human rights. No one has yet discussed the relationship of the esoteric debate to the real-world requirements faced by business firms, but those implications should have a voice in discussions about human rights and corruption.

A. The Esoteric Debate Could Affect Business Firm Culture

Business firms have been called on to create effective programs to curb bribery by persons associated with those firms. We do not fully understand why business firms, or organizations of any kind, comply with rules. When an individual within a business firm makes a decision or takes action, however, we do know that the individual does not make the decision within a vacuum. Every organization has a culture.²⁴⁷ Edgar Schein defines an organization's culture as

the accumulated shared learning of that group as it solves its problems of external adaptation and internal integration; which has worked well enough to be considered valid and, therefore, to be taught to new members as the correct way to perceive, think, feel, and behave in relation to those problems.

This accumulated learning is a pattern or system of beliefs, values, and behavioral norms that come to be taken for granted as basic assumptions and eventually drop out of awareness.²⁴⁸

Culture, in other words, affects behavior.²⁴⁹

²⁴⁷ See EDGAR H. SCHEIN, *ORGANIZATIONAL CULTURE AND LEADERSHIP* 15 (5th ed. 2017) (noting that any social unit with a shared history "will have evolved a culture").

²⁴⁸ *Id.* at 6.

²⁴⁹ See Nissim Cohen, *How Culture Affects Street-Level Bureaucrats' Bending the Rules in the Context of Informal Payments for Health Care: The Israeli Case*, 48 AM. REV. PUB. AD-

Business scholars, for obvious reasons, pay substantial attention to the influence of a business firm's culture on its effectiveness in achieving its goals.²⁵⁰ Background rules, norms, assumptions, and heuristics—culture—exert powerful influences on almost all decisions within an organization.²⁵¹ These rules and norms affect small behaviors, such as who stands where in an elevator or whether to open the door for a customer.²⁵² They also affect significant behaviors, such as how to craft accounting entries, or notifying managers of fellow employees' misconduct.²⁵³ The way that we speak about business acknowledges the centrality of culture. When we talk about "learning how things are done" in a new place of employment, we are talking about culture.²⁵⁴ When we speak of organizational acculturation of merged or acquired firms, we refer to the blending and harmonization of two or more distinct cultures.²⁵⁵

Culture, therefore, influences decisions and behaviors regarding compliance with social and ethical rules.²⁵⁶ A large and growing body of research finds that weak ethical cultures tilt persons associated with a business firm towards misconduct, whereas a strong ethical culture promotes socially ac-

MIN. 175, 175 (2018) (noting that "[c]ulture will always be . . . part of the set of forces in an organization."); JinHyo Joseph Yun et al., *The Culture for Open Innovation Dynamics*, SUSTAINABILITY, June 22, 2020, at 1, 2 ("Culture influences action not by providing the ultimate values toward which action is oriented, but by shaping a repertoire or 'toolkit' of habits, skills, and styles from which people construct 'strategies of action.'").

²⁵⁰ See Suzanne B. Goldberg, *Harassment, Workplace Culture, and the Power and Limits of Law*, 70 AM. U. L. REV. 419, 448 (2020) ("Most often, organizational culture is associated, from a business perspective, with an organization's ability to achieve its goals.").

²⁵¹ See Gene E. Fusch et al., *Why Culture Matters in Business Research*, 8 J. SOC. CHANGE 39, 40 (2016) ("one must live in a cultural context so one knows what to do beyond the biological necessities of eating and sleeping"); Sukhsimranjit Singh, *Working With Corporate Culture: Best Practices for Attorneys in Business*, 56 WILLAMETTE L. REV. 397, 398 (2020) ("a corporate culture dictates acceptable business practices, relationships between managers and those whom they lead, and the value employees place on their work").

²⁵² "[W]here you stand in the elevator is decided by your status in the company. The basic rule is the younger you are, the closer to the door you should stand. The youngest has to control the doors for the others, so you must stand in the front of the panel. . . . Remember that the customer is regarded as God in Japan, so you should give priority to them, not your colleagues." *Elevator Manners in Japan*, WA SHOKU (Nov. 29, 2019), <https://wa-shoku.info/elevator-manners-in-japan/>.

²⁵³ See NELSON & STOUT, *supra* note 172, at 291–92 (identifying and arguing for the importance of organizational culture that guides people toward reporting misconduct); Oluyinka Isaiah Ogungbade & Ezekiel Oluwagbemiga Oyerogba, *Firm Culture and Management Accounting Practices Among Manufacturing Firms in Nigeria*, 6 FUTURE BUS. J., no. 1, 2020, at 1, 11–12 (identifying cultural influences that affect accounting).

²⁵⁴ See Paul Petrone, *The 10 Things You Should Do in the First 30 Days of a New Job*, LINKEDIN (Sept. 2, 2019), <https://www.linkedin.com/business/learning/blog/career-success-tips/the-10-things-you-should-do-in-the-first-30-days-of-a-new-job> (emphasizing learning about customs and culture).

²⁵⁵ See Ann-Kathrin Leiting, Bart Clarysse & Jana Thiel, *Successful Corporate Entrepreneurship: A Process of Acculturation into Corporate Logics*, 2020 ACAD. MGMT. PROC. 648, 648–49 (discussing acculturation in the context of the acquisition of entrepreneurial firms).

²⁵⁶ See Robert C. Bird, *Caremark Compliance for the Next Twenty-Five Years*, 58 AM. BUS. L.J. 63, 106 (2021) ("Culture is not only a crucial organizational force, but it has an increasingly important influence on the legal responsibilities of companies.").

ceptable, rule-compliant behavior.²⁵⁷ Indeed, empirical research suggests that culture is far more important than rules.²⁵⁸ Appropriately, therefore, Todd Haugh reports that “a majority of companies see creating an ethical business culture as the supreme goal of their compliance programs.”²⁵⁹

A smaller but still vibrant body of research directly examines the effects of the ethical culture of a business firm on bribery. Amalina Abdullah

²⁵⁷ See Nicole Andreoli & Joel Lefkowitz, *Individual and Organizational Antecedents of Misconduct in Organizations*, 85 J. BUS. ETHICS 309, 309 (2009) (finding “that organizational factors [particularly ethical culture] but not personal characteristics were significant antecedents of misconduct”); Pierre A. Balthazard et al., *Dysfunctional Culture, Dysfunctional Organization: Capturing the Behavioral Norms that Form Organizational Culture and Drive Performance*, 21 J. MANAGERIAL PSYCH. 709, 727 (2006) (finding organizational culture to be more influential in causing or preventing individual dysfunction than external influences or characteristics of individuals); Lynn K. Bartels et al., *The Relationship Between Ethical Climate and Ethical Problems Within Human Resource Management*, 17 J. BUS. ETHICS 799, 799 (1998) (finding “a statistically significant negative relationship between the strength of an organization’s ethical climate and the seriousness of ethical violations and a statistically significant positive relationship between an organization’s ethical climate and success in responding to ethical issues”); John B. Cullen, K. Praveen Parboteeah & Bart Victor, *The Effects of Ethical Climates on Organizational Commitment: A Two-Study Analysis*, 46 J. BUS. ETHICS 127, 138 (2003) (finding a strong relationship between negative cultures and self-interested misbehavior by individuals, and a strong relationship between positive cultures and behaviors that support the business firm); Kelly D. Martin & John B. Cullen, *Continuities and Extensions of Ethical Climate Theory: A Meta-Analytic Review*, 69 J. BUS. ETHICS 175, 188 (2006) (finding, in a meta-analysis of prior research, that positive behaviors are related to positive ethical cultures, and negative behaviors are associated with instrumental business cultures); Mitchell J. Neubert et al., *The Virtuous Influence of Ethical Leadership Behavior: Evidence from the Field*, 90 J. BUS. ETHICS 157, 165 (2009) (finding that ethical leadership influences perception of ethical culture, which in turn influences how members of a business firm behave); Dane K. Peterson, *Deviant Workplace Behavior and the Organization’s Ethical Climate*, 17 J. BUS. & PSYCH. 47, 57 (2002) (finding “that deviant workplace behavior can be partially predicted from the [perceived ethical culture] of an organization”); Dane K. Peterson, *The Relationship Between Unethical Behavior and the Dimensions of the Ethical Climate Questionnaire*, 41 J. BUS. ETHICS 313, 324 (2002) (confirming research finding strong relationships between positive ethical culture and ethical behavior); Yoav Vardi, *The Effects of Organizational and Ethical Climates on Misconduct at Work*, 29 J. BUS. ETHICS 325, 325 (2001) (finding a negative relationship between a positive culture and office misbehavior). This applies to specific misbehaviors as well. See, e.g., Füsun Bulutlar & Ela Ünler Öz, *The Effects of Ethical Climates on Bullying Behaviour in the Workplace*, 86 J. BUS. ETHICS 273, 288–89 (2008) (finding a positive relationship between instrumental cultures and workplace bullying, and a negative relationship between ethical cultures and bullying); Helen Cowie et al., *Measuring Workplace Bullying*, 7 AGGRESSION & VIOLENT BEHAVIOR 33, 37–38 (2002) (reviewing research finding that ethical culture affects the amount of and perception of bullying at the workplace); William T. Ross, Jr. & Diana C. Robertson, *Lying: The Impact of Decision Context*, 10 BUS. ETHICS Q. 409, 434 (2000) (finding that “[p]roviding an environment in which employees are clear about what is expected ethically and are aware that expectations are enforced leads to a reduced willingness to lie”); H. Jeff Smith, Ron Thompson & Charalambos Iacovou, *The Impact of Ethical Climate on Project Status Misreporting*, 90 J. BUS. ETHICS 577, 584–85 (2009) (finding that the perceived nature of a business firm’s ethical culture influenced the likelihood of misreporting project status).

²⁵⁸ See Marshall Schminke, Anke Arnaud & Maribeth Kuenzi, *The Power of Ethical Work Climates*, 36 ORG. DYNAMICS 171, 174 (2007) (discussing research that shows that “formalized rules-based ethics programs are not as effective as less formal values-based programs in generating sustainable ethical outcomes”).

²⁵⁹ Todd Haugh, *The Power Few of Corporate Compliance*, 53 GA. L. REV. 127, 140 (2018).

and her colleagues find, through simple regression analysis of surveys in Malaysia, that the ethical climate of a firm explains a substantial portion of respondents' decisions about engaging in misconduct, including bribery.²⁶⁰ Similarly, Malini Sathappan and her colleagues find, through qualitative analysis of structured interviews and field observation, that organizational culture has a significant effect on the levels of bribery within public bodies in Malaysia.²⁶¹ Lam Nguyen and his colleagues find, through analysis of questionnaires distributed throughout Russia, a relationship between factors they consider basic components of strong ethical cultures and higher levels of ethical behavior including avoidance of bribery and corruption.²⁶² Praveen Parboteeah and his colleagues find, using a qualitative case study approach in Nigeria and South Africa, support for the proposition that a strong ethical climate in a business firm reduces bribery by members of that firm.²⁶³ All of these findings support the widespread notion that ethical culture constitutes an effective tool for controlling corruption at the firm level, although both Nguyen's team and Parboteeah's team suggest a need for more research.²⁶⁴

B. A Potential Problem

Business firms, which bear the bulk of responsibility under the global anticorruption regime, would be well-served to purposefully set about the cultivation of a strong ethical culture that specifically discourages bribery. As discussed in this section, norms and ways of thinking—in other words, ethical frameworks—comprise an important part of culture. The debate about corruption and human rights, however, mirrors two incompatible ethical frameworks. Therein lies the trouble. As Mark Edwards and Nin Kirkham observe this sort of theoretical pluralism “can result in the loss of ethical theorising as a moral guide to decision-making, goal setting and purposive behavior” as well as “what might be called, arbitrary eclecticism where a more-or-less random mixture of theoretical positions is adopted with no reasoned justification.”²⁶⁵ In other words, business managers can

²⁶⁰ Amalina Abdullah, Zunaidah Sulong & Ridzwana Mohd Said, *An Analysis on Ethical Climate and Ethical Judgment Among Public Sector Employees in Malaysia*, 16 J. APPLIED BUS. & ECON. 133, 138–40 (2014).

²⁶¹ Malini Sathappan et al., *Exploring Causes of Bribery: A Case Study in a Public Organization in Malaysia*, INT'L J. HUM. RES. STUD., Aug. 19, 2016, at 1, 10 (2016).

²⁶² Lam D. Nguyen, Natalia Ermasova & Sergey Ermasov, *Business Ethics Perceptions of Russian Working Adults: Do Age, Gender, Education, and Various Work Experiences Make a Difference?*, 81 SAM ADVANCED MGMT. J. 4, 8–16 (2016).

²⁶³ K. Praveen Parboteeah, H. Titilayo Serikib & Martin Hoegl, *Ethnic Diversity, Corruption and Ethical Climates in Sub-Saharan Africa: Recognizing the Significance of Human Resource Management*, 25 INT'L J. HUM. RESOURCE MGMT. 979, 997 (2014).

²⁶⁴ Nguyen, Ermasova & Ermasov, *supra* note 262, at 18; Parboteeah, Serikib & Hoegl, *supra* note 263, at 997–98.

²⁶⁵ Mark G. Edwards & Nin Kirkham, *Situating 'Giving Voice to Values': A Metatheoretical Evaluation of a New Approach to Business Ethics*, 121 J. BUS. ETHICS 477, 480 (2014).

pick and choose among frameworks to find permission to behave in any way they desire.

The lack of moral clarity in a culture presents a tangible threat to efforts to combat bribery in business firms. Merck and Walmart again serve as examples. As described, under the leadership of Roy Vagelos, Merck as an organization possessed a clear and unambiguous understanding of its role in and responsibility to society.²⁶⁶ Mike Useem notes that Vagelos explicitly perpetuated the organizational culture created by his predecessor, George W. Merck.²⁶⁷ George Merck unequivocally stated that “medicine is for the people. It is not for the profits,” although Useem notes that this approach did result in profits for the firm.²⁶⁸ Indeed, Merck’s mission statement once articulated that “[w]e are in the business of preserving and improving human life. . . . All of our actions must be measured by our success in achieving this goal. . . . We expect profit from work that satisfies customer needs and benefits humanity.”²⁶⁹ Following Vagelos’s departure, however, Merck’s culture morphed into something less clear and articulable.²⁷⁰ After reviewing decades of material from Merck, Stephen Jasper, Mark Leenders, and Tim O’Shannassy describe a change from a culture singularly focused on producing cutting-edge science to one that continued to value science but also, confusingly, prioritized profit ahead of science and at times prioritized competition with other business firms over everything else.²⁷¹ They observed that, as an organization, Merck “lost focus on their [prior] ethical orientation.”²⁷² That murky culture constituted the context in which people made

²⁶⁶ See *supra* note 194 and accompanying text.

²⁶⁷ MICHAEL USEEM, THE LEADERSHIP MOMENT 29–30, 35 (1998). See also Mitchell Langbert, Michael Stanchina & Donal Grunewald, *Howard Roark and the Ghost of Admiral Rickover*, 15 CROSS CULTURAL MGMT. 194, 197 (2008) (noting that George W. Merck may have been “one of the ten best CEOs of all time because of the culture of social responsibility that Merck had created”).

²⁶⁸ USEEM, *supra* note 267, at 29. See Langbert, Stanchina & Grunewald, *supra* note 267, at 197 (George W. Merck “focused on building a culture that blended scientists and technicians into a team that aimed to produce significant and marketable scientific accomplishments in biology and medicine”).

²⁶⁹ USEEM, *supra* note 267, at 29.

²⁷⁰ See Langbert, Stanchina & Grunewald, *supra* note 267, at 197–98 (describing the changes in culture following Vagelos’s departure, and reporting that people at Merck considered Vagelos’s successor “the invisible man”); see also Ronald M. Green, *Direct-to-Consumer Advertising and Pharmaceutical Ethics: The Case of Vioxx*, 35 HOFSTRA L. REV. 749, 750 (2006) (“A change in leadership from the kind of research-oriented, medically trained individual represented by Dr. P. Roy Vagelos, who presided over Mectizan’s development, to a business school-trained manager like Raymond V. Gilmartin, also may have played a role.”).

²⁷¹ Stephen Jasper, Mark A.A.M. Leenders & Tim O’Shannassy, *The Dramatic Breakdown of the Market Orientation Concept in the Pharmaceutical Industry: Lessons from Vioxx*, 27 J. STRATEGIC MKTG. 227, 237–38 (2019); see JIM COLLINS, HOW THE MIGHTY FALL: AND WHY SOME COMPANIES NEVER GIVE IN 53 (2009) (describing how George Merck’s vision was “religated to more of a background role” amongst more commercial purposes).

²⁷² Jasper, Leenders & O’Shannassy, *supra* note 271, at 237.

decisions about marketing Vioxx, decisions that included the use of ghost-written articles.²⁷³

In the case of Walmart, the problem was not degeneration, but instead an institutional lack of clarity regarding the priority of compliance and ethical thinking. Walmart's mantra is "Every Day Low Prices," and this "EDLP" principle constitutes the guiding star for organizational action.²⁷⁴ Walmart's core strategy for supporting the EDLP principle consists of rapid growth to push aside possible competitors, and leveraging its outsized role to the disadvantage of suppliers, workers, and other stakeholders.²⁷⁵ This strategy informs almost all of Walmart's decisions, and Walmart clings to it even when it fails.²⁷⁶ Thus, although Walmart claims to have a robust set of rules and principles, the culture at Walmart seems to regard those as secondary to the EDLP principle and its core strategy.²⁷⁷ After reviewing decades of material from Walmart, Prakash Sethi finds a

wide gap in Wal-Mart's espoused policies with regard to ethical behavior and the company's compliance with those policies. This gap is not due to isolated incidents of errant behavior. Instead, it is embedded in the company's business model where one of its pillars rests on growth and profitability through rapid expansion in sales (by whatever means). These actions have had a corrosive impact on Wal-Mart's corporate culture, where senior managers ap-

²⁷³ See Barry Shore, *Systematic Biases and Culture in Project Failures*, 39 PROJECT MGMT. J. 5, 11 (2008) (identifying the "degenerat[ion]" of Merck's organizational culture as a significant cause of Merck's lapses in the marketing of Vioxx).

²⁷⁴ See Prakash Sethi, *The Wal-Mart Affair – Where Implausible Deniability is the Coin of the Realm*, 14 CORP. GOV. 424, 429 (2014) (describing the principle and its centrality to Walmart).

²⁷⁵ See Benedict Sheehy, *Corporations and Social Costs: The Wal-Mart Case Study*, 24 J.L. & COM. 1, 33–34 (2004) (describing Walmart's strategy). Sheehy goes on to thoroughly discuss the costs to and effects on society of this strategy. *Id.* at 35–48.

²⁷⁶ Scott Martin, João Cândia Veiga & Kátiuscia Galhera thoroughly review how each prong of Walmart's strategy failed in Brazil, and how Walmart clung to its strategy long after its failure was clear to market observers. See SCOTT B. MARTIN, JOÃO PAULO CÂNDIA VEIGA & KÁTUSCIA MORENO GALHERA, LABOR CONTESTATION AT WALMART BRAZIL 264–72 (2021); see also Susan Christopherson, *Barriers to "US Style" Lean Retailing: The Case of Wal-Mart's Failure in Germany*, 7 J. ECON. GEOGRAPHY 451, 464 (2007) (noting the "ideology" of EDLP and Walmart's rigidity "rather than adapting its strategy to allow wider adaptability to a multiplicity of international market conditions"); Renee B. Kim, *Wal-Mart Korea: Challenges of Entering a Foreign Market*, 9 J. ASIA-PAC. BUS. 344, 349–50 (2008) (noting that "Wal-Mart's EDLP strategy, [is] its core competence" and that "Wal-Mart's attempt to employ its standard EDLP strategy, lack of adaptation to the local supply chain conditions, and ineffective market entry time led to the failure in market penetration in the Korean retail sector").

²⁷⁷ See Denis G. Arnold, *Corporations and Human Rights Obligations*, 1 BUS. & HUM. RTS. J. 255, 261 (2016) ("A different bribery scheme was later discovered in Walmart's Indian operations. The failure of the parent company to monitor and enforce its own anti-bribery policies at Walmart de Mexico, or to discipline those involved, further undermined Walmart's normative legitimacy which has already been undermined by its labour practices in the U.S. and in its global supply chains."); Sethi, *supra* note 274, at 440 ("Wal-Mart's culture and value system appear to be dominated by economic and financial values and to the exclusion of ethical concerns").

pear more concerned about damage control after the fact than a questioning of why such events and activities were allowed to happen in the final place.²⁷⁸

When making decisions regarding bribery, therefore, managers in Walmart de México prioritized the cultural drivers over the written guidance, and managers at the global headquarters reacted in what charitably could be characterized as a confused and disorganized manner.²⁷⁹

It seems likely that clarifying its ethical culture presents the greatest opportunity for reducing the likelihood that Walmart will pay more bribes. The debate over whether corruption violates human rights, however, seems to offer the diametric opposite of clarity.

C. *A Window of Clarity*

Josephine Nelson and Lynn Stout call for deep and explicit thinking by members of organizations about social and ethical questions:

Research has shown us that, if individuals do not rigorously examine their methods of thinking about choices, they tend to fall into the same traps and often start to justify increasingly worse behavior. It takes conscious will and effort to build ethical muscle.²⁸⁰

The debate over whether corruption violates human rights requires extensive flexing of ethical muscle. The debate takes its protagonists to the frontiers of the meanings of rights, and to the edges of causality and consequence. While intellectually fascinating, debates over human rights seem to have little to offer business firms in terms of creating clarity with respect to bribery.

Business firms do not, however, need to rely on concerns about human rights in order to find ethical grounds for compliance with the global trade regime. Historically, every major faith or school of thought has condemned corruption.²⁸¹ The *Quran* admonishes that “Allah certainly does not like corruptors,”²⁸² while the Sikh *Sri Guru Granth Sahib* teaches that those who “take bribes . . . do not know the essence of reality.”²⁸³ Chuang Tzu, an ancient Taoist scholar, condemned “[t]he intelligence of the mean man” for

²⁷⁸ Sethi, *supra* note 274, at 433.

²⁷⁹ *Id.* at 430–31.

²⁸⁰ NELSON & STOUT, *supra* note 172, at 30. See G. RICHARD SHELL, THE CONSCIENCE CODE: LEAD WITH YOUR VALUES, ADVANCE YOUR CAREER 12 (2021) (“You will create more value for everyone around you—and become a more trusted leader—if you acquire the habit of calling out serious ethical concerns when you see them and working to resolve them to the best of your ability.”).

²⁸¹ See Philip M. Nichols, *The Good Bribe*, 49 U.C. DAVIS L. REV. 647, 652–57 (2015) (reviewing doctrinal texts).

²⁸² *Quran* 28:77, <https://quran.com/al-qasas/77>.

²⁸³ *Sri Guru Granth Sahib* 1032, <https://www.sikhithothemax.org/ang?source=G&ang=1032>.

“not ris[ing] beyond bribes,”²⁸⁴ while the Dalai Lama, a Buddhist leader alive today, condemns “acting corruptly” as an example of “dirty law.”²⁸⁵ There is no shortage of moral condemnation of corruption.

Social condemnation can also motivate business firm’s anticorruption culture. Corruption is universally condemned.²⁸⁶ Crime and corruption are considered the most pressing problems in emerging and developing polities.²⁸⁷ A survey across Asia found that an overwhelming seventy-four percent of respondents consider corruption a serious problem.²⁸⁸ Around the globe, tens of thousands of people, often in difficult conditions, regularly march in protest of corruption.

Corruption deserves critical thought. Perhaps, however, in cultivating the mores and norms and frameworks that will constitute their organizational culture, corruption should be the *object* of that thought rather than the *subject*. Rather than exercising their ethical muscle in contemplation of the extent to which corruption may or may not violate human rights, and possibly becoming distracted by the irreconcilable frameworks that mirror that debate, business firms would be better served by harnessing their creativity and entrepreneurial spirits to inculcate cultures that reinforce compliance with the global anticorruption regime.²⁸⁹

CONCLUSION

Corruption inflicts extraordinary damage on, and presents a significant challenge to, society, people, and the planet. In response to that challenge, polities across a broad spectrum have cobbled together the global anticorruption regime, a network of laws, regulations, and administrative rules. That regime places a heavy burden on individual business firms to create and

²⁸⁴ CHUANG TZU, MYSTIC, MORALIST, AND SOCIAL REFORMER 428 (Herbert A. Giles trans., 1889).

²⁸⁵ Rebecca R. French, *The Dalai Lama Speaks on Law*, 55 BUFF. L. REV. 647, 655 (2007).

²⁸⁶ See Hannah Harris, *Experimenting with Corruption – An Analysis of the OECD Anti-Bribery Convention Through the Lens of Experimentalism*, 51 GEO. J. INT’L L. 565, 580 (2020) (noting universal condemnation of corruption that underlies the global anticorruption regime); Jake Elijah Struebing, *Federal Criminal Law and International Corruption: An Appraisal of the FIFA Prosecution*, 21 NEW CRIM. L. REV. 1, 48 (2018) (noting universal condemnation); see also JOHN T. NOONAN, JR., BRIBES 703 (1984) (“[I]t is often the Westerner with ethnocentric prejudice who supposes that a modern Asian or African society does not regard the act of bribery as shameful in the way that Westerners regard it.”).

²⁸⁷ See PEW RSCH. CTR., CRIME AND CORRUPTION TOP PROBLEMS IN EMERGING AND DEVELOPING COUNTRIES 2 (2014), <https://www.pewresearch.org/global/2014/11/06/crime-and-corruption-top-problems-in-emerging-and-developing-countries/> (reporting results of global survey).

²⁸⁸ JON VRUSHI, TRANSPARENCY INT’L, GLOBAL CORRUPTION BAROMETER ASIA 2020 10, 38 (2020), <https://www.transparency.org/en/gcb/asia/asia-2020>.

²⁸⁹ See On Amir & Orly Lobel, *Stumble, Predict, Nudge: How Behavioral Economics Informs Law and Policy*, 108 COLUM. L. REV. 2098, 2132 (2008) (reviewing research that demonstrates the centrality of organizational culture in supporting ethical and legally compliant behaviors).

implement effective programs to control participation in acts of bribery by persons associated with those firms. The means of effectuating sound program design, and of ensuring compliance by individual persons with those individual programs merits attention by scholars and practitioners.

At first glance, the debate over whether corruption violates human rights may seem esoteric and unrelated to the serious matter of ensuring compliance with the law. As this article demonstrates, however, a practical connection exists. The most effective means of ensuring compliance with the law lies in creating an organizational culture that leads people to make appropriate decisions. An organizational culture consists of the mores, norms, spoken and unspoken rules, and similar social artifacts. The debate over corruption and human rights balances two competing frameworks for ethical decision-making, rights-based frameworks, and consequentialist frameworks. How a business firm approaches the debate, therefore, could strongly affect the norms and rules that it absorbs into its organizational culture. Moreover, the debate seems irresolvable, and thus deep contemplation of the debate could introduce uncertainty into a business firm's culture. A lack of clarity opens the door for misbehavior.

Having noted that possibility, this article does not conclude that business firms should eschew contemplation of the debate. The article instead suggests that business firms should not rely on the outcome of that debate as a cultural justification for compliance with anticorruption rules and regulations. Abundant moral and social justifications exist for avoiding corruption. With those justifications firmly in mind, business firms should flex their entrepreneurial ethical muscles to develop creative and novel cultural tools to support compliance.

