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Ethical Challenges of Corrupt Practices
Formal and Informal Conflicts of Norms and Their Moral Ramifications

Guest Editors
Sebastian Wolf & Peter Graeff

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Special Issue – Ethical Challenges of Corrupt Practices

Special Issue
Ethical Challenges of Corrupt Practices

Ethics and Corruption: An Introduction to the Special Issue

By Peter Graeff[*]

Abstract

Corruption necessarily involves particularistic advantages at the expense of the society as a whole. It might be, however, misleading to assume these implications are *a priori* negative. The moral assessment of corrupt practices depends on contemporary ethical standards, which differ from country to country and undergo change over time. As a result, some practices labeled as corrupt might become legitimate while others turn from legitimate actions to offenses. When ethical dimensions are considered, corrupt practices reveal an inherent tension between particularistic and universalistic normative standards. Particularistic standards belong to the person-specific obligations and the expectations of actors involved in corruption. These necessarily clash with universalistic standards, which are valid and applicable for everyone and are usually approved by legal provisions or codes of conduct. As a result corrupt exchanges reveal both positive social features between corruption partners—such as mutual trust—and negative societal ramifications—such as disadvantages of non-involved actors. Corrupt partners behave fairly and honestly with respect to their partners but unfairly and dishonestly with respect to anyone else.

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A. Norms and Moral-Trade Offs

A clear-cut incident of corruption is a simple case: A person in a position of trust or authority abuses that position for his or her own gain, mostly for the benefit of a third person or another party.[1] This offense damages victims who often do not know about the corrupt act. The norm that the "abuse of power is prohibited" usually stands as a part of every legal system. Transgressing this norm is considered a crime and is prosecuted. The rationale behind penalizing corruption as a crime results from its damage in society which is partly intangible—as in a lack of trust in authorities—and partly substantial—when there are aftermaths that were not intended by the corrupt persons. Corruption may also cause damage in people´s lives where no one would expect it. Ambraseys and Bilham[2] find that about eighty-three percent of all persons who die in collapsed buildings during an earthquake are citizens of countries with a relatively high level of corruption. This result coincides with the fact that the construction industry is one of the parts of the global economy that experience the highest frequency of incidents of corruption. Some corrupt constructors accept a low quality of building material and thus increase the probability of fatalities by catastrophes.

Even if the negative consequences are obvious and there is ample need for laws and rules to regulate or prohibit such a behavior, in many cases, how people should avoid corrupt behavior might not be so clear. In the legal sense, corruption and ethics are related to each other by questions of what people ought to do. From a meta-ethical perspective, acting legally does not necessarily mean that people act good or bad simply by keeping the law. Some laws may contradict human rights or general moral standards. Even when its conduct is in line with the national law, a government might abuse its position in such a way that it violates human rights or basic freedoms.

As to corruption, the contradiction between group standards and general standards is particularly important. A conflict may arise due to the trade-off of loyalty toward different reference groups such as family, friends[3], or a club, and general legal standards. The same applies in business. For example, an employee goes to a foreign business partner to conclude a contract, which will greatly benefit his company. If there is a clear company-specific code of conduct prohibiting any bribing of business partners, this normative guideline might conflict with normative expectations of foreign partners who might wait

[1] For bribe givers who intend to benefit their company or organization, see generally, Markus Pohlmann, Kristina Bitsch, & Julian Klinkhammer, *Personal Gain or Organizational Benefits? How to Explain Active Corruption*, in this special issue of the *German Law Journal*.

[2] *See* Nicholas Ambraseys & Roger Bilham, *Corruption Kills*, 469 NATURE 153, 155 (2011).

[3] *See* Holger Niehaus, *Donations Granted Amongst "Friends" in Public Office—Kindness or Corruption?—There Ain't No Such Thing as a Free Lunch*, in this special issue of the *German Law Journal*.

for gifts or other signs of approval of their economic closeness. The employee's colleagues and superiors might implicitly support corrupt activities which lead to fixing the contract because they are benefiting as free-riders if these illegal activities are not discovered. Implicit expectations to apply undue practices pose a problem for firm agents if they have to deal with different aims, interests, and expectations.[4]

This example shows that there are different norms, and valid standards of behavior that refer to different levels of norms. Moral decisions for or against corrupt practices usually include those different levels when the interests of social reference groups—such as the working team or the family—and the interests of a firm or a state are considered. Moral decisions may turn in favor of one group—e.g. referring to particularistic norms of a working team—at the expense of the organization or general laws. Those corruption situations are no longer clear-cut cases with simple incentive structures. Ethical considerations dealing with those situations must reflect the different standards and may no longer refer to a simple good or bad dichotomy.

As one could assume that people prefer to live in buildings of untainted quality, one would suggest that the absence of corruption is a preferable situation. The question of how corruption can be curbed remains crucial. One immediate answer to this question is the strengthening of legal regulation.[5] Prominent corruption cases with a lot of suspects usually trigger the call for stricter or broader laws about corruption, like what has happened in the Siemens corruption scandal. Such a process of ethical adjustment, in which norms and regulations are being reconsidered and matched with new standards, might reflect an important societal step forward. It remains unclear, though, whether these ethical dilemmas will be actually solved. Existing high moral standards might not apply to potentially corrupt actors if they orient themselves to rather particularistic group-norm standards. Dungan, Waytz, and Young show that many people behave as moral hypocrites.[6] Such people apply moral values and high moral standards when judging others, but do not apply those standards to their own behavior. As corruption is necessarily a situation in which double standards are applied, ethical dilemmas might not be relieved by setting higher or clearer universal rules. Curbing corruption thus becomes a trade-off between situations in which people treat others fairly and situations in which

[4] *See* Peter Graeff, *Im Sinne des Unternehmens? Soziale Aspekte der korrupten Transaktionen im Hause Siemens*, *in* DER KORRUPTIONSFALL SIEMENS: ANALYSEN UND PRAXISNAHE FOLGERUNGEN DES WISSENSCHAFTLICHEN ARBEITSKREISES VON TRANSPARENCY INTERNATIONAL DEUTSCHLAND 151 (Peter Graeff, Katharina Schröder & Sebastian Wolf eds., 2009).

[5] Under certain circumstances specific provisions of anti-corruption measures are not desirable, see Sebastian Wolf, *Dark Sides of Anti-Corruption Law: A Typology and Recent Developments in German Anti-Bribery Legislation*, in this Special Issue.

[6] *See generally* James Dungan, Adam Waytz & Liande Young, *Corruption in the Context of Moral Trade-Offs*, 26 J. INTERDISC. ECON. 97 (2014).

people unduly favor others due to personal loyalty.[7] This is tantamount to the clash of universal and particular norms.

B. The Special Issue

This interdisciplinary *German Law Journal* special issue brings together contributions by legal scholars, sociologists, political scientists, economists, and philosophers. The selected Articles analyze corrupt practices with regard to ethical and moral positions or implications. Some contributions deal with normative conflicts and moral consequences that occur in corrupt exchanges, and others focus on ethical issues of corruption prevention or practical consequences of normative conflicts. The clash of particular and universal norms runs like a golden thread through the papers of this issue. Several contributions explore the demarcation of particular and universal norms.

The first three contributions to this issue focus on a legal approach to analyzing ethical problems in conjunction with corruption. They try to address the central ethical challenges when legal aspects are concerned. As a consequence, they imply not only different ethical positions about corruption—and reasons and ways of curbing it—but also fathom the ideas of legal scholars between the poles of empirical-oriented argumentation and a purely normative line of argumentation.

Sebastian Wolf explores in his Article the dark sides of anti-corruption laws. While laws against corruption try to curb corrupt practices generally, in practice, they often fail to do so. Moreover, they may also have unintended side effects. Wolf suggests a typology which compiles negative and unintended side effects and through this provides a systematic view of the critical comments on anticorruption laws. When laws are designed, arranged, and implemented, so many things may go awry that it might be better in particular situations that no or only narrow anti-corruption laws exist. With this interesting proposition, Wolf extends the boundaries of ethical issues of corruption. Corruption with its negatives and potential benefits might be assessed within a bigger societal context, in which the acceptance of a certain level of corruption might be a valid option.

Anna Cornelia Rink also tackles questions regarding anti-corruption measures. She takes a stance against authors who argue that international anti-bribery standards should not be applied to "non-Western" countries because of potential "moral/legal imperialism." This line of argumentation holds that strict criminal laws with a Western notion of law do not meet the business and societal standards in several countries, such as most parts in Africa or Asia. Rink argues that there already is a comprehensive legal framework on the international level, which allows the reconciliation of criminal law and country-specific

[7] For a perspective that tries to transcend the logic of economic exchange, see Verena Rauen, *Corruption: Uncovering the Price of Normative Morality and the Value of Ethics*, in this Special Issue.

social conditions, or social morals. The courts in each country play a crucial role in this process, as they are able to adapt to the country-specific requirements when foreign bribery should be combated. Whether universal and particularistic norms actually fit to each other, is a problem for the authorities, which put the country-specific legal framework into action.

Holger Niehaus also fathoms the boundaries of universalistic and particularistic norms. He addresses the case of the former German federal president Christian Wulff, who was accused of acceptance of undue benefits, to explore the blurred area between private and non-private activities of public officials. In this, he details a severe problem of legal practice, namely to find an adequate treatment of minor offenses, which are usually allowed for private individuals—such as gift-giving—but not for public officials. He stresses the importance of the general public faith in the integrity of public administrations. Thus, he derives a clear statement about the priority of universal norms when corruption or questionable exchanges of benefits are concerned.

While the first three Articles apply a legal perspective to ethical issues of corruption, the remainder deals with various, discipline-specific perspectives.

In their review Article, Eugen Dimant and Thorben Schulte compile empirical research findings from psychology and criminology and, in particular, from economics. For explaining corrupt behavior, they develop an interdisciplinary concept that incorporates individual approaches, but also social aspects such as norms, values, and education, as well as other aspects like institutional, political, or geographic conditions. They conclude that corruption is caused by a multitude of mechanisms, which belong to the individual and the collective levels. They also suggest, however, that moral issues are important to understand the prevalence of corruption incidents on the individual or the collective levels.

By referring to the early work of sociologist Niklas Luhmann, Markus Pohlmann, Kristina Bitsch, and Julian Klinkhammer provide a new theoretical framework, which is applied to bribe givers. By introducing the concept of “useful illegality” to corruption research, they shift the perspective from an individual to an organizational level. Their in-depth of analysis of two prominent corruption cases—*Siemens* and *Telekom*—exemplifies the importance of particularistic, mostly “unwritten” rules and norms which are being borne by highly loyal behavior of employees to their employer. Moreover, their results dilute the economic normative assessments of corruption as they show that corrupt incidents do not only happen due to a lack of compliance management or not sufficiently incentivized employees. In fact, some corrupt agents feel a “moral duty” to provide “advanced payments.”

In her philosophical Article, Verena Rauen frames the ethical problems of corruption in a theoretically-inspiring manner. She defines corruption as an unethical exchange in which moral values are traded for marketable prices. Her aim is to overcome the logic of

economic exchanges by which corruption is usually perceived within academic literature. Like all other authors in this special issue, she refers to specific particularistic norms—a moral order of corrupt actors—to characterize corrupt exchanges. In her paper, she exceeds the scope of ethical analysis that is usually done in literature by pointing out that there are ethical correctives regarding corruption which are not based on economic exchange principles.

This special issue shows that ethical perspectives on corruption are multifaceted and not restricted to a certain scientific discipline. Since a multitude of scientific disciplines contribute to corruption research, they also enrich the ethical assessment of corrupt practices by implying normative and empirically-based arguments. As the clash between group-oriented norms and general norms will not vanish in the future, the debates about the assessment of corrupt practices will continue. The adjustment of existing norms and legal systems is a perpetual process that needs to be reflected in the scientific literature. This special issue is an attempt to do so.

Special Issue
Ethical Challenges of Corrupt Practices

Dark Sides of Anti-Corruption Law: A Typology and Recent Developments in German Anti-Bribery Legislation

By Sebastian Wolf[*]

Abstract

This Article takes a preliminary look at some distinct, unintended effects of anti-bribery law. In an exemplary and exploratory way, it intends to examine structural socio-legal problems and dilemmas of designing and implementing legislation against corruption. Firstly, it outlines four ideal types of legal norms that are meant to combat corruption but display significant negative features. Secondly, the typology is briefly applied to selected recent developments in German federal anti-bribery legislation. The Article concludes, *inter alia*, that the design, implementation, and interpretation of anti-corruption law is full of functional, legal, political, and moral pitfalls.

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A. Introduction

Since the early 1990s, the international anti-corruption boom[1] has resulted in a myriad of publications, numerous legal norms at various levels of government, and countless practical measures.[2] Not surprisingly, most activities in this area assume a net benefit when anti-corruption law is used. With few exceptions, corruption is invariably considered bad or condemnable.[3] Therefore, many scholars and policymakers usually work to reduce sectoral or organizational levels of corruption by introducing, strengthening, or expanding anti-corruption instruments. As Steven Sampson put it, "*We need to study how anti-corruption has been making us feel so good over the past decade*."[4] Problem-oriented analyses still hardly deal with anti-corruption as a potential and specific source of undesired phenomena in economy, politics, and society.

Nevertheless, there is a small but growing body of literature diverging from the above-mentioned mainstream path of research. It deals with—allegedly—negative aspects and effects of the fight against corruption. Some authors, for example, have argued that transnational anti-corruption law tends to be imperialistic[5] and that many anti-corruption policies are based on neo-liberal or Western ideology[6] despite their pretended politically neutral good governance rhetoric.[7] Under certain circumstances, specific anti-corruption

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[1] Sebastian Wolf & Diana Schmidt-Pfister, *Between Corruption, Integration, and Culture: The Politics of International Anti-Corruption*, *in* INTERNATIONAL ANTI-CORRUPTION REGIMES IN EUROPE. BETWEEN CORRUPTION, INTEGRATION, AND CULTURE 13 (Sebastian Wolf & Diana Schmidt-Pfister eds., 2010).

[2] For comprehensive overviews including comparative analyses regarding German anti-corruption law, see*, e.g.*, IOANNIS N. ANDROULAKIS, DIE GLOBALISIERUNG DER KORRUPTIONSBEKÄMPFUNG. EINE UNTERSUCHUNG ZUR ENTSTEHUNG, ZUM INHALT UND ZU DEN AUSWIRKUNGEN DES INTERNATIONALEN KORRUPTIONSSTRAFRECHTS UNTER BERÜCKSICHTIGUNG SOZIALÖKONOMISCHER HINTERGRÜNDE (2007); ANNA-CATHARINA MARSCH, STRUKTUREN DER INTERNATIONALEN KORRUPTIONSBEKÄMPFUNG: WIE WIRKSAM SIND INTERNATIONALE ABKOMMEN? (2010); SIMONE NAGEL, ENTWICKLUNG UND EFFEKTIVITÄT INTERNATIONALER MAßNAHMEN ZUR KORRUPTIONSBEKÄMPFUNG (2007).

[3] SEBASTIAN WOLF, KORRUPTION, ANTIKORRUPTIONSPOLITIK UND ÖFFENTLICHE VERWALTUNG: EINFÜHRUNG UND EUROPAPOLITISCHE BEZÜGE 24 (2014).

[4] Steven Sampson, *The Anti-Corruption Industry: From Movement to Institution*, 11 GLOBAL CRIME 261, 278 (2010). The original quote is in italics.

[5] Steven R. Salbu, *Extraterritorial Restriction of Bribery: A Premature Evocation of the Normative Global Village*, 24 YALE J. INT'L L. 223 (1999); Bernd Schünemann, *Das Strafrecht im Zeichen der Globalisierung*, 150 GOLTDAMMERS ARCHIV FÜR STRAFRECHT 299 (2003); Thomas Weigend, *Internationale Korruptionsbekämpfung – Lösung ohne Problem?*, *in* FESTSCHRIFT FÜR GÜNTHER JAKOBS 747 (Michael Pawlik & Rainer Zaczyk eds., 2007).

[6] Barry Hindess, *International Anti-Corruption as a Programme of Normalization*, *in* GOVERNMENTS, NGOS AND ANTI-CORRUPTION: THE NEW INTEGRITY WARRIORS 19 (Luís de Sousa, Peter Larmour & Barry Hindess eds., 2009).

[7] Ivan Krastev, *Die Obsession mit Transparenz: Der Washington-Konsens zur Korruption*, *in* VOM IMPERIALISMUS ZUM EMPIRE: NICHT-WESTLICHE PERSPEKTIVEN AUF GLOBALISIERUNG 137, 159 (Shalini Randeria & Andreas Eckert eds., 2009).

measures can negatively impact on democratic development and stability.[8] Moreover, several critics see an expanding self-referential anti-corruption industry[9]—particularly consisting of non-governmental organizations, consultants, agencies, and scholars—and question, *inter alia*, its growing consumption of resources, quantification of corruption, and decontextualization of corrupt behavior.[10] Inspired by these studies and their alternative views on the field of anti-corruption,[11] this Article takes a preliminary look at some distinct, unintended effects of anti-bribery law. Unlike many studies by legal scholars in this field, it will deliberately not address simple gaps or minor inconsistencies in criminal law provisions. Rather, this explorative Article intends to examine structural socio-legal problems and dilemmas of designing and implementing legislation against corruption.

Section B outlines four ideal types of legal norms that are meant to combat corruption but display significant negative features. It should be emphasized right from the start that this compilation is non-exhaustive and primarily focuses on criminal law. The Article shall serve as a contribution to a broader interdisciplinary discussion on dilemmas and dysfunctionalities of anti-corruption law.[12] Section C briefly applies the typology to selected recent developments in German federal anti-bribery legislation. However, this Article does not aim to thoroughly analyze the new law on bribery involving parliamentarians and the brand-new law on combating corruption.[13] Mainly a conceptual contribution, this Article rather intends to illustrate, in an exemplary and exploratory way, how the typology might be applied—and potentially revised—in future legal and policy analyses. Against this background, the concluding section shortly discusses, *inter alia*, the apparent narrowing of policy makers' discretion over anti-bribery legislation. With regard to the overall topic of this German Law Journal special issue, it can be argued that the design, implementation, and interpretation of anti-corruption law is full of functional, legal, political, and moral pitfalls.

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[8] Staffan Andersson & Paul M. Heywood, *Anti-Corruption as a Risk to Democracy: On the Unintended Consequences of International Anti-Corruption Campaigns*, *in* GOVERNMENTS, NGOS AND ANTI-CORRUPTION: THE NEW INTEGRITY WARRIORS, *supra* note 6, at 33.

[9] Sampson, *supra* note 4; Bryane Michael & Donald Bowser, *The Evolution of the Anti-Corruption Industry in the Third Wave of Anti-Corruption Work*, *in* INTERNATIONAL ANTI-CORRUPTION REGIMES IN EUROPE: BETWEEN CORRUPTION, INTEGRATION, AND CULTURE, *supra* note 1, at 161; Luís de Sousa, *TI in Search of a Constituency: The Institutionalization and Franchising of the Global Anti-Corruption Doctrine*, *in* GOVERNMENTS, NGOS AND ANTI-CORRUPTION. THE NEW INTEGRITY WARRIORS, *supra* note 6, at 186.

[10] Krastev, *supra* note 7.

[11] This does not mean that the author shares all opinions of all above-mentioned works. As to the contributions cited in footnote 5, he particularly does not agree with their thinking in rather nationalistic or parochial terms.

[12] *See* Weigend, *supra* note 5; Wolf, *supra* note 3, at 131–33; Daniel K. Tarullo, *The Limits of Institutional Design: Implementing the OECD Anti-Bribery Convention*, 44 VA. J. INT'L L. 665 (2004).

[13] See *infra* Section C.

B. A Typology of Partly Dysfunctional Anti-Corruption Law

The conceptual framework of this explorative Article consists of four ideal types of structurally problematic legal norms. On the one hand, these legal norms are able to combat certain corrupt acts, at least to some degree. On the other hand, they are partly dysfunctional because they show diverging adverse characteristics beyond minor technical shortcomings. A common negative effect is decreased levels of trust in politics.[14] Following Max Weber's well-known approach, this typology constructs, by drawing on selected existing phenomena, pure and clear-cut types that can be used, *inter alia*, for comparative purposes.[15] Overall, the typology's main focus is on positive criminal law, but one ideal type principally addresses implementation because it depends on the application of anti-corruption provisions. In reality, the ideal types outlined in the following table and paragraphs do not exclude each other. Real anti-bribery norms may feature several—partial—aspects of different pure types.[16]

Table 1: A Typology of Partly Dysfunctional Anti-Corruption Law

Ideal type	***Anti-corruption as…***	***Negative effects***
(1) Over-criminalized Anti-Corruption Law	disproportionate punishment and crime prevention	Lacking proportionality, limited anti-corruption effectiveness
(2) Collateral Damage-Causing Anti-Corruption Law	inappropriate, ill-designed cross-sectoral policy	Significant undesirable side effects on socially adequate behavior
(3) Symbolic Anti-Corruption Law	deliberately ineffective measure	Window dressing, factitious anti-corruption
(4) Perverted Anti-Corruption Law	an arbitrary instrument of an oppressive regime	Selective, self-interested, abusive law enforcement

Source: Compiled by the author.

[14] *See* Andersson & Heywood, *supra* note 8, at 33. For a comprehensive overview on the topic of trust in politics, see TRUST AND GOVERNANCE (Valerie Braithwaite & Margaret Levi eds., 1998).

[15] MAX WEBER, WIRTSCHAFT UND GESELLSCHAFT. GRUNDRISS DER VERSTEHENDEN SOZIOLOGIE 124 (5th ed. 1980).

[16] See *id.*

For the purposes of this typology, over-criminalized anti-corruption law has the following meaning: A deviant act justifiably categorized or criminalized as corrupt behavior is penalized with a disproportionately severe penalty.[17] Admittedly, it is often highly controversial and dependent on the specific context whether a certain punishment is adequate, i.e. fits the crime.[18] While the conceptual framework developed in this section shall not be diluted by questions of empirical ambiguity, the following section reveals that its categories are obviously open to interpretation in the application process. Despite the shortcomings of over-criminalization, lawmakers have good intentions to combat corruption. However, these good intentions are tainted by the selection of excessive means. The inadequacy and disproportionality of over-criminalized anti-corruption law may interfere with fundamental rights and freedoms or, more generally, the rule of law. Moreover, too draconic penalties can hamper the fight against crime because they might be difficult to enforce[19] and repentant offenders could be discouraged to confess their wrongdoings.

Anti-corruption law which creates collateral damage within the meaning of the typology effectively criminalizes a specific corrupt behavior. As in the case of ideal type (1), it shall be assumed that the legislature uses good faith to construct penalties for the deviant conduct in question. The chosen instrument, however, is partly dysfunctional because the legislation is too broad.[20] It negatively and unintentionally impacts on adjacent—but functionally and morally different—areas and policies. As a consequence, socially accepted conduct and perhaps even desirable behavior is unjustifiably criminalized as corruption.[21] It may be difficult for those within the proximity of a collateral damage-causing anti-corruption law to anticipate—and to accept—that their activities are illegal. Such imprecise legal norms are questionable under the rule of law.[22] The structural problem this kind of criminal law provisions presents can also be described as "overbreadth: rules that . . . authorize sanctioning of conduct beyond what generated the demand to regulate."[23]

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[17] On a certain tendency of anti-corruption policy to over-criminalization, see Weigend, *supra* note 5, at 752; Martin Killias, *Korruption: Vive La Repression!—Oder was sonst? Zur Blindheit der Kriminalpolitik für Ursachen und Nuancen*, *in* FESTSCHRIFT FÜR HANS JOACHIM SCHNEIDER 239 (Hans-Dieter Schwind, Edwin Kube & Hans-Heiner Kühne eds., 1998).

[18] An example is the long-lasting debate on the alleged over-criminalization of the possession and consumption of cannabis in Germany. See Kai Ambos, *Kiffen – bitte erst mit 18*, SÜDDEUTSCHE ZEITUNG 2 (Mar. 11, 2015).

[19] *See* Wolf, *supra* note 3, at 69. This Article does not deal with other potential excessive means that might be used in the fight against corruption, for example dragnet investigation and interception.

[20] Samuel W. Buell, *The Upside of Overbreadth*, 83 N.Y.U. L. REV. 1491 (2008).

[21] Wolf, *supra* note 3, at 69.

[22] On the necessity of clarity and definiteness, see *infra* Section C.

[23] Buell, *supra* note 20, at 1563.

Symbolic anti-corruption law, as understood and defined in this Article, is a rather ineffective means to deter corruption. The lawmaker deliberately designed it to only cover a very limited number of all the relevant acts that the society considers as corrupt behavior.[24] Gaps or inconsistencies in anti-corruption legislation do not exist because a benevolent legislature lacks resources, e.g. empirical insights, technical expertise, time etc. Though the government or the parliamentary majority intends, knows, or at least assumes the limited functionality of the legal provisions in question, it claims that these provisions help to achieve the (official) regulatory objectives. Thus, in contrast to ideal types (1) and (2), the lawmaker, here, has a hidden or questionable agenda—e.g., to exclude certain actors from liability and prosecution.[25] In this type, the structural problem is not too far-reaching criminal law with unintended side effects but factitious anti-corruption or window dressing with delegitimizing effects on the political system. While ideal type (2) is characterized by unintended over-breadth, the systemic weakness of symbolic anti-corruption law is intended under-breadth.

In the typology outlined in this Article, perverted anti-corruption law has the following meaning: Criminal law provisions are misused for particularistic purposes by the authorities.[26] The relevant positive law could be—and may have been—used to effectively combat corrupt behavior. However, it is strategically applied as a political tool to achieve self-interested ends. Apparently, this selective practice of rule enforcement is hardly compatible with the rule of law. It is more likely to exist under an authoritarian regime than in a functioning constitutional democracy. Law enforcement authorities can, for example, instrumentalize anti-corruption norms to silence the opposition or political enemies.[27] Obviously, this ideal type is distinct from the above-mentioned types because it includes effective anti-corruption provisions, as types (1) and (2) do, but not as part of an altruistic criminal policy. The government publicly states, as in the case of ideal type (3), that its anti-corruption measures serve public objectives.[28] In contrast to type (3), the government, here, does not confine itself to enact toothless regulation: It actively abuses the anti-corruption law through its application. Therefore, perverted anti-bribery law can be seen as a corrupted anti-corruption measure.

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[24] *See* Hans Herbert von Arnim, *Der gekaufte Abgeordnete – Nebeneinkünfte und Korruptionsproblematik*, 25 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT 249, 252 (2006); Thomas Fischer, *Dieses Gesetz ist ein Witz!*, DIE ZEIT, 26 June 2014, at 8.

[25] Von Arnim, *supra* note 24, at 254; Fischer, *supra* note 24.

[26] Andersson & Heywood, *supra* note 8, at 34.

[27] *Id.* at 48–49.

[28] *See* Hindess, *supra* note 6, at 120.

C. The Typology and Recent Developments in German Anti-Bribery Legislation

As outlined in the introduction, this section will apply the typology of partly dysfunctional anti-corruption law to two current reforms in German federal anti-bribery legislation: the rather new criminal law on bribery of parliamentarians[29] and the brand-new law on combating corruption which deals, *inter alia*, with bribery in the private sector and transnational bribery.[30] This Article deliberately eschews comprehensive policy or legal analyses of these recent developments.[31] In an exploratory way, it intends to illuminate the usefulness and applicability of the conceptual framework developed in the previous section. Both legislative reforms emerge from international anti-corruption provisions. This comes as no surprise because international anti-corruption regimes have shaped German anti-bribery law since the late 1990s.[32] In the following paragraphs, it is discussed whether and how the four ideal types apply to the selected sectoral anti-corruption laws before and after the respective legislative reform.

For many years, scholars have critically discussed the offense of active and passive bribery involving parliamentarians in German criminal law.[33] The offense already faced criticism when it was (re)introduced in 1994 as Sect. 108e of the *Strafgesetzbuch* (StGB; Penal Code).[34] After the adoption of the United Nations Convention Against Corruption (UNCAC) in 2003,[35] it was evident that German law did not comply with the Convention's mandatory

[29] *Achtundvierzigstes Strafrechtsänderungsgesetz – Erweiterung des Straftatbestandes der Abgeordnetenbestechung* [48th Law Amending the Penal Code – Extension of the Criminal Offense of Bribery of Members of Parliament], Apr. 29, 2014, BUNDESGESETZBLATT [BGBL.] I at 410. The amendment entered into force as of 1 September 2014.

[30] *Gesetz zur Bekämpfung der Korruption* [Law on Combating Corruption], Nov. 25, 2015, BGBL. I at 2025. The amendment entered into force as of 26 November 2015.

[31] Moreover, the author will not deal with another current reform proposal concerning bribery of resident physicians since that sectoral issue and the draft law are not relevant for the paper's main argumentation. For a brief and critical review of the Federal Government's bill (DRUCKSACHE 18/6446), see Rainer Hüper, *Maas legt Gesetzentwurf gegen Korruption im Gesundheitswesen vor*, 20 TRANSPARENCY DEUTSCHLAND SCHEINWERFER 13 (2015).

[32] *See* Androulakis, *supra* note 2; Marsch, *supra* note 2; Nagel, *supra* note 2.

[33] For an overview, *see, e.g.*, Manfred Ernst Möhrenschlager, *Die Struktur des Straftatbestandes der Abgeordnetenbestechung auf dem Prüfstand: Historisches und Künftiges*, *in* FESTSCHRIFT FÜR ULRICH WEBER 217 (Bernd Heinrich, Eric Hilgendorf, Wolfgang Mitsch & Detlev Sternberg-Lieben eds., 2004). This paragraph on bribery of Members of Parliament is partly based on Sebastian Wolf, *Political Corruption as a Regulatory Problem in Germany*, 14 GERMAN L.J. 1627 (2013).

[34] Jan. 22, 1994, BGBL. I at 3322. For a much-cited early critique, see Stephan Barton, *Der Tatbestand der Abgeordnetenbestechung (§ 108e StGB)*, 47 NEUE JURISTISCHE WOCHENSCHRIFT 1098 (1994).

[35] United Nations Convention Against Corruption, Oct. 31, 2003, 2349 U.N.T.S. 41, http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf.

provisions on bribery of parliamentarians.[36] Because the *Bundestag* (lower house of the German Federal Parliament) could not agree to reform that criminal offense,[37] Germany was unable to ratify the UNCAC for more than ten years. Due to the law's significant shortcomings[38] and the parliament's inactivity, many legal scholars saw Section 108e StGB only as symbolic anti-corruption law.[39] In contrast, several politicians and a minority of scholars who opposed a reform argued, *inter alia*, that a stricter criminal offense would violate clarity and definiteness requirements of the constitution, and would unnecessarily criminalize legitimate and socially adequate parliamentarian behavior.[40] From their perspective, the draft laws submitted by the oppositional parties—such as during the last legislative period[41]—would have amounted to collateral damage-causing anti-corruption law. Finally, the *Bundestag* adopted a reform of Section 108e StGB that paved the way for Germany's ratification of UNCAC in 2014.[42] Many observers appreciate the new legislation.[43] Some scholars, however, argue that the new law also contains deliberate loopholes, ambiguities, and exceptions that will thwart the fight against parliamentary corruption.[44] In their view, the new Section 108e StGB is, too, symbolic anti-bribery law.

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[36] To name just one of the most cited references, see Anne van Aaken, *Genügt das deutsche Recht den Anforderungen an die VN-Konvention gegen Korruption? Eine rechtsvergleichende Studie zur politischen Korruption unter besonderer Berücksichtigung der Rechtslage in Deutschland*, 65 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 425, 430 (2005).

[37] Sebastian Wolf, *Parlamentarische Blockade bei der Korruptionsbekämpfung? Zur verschleppten Neuregelung des Straftatbestandes der Abgeordnetenbestechung*, 39 ZEITSCHRIFT FÜR PARLAMENTSFRAGEN 493 (2008).

[38] For some illustrative examples of bribery not covered by the current Section 108e StGB, *see* Elisa Hoven, *Die Strafbarkeit der Abgeordnetenbestechung: Wege und Ziele einer Reform des § 108e* StGB, 8 ZEITSCHRIFT FÜR INTERNATIONALE STRAFRECHTSDOGMATIK 33, 35 (2013).

[39] von Arnim, *supra* note 24, at 252; Fischer, *supra* note 24. For several other references, see Hoven, *supra* note 38, at 39.

[40] Wolf, *supra* note 33, at 1635.

[41] *See* Hoven, *supra* note 38, at 40–44; Wolfgang Jäckle, *Abgeordnetenkorruption und Strafrecht—Eine unendliche Geschichte?*, 45 ZEITSCHRIFT FÜR RECHTSPOLITIK 97 (2012); Sebastian Wolf, *Regulierungsproblem Abgeordnetenbestechung: eine Analyse neuerer Entwicklungen*, 6 CORP. COMPLIANCE ZEITSCHRIFT 99 (2013).

[42] *Gesetz zu dem Übereinkommen der Vereinten Nationen vom 31. Oktober 2003 gegen Korruption* [Law on the United Nations Convention Against Corruption adopted on 31 October 2003], Oct. 31, 2014, BGBL. II at 762.

[43] Sebastian Wolf, *Internationale Korruptionsbekämpfung: Zur Weiterentwicklung des UN-Übereinkommens gegen Korruption*, 63 VEREINTE NATIONEN 79, 80 (2015).

[44] Fischer, *supra* note 24; Wolfgang Jäckle, *Sturzgeburt—"Hauruck"-Gesetzgebung bei der Mandatsträgerbestechung*, 47 ZEITSCHRIFT FÜR RECHTSPOLITIK 121 (2014).

In German criminal law, bribery offenses in commercial practice—Section 299 StGB—were primarily derived from the competition model (*Wettbewerbsmodell*);[45] however, this regulatory approach does not comply with several international anti-corruption provisions, particularly the EU Framework Decision on combating corruption in the private sector.[46] The Framework Decision—and also relevant but legally non-binding provisions of UNCAC and the Council of Europe's Criminal Law Convention on Corruption[47]—prescribe the principal-agent model (*Geschäftsherrenmodell)*.[48] In 2007, the Federal Government (*Bundesregierung*) submitted a draft anti-corruption law that included a reform of Section 299 StGB. It suggested to add the *Geschäftsherrenmodell* to the bribery offenses in commercial practice and thus combine both approaches.[49] Several practitioners and scholars strongly criticized the bill. They argued, *inter alia*, that the proposed new Section 299 StGB was unnecessary, violated the requirement of clarity and definiteness, vaguely and contradictorily overlapped with the offense of embezzlement and abuse of trust—Section 266 StGB—and was a negative mixture of two different regulatory models.[50] It was also criticized that the suggested offense would unjustifiably criminalize minor misdemeanors that could be sufficiently dealt with by means of labor law and civil law.[51] This draft law was not adopted by the *Bundestag*—probably because the parliamentarians were unable to agree on a complementary reform of Sect. 108e StGB in the respective legislative period–and therefore lapsed.[52] In 2015, however, the *Bundesregierung*

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[45] Joachim Vogel, *Wirtschaftskorruption und Strafrecht—Ein Beitrag zu Regelungsmodellen im Wirtschaftsstrafrecht*, *in* FESTSCHRIFT FÜR ULRICH WEBER, 395, 404 (Bernd Heinrich, Eric Hilgendorf, Wolfgang Mitsch & Detlev Sternberg-Lieben eds., 2004).

[46] Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector, 2003 O.J. (L 192).

[47] Criminal Law Convention On Corruption, Jan. 27, 1999, C.E.T.S. No. 173, http://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168007f3f5.

[48] Sebastian Wolf, *Ein hybrides Regelungsmodell zur strafrechtlichen Bekämpfung von Wirtschaftskorruption? Zur ausstehenden Reform von § 299 StGB*, 7 CORP. COMPLIANCE ZEITSCHRIFT 29, 31–32 (2014).

[49] Sebastian Wolf, *Modernization of the German Anti-Corruption Criminal Law: The Next Steps*, 8 GERMAN L.J. 295, 301 (2007).

[50] See*, e.g.*, Matthias Braasch, *Kriminologische und strafrechtliche Aspekte der Bestechlichkeit und Bestechung im geschäftlichen Verkehr (§ 299 StGB)*, *in* KORRUPTION: FORSCHUNGSSTAND, PRÄVENTION, PROBLEME 234, 259 (Thomas Kliche & Stephanie Thiel eds., 2011); Holger Niehaus, *Strafrechtliche Folgen der "Bestechung" im vermeintlichen Unternehmensinteresse*, *in* DER KORRUPTIONSFALL SIEMENS. ANALYSEN UND PRAXISNAHE FOLGERUNGEN DES WISSENSCHAFTLICHEN ARBEITSKREISES VON TRANSPARENCY INTERNATIONAL DEUTSCHLAND 21, 43 (Peter Graeff, Karenina Schröder & Sebastian Wolf eds., 2009); Thomas Rönnau & Tine Golombek, *Die Aufnahme des "Geschäftsherrenmodells" in den Tatbestand des § 299—ein Systembruch im deutschen StGB*, 40 ZEITSCHRIFT FÜR RECHTSPOLITIK 193 (2007).

[51] Rönnau & Golombek, *supra* note 50, at 194.

[52] Wolf, *supra* note 48, at 33.

submitted a new bill that proposed an identical reform of Section 299 StGB.[53] From the point of view of the cited critics, the Federal Government once again tried to enact inconsistent and over-criminalized anti-corruption law on the private sector.[54]

D. Concluding Remarks

Inspired by critical studies that analyze the structural and neglected dark sides of anti-corruption, this mainly conceptual Article at the intersection of law and politics developed a typology of partly dysfunctional anti-corruption law. It consists of four ideal types: (1) Over-criminalized anti-corruption law, (2) collateral damage-causing anti-corruption law, (3) symbolic anti-corruption law, and (4) perverted anti-corruption law. An exploratory analysis of two recent developments in German federal anti-bribery legislation shows that the critique of several scholars can be categorized using the typology. Bribery offenses in commercial practice did not comply with EU law and international anti-corruption conventions for a long time, but critics argued that the Federal Government's reform proposals would establish, *inter alia*, over-criminalized anti-corruption law in the private sector. Some observers see both old and new criminal offenses for bribery of members of parliament as symbolic anti-corruption law. For others, the new legislation can be considered as collateral damage-causing anti-corruption law. Does this mean that the ideal types outlined in this paper are arbitrary and blurry? First, anti-bribery provisions, as all legal norms, can have multiple interpretations. Second, the last-mentioned view regarding the new law on bribery of members of parliament clearly is a rather unconvincing minority opinion.[55] Third, using this minority opinion as an example, opponents of certain stronger anti-corruption measures or legislative reforms might tend to discredit them as partly dysfunctional by referring to the effects of the ideal types discussed in this paper.

During recent decades, there have not been any serious accusations of perverted anti-corruption law—as understood and defined in this paper—in Germany. This is not surprising because this type is more likely to exist in authoritarian political systems and in transitioning countries.[56] Looking forward, the applicability and usefulness of the conceptual framework developed in this article still have to be tested on the basis of more

[53] Wolf, *supra* note 43, at 83.

[54] *See, e.g.*, Reinhard Grindel, Member of Parliament at the First Reading of the Draft Law, Mar. 26, 2015, 97th meeting of the *Bundestag*, STENOGRAFISCHER BERICHT, at 9307. Remarkably, the *Bundestag's* Committee on Legal Affairs and Consumer Protection has significantly amended the bill (see DRUCKSACHE 18/6389). Nevertheless, an attenuated *Geschäftsherrenmodell* is still part of the recently adopted law; see *supra* note 30.

[55] For further persuasive reasoning, see, *e.g.*, Fischer, *supra* note 24; Hoven, *supra* note 38; Jäckle, *supra* note 44.

[56] On China and Vietnam, see Andersson & Heywood, *supra* note 8, at 43–49. On Fiji, see generally Larmour, *supra* note 28. On Taiwan and South Korea, see Christian Göbel, *Warriors in Chains. Institutional legacies and Anti-Corruption Programmes in Taiwan and South Korea*, *in* GOVERNMENTS, NGOS AND ANTI-CORRUPTION: THE NEW INTEGRITY WARRIORS 102 (Luís de Sousa, Peter Larmour & Barry Hindess eds., 2009).

cases. Maybe the typology will be refined in the future. Nevertheless, it already seems to add value to critical and systematic analyses of anti-corruption measures.

This Article does not intend to question the fight against corruption. Corruption is harmful and anti-bribery law should be a cornerstone of anti-corruption policies. Still, it often is not easy to distinguish between acceptable behavior and conduct that clearly should be criminalized. Moreover, even if society and parliament overwhelmingly agree in this respect, designing appropriate anti-corruption law is difficult and probably becomes more delicate and demanding against the backdrop of increasing regulative complexity. After roughly two decades of multi-faceted transnational anti-corruption activities, corruption persists to some degree and both the potential and the actual impacts of regulatory frameworks might be limited—albeit frequently not exhausted.[57] When legislatures from anywhere in the world battle corruption, they are confronted with high, often rising, and sometimes even exaggerated expectations. Media reports, nongovernmental awareness-raising campaigns, and international anti-corruption regimes urge lawmakers to enact and enforce strong and deterrent criminal law. This may lead to disproportionate regulation and unintended side effects[58] (see ideal types (1) and (2)). If authorities mix anti-corruption with self-interest, even hypocritical and abusive measures may emerge (see types (3) and (4)).

In addition, anti-corruption law risks to be

> caught in a "regulatory trilemma": If the law is strong enough to change the culture of the regulated organization,[59] it risks crushing the organization's capacity to maintain robust, independent norms of virtuous behavior [cf. type (2)]; if the law is too weak, it has no effect [cf. type (3)]; if the rules are 'just right', chances are we are seeing agency capture [cf. type (4)].[60]

Against this background, sometimes deliberate legislative inactivity might seem preferable because this strategy prevents legislation with adverse effects. Moreover, no one wishes politicians and officials, driven to act on corruption, to do things just for the sake of doing things; however, a legal vacuum tends to be disadvantageous, especially for the poor and

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[57] *See* Wolf & Schmidt-Pfister, *supra* note 1, at 15–16.

[58] *See* Weigend, *supra* note 5, at 752.

[59] This citation refers to "organization" since it stems from a text on governance; see, *infra* note 60. Nevertheless, the argumentation also applies to natural persons.

[60] Scott Burris, Michael Kempa & Clifford Shearing, *Changes in Governance: A Cross-Disciplinary Review of Current Scholarship,* 41 AKRON L. REV. 1, 40 (2008). Square brackets added by the author.

weak. Apart from type (4), partly dysfunctional anti-corruption law–that perhaps can be improved to some extent or at some stage–is likely to be more effective than no respective regulation at all.[61] In summary, there is strong evidence that not only corruption but also anti-corruption may imply ethical dilemmas. The design, implementation, and interpretation of anti-corruption law is full of functional, legal, political, and moral pitfalls as well as promising avenues for future interdisciplinary research.

[61] *See* Buell, *supra* note 20, at 1563–64. This crucial aspect seems to be neglected at least by some of the critical scholars cited in section A. See sources cited, *supra* Part A.

Special Issue
Ethical Challenges of Corrupt Practices

Leges Sine Moribus Vanae?: On the Relationship Between Social Morality and Law in the Field of Foreign Bribery

*By Cornelia Rink**

Abstract

The relationship of social morals and laws becomes particularly crucial and problematic with regard to foreign bribery. This is because of three reasons: Foreign bribery is embedded in social actions, has a transnational character, and is mostly committed in business contexts. Therefore, the author reflects on the relationship of social morals and laws. The author argues that even though social morals and laws have to be distinguished on a conceptual level, it is wise to work towards a factual synchronicity. In this context, the author provides some suggestions for linking social morals and anti-bribery laws more closely. However, this linkage becomes especially problematic regarding extraterritorial criminal liability. Nevertheless, after a critical examination the author concludes that the reproach of moral imperialism is not substantial.

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A. Introduction

Synchronizing social morality and law has always been a challenge in any legislative activity regarding criminal law.[1] Horace describes this in the context of Augustus forcing new laws on the reprobate Romans, when he raises the rhetorical question: "Quid leges sine moribus vanae proficiunt?"[2]—"Of what avail are empty laws without [good] morals?"[3] In the transnational context, especially in the field of foreign bribery, the challenge of balancing laws, practical needs, and social morals has gained substantial significance because the legal standards must consider both a global, ever-changing economy and high social-moral demands. Accordingly, recent legislative efforts in Germany have shown that the fight against foreign bribery is one in which old questions become pressing issues again.[4]

The relationship of social morals and criminal law is discussed in the first part of this article. The article concludes that laws and social morals have to be distinguished conceptually. Nevertheless, it seems necessary for the law not to lose touch with social morals. In the field of foreign bribery, it is argued that such a synchronization of social morals and criminal law falls less within the province of the national legislator and more within that of legal operators, namely the courts and the corporations.

The second part of this article then goes a step further: If the social morals are not theoretically but factually closely tied to laws, is it possible to transfer the anti-bribery provisions to other countries—or would this be a moral imposition? This article ends with a short discussion on the issue of moral imperialism due to anti-corruption laws. It becomes apparent that this concern does not fully take into account cultural and economic realities and, consequently, has to be rejected.

B. Social Morals and Anti-Corruption Law

The article begins with a description of the difficulties of laws and social morality in the context of corruption, particularly foreign bribery. Subsequently, the relationship between social morals and criminal law is shortly illuminated on a more general level. Ultimately,

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[1] DIETMAR VON DER PFORDTEN, RECHTSETHIK 68–70 (2d ed. 2011) (defining both social morality and law as part of social ethics).

[2] HORACE, THE ODES, EPODES, AND CARMEN SAECULARE, bk. III, ode 24, ll. 35–36 (Clifford Herschel Moore ed., 1930).

[3] For the translation, *see Frequently Asked Questions*, UNIVERSITY OF PENNSYLVANIA, https://secure.www.upenn.edu/secretary/FAQ.html (last visited Oct. 25, 2015).

[4] The new German Law against Corruption from Nov. 2015, published in Bundesgesetzblatt Part 1, No. 46, p. 2025; on this: Michael Kubiciel & Cornelia Spörl-Rink, *Gesetz zur Bekämpfung der Korruption—Stellungnahme zum Referentenentwurf des Bundesministeriums für Justiz und für Verbraucherschutz*, 4 KÖLNER PAPIERE ZUR KRIMINALPOLITIK 2 (2014); Heiko Maas, *Wann darf der Staat strafen?* NEUE ZEITSCHRIFT FÜR STRAFRECHT 305 (2015).

this section gives thought to how to bridge the gap between the two in the area of foreign bribery.

I. Corruption: A Challenge for Social Morals and Criminal Law

Corruption is a challenging field for both law and social morality. Both determinants have to confront considerable uncertainties when it comes to the decision whether an action is corrupt or not.

1. Social Morals: Uncertainty and Inflated Expectations

Corruption, roughly defined as "the abuse of entrusted power for personal gain,"[5] is the cardinal anti-social action because it is detrimental to society as a whole and benefits only the individual.[6] To avoid damage to the collective, it therefore seems natural to condemn any corrupt behavior by all possible social-moral means. In cases of doubt, the idea is that it is better to label too much than too little. This leads to a common labeling of behavior as corrupt.

But the term "corruption" is not only used too frequently; it is also used imprecisely.[7] The inexactitude of its use can be attributed to the fact that corruption is a difficult concept to grasp. The reason for this lies, first and foremost, in a characteristic of corruption: its embeddedness in social actions.[8] No other potential criminal act is this much intertwined with normal social behavior and, thus, it is almost incomparably difficult to distinguish it from the social-morally reprehensible.[9]

Compounding the problem of the social-moral side of corruption is that the public attitude toward white-collar crime is just as inconsistent as the public's relationship with business behavior. This problematic relationship to the economic world is primarily due to two

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[5] For definition, see *FAQs on Corruption*, TRANSPARENCY INTERNATIONAL, https://www.transparency.org/whoweare/organisation/faqs_on_corruption/2/ (last visited Oct. 25, 2015).

[6] Michael Baurmann, *Korruption, Recht und Moral*, *in* DIMENSIONEN POLITISCHER KORRUPTION 164 (Ulrich von Alemann ed., 2005).

[7] MATTHIAS BAUER, KORRPTIONSBEKÄMPFUNG DURCH RECHTSETZUNG 15–16 (2002); Werner Plumpe, *Korruption – Annäherungen an ein Historisches und Gesellschaftliches Phänomen*, *in* GELD – GESCHENKE – POLITIK: KORRUPTION IM NEUZEITLICHEN EUROPA 19 (Jens Ivo Engels, Andrea Fahrmeir & Alexander Nützenadel eds., 2009); ULRICH SOMMER, KORRUPTIONSSTRAFRECHT para. 1 (2010).

[8] Samuel W. Buell, "*White Collar" Crimes*, *in* THE OXFORD HANDBOOK OF CRIMINAL LAW 837, 841–42 (Markus D. Dubber & Tatjana Hörnle eds., 2014); Baurmann, *supra* note 6, at 165–66.

[9] Buell, *supra* note 8. This indistinguishability between criminal and normal behavior holds even true for many perpetrators. On the "acceptable and even necessary behavior" in "occupational subcultures," see JAMES WILLIAM COLEMAN, CRIMINAL ELITE: UNDERSTANDING WHITE-COLLAR CRIME 190 (5th ed. 2002).

reasons. First, our economic system is characterized by continuing transformation and growth. Business conditions are complex and change quickly. Many financial operations are barely comprehensible without special expertise. This applies not only to business transactions like corporate acquisitions but also, for example, to the construction of an airport. It can be hard to form a public attitude towards a certain behavior that is embedded in such complex and ever-changing conditions.[10]

Second, our capitalist economic system is built on the idea that individual growth fosters collective economic and social development.[11] In other words, being self-interested serves the community. For this reason, it could be difficult to define which pursuit of profit is socially desirable to ensure proper economic growth, and which is abhorrent because it solely and entirely benefits the individual. The public relationship to economic activities is especially complex in Germany where, unlike in the United States, capitalism has never been fully embraced despite certain economic boom times.[12] The general unease about the capitalist economic system with its few leaders[13] increases the uncertainties in judgments concerning specific questions within this system. This leads to a situation in which social morals gain strength, regularly finding expression in harsh media reports,[14] while there is still confusion concerning where to draw the line between legality and illegality in the first place.

2. Laws: Rigidity and Lethargy in Reference to the Intricate and Dynamic Economy

This challenge becomes even more crucial for legislation. Because corruption permeates every aspect of society,[15] it is hard to define it in a legal way that encompasses all the

[10] *Wall Street* (Twentieth Century Fox Film Corporation 1987) ("Greed, for lack of a better word, is good. Greed is right. Greed works. Greed clarifies, cuts through, and captures the essence of the evalutionary spirit. Greed, in all forms . . . has marked the upward surge of mankind.") (quoting character Gordon Gekko). On the "culture of competition," see COLEMAN, *supra* note 9, at 189–90; Jürgen Matthes, Christina Langhorst & Bodo Herzog, *Globalisierung in Deutschland*, 89 KAS ZUKUNFTSFORUM POLITIK 1, 41 (2008). Critically, "the American Dream is criminogenic." MATTHEW ROBINSON & DANIEL MURPHY, GREED IS GOOD 3 (2009).

[11] ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 423 (1937). For an examination of the egocentrism of economic operators with further references, see BAUER, *supra* note 7, at 101.

[12] Sven Thomas, *Soziale Adäquanz und Bestechungsdelikte*, *in* FESTSCHRIFT FÜR HEIKE JUNG 973, 974 (Heinz Müller-Dietz et al. eds., 2007).

[13] Viktoria Kaina, *Deutschlands Eliten Zwischen Kontinuität und Wandel*, 10 AUS POLITIK UND ZEITGESCHICHTE 8 (2004); RUPRECHT-KARLS-UNIVERSITÄT HEIDELBERG, HEIDELBERGER ELITESTUDIE 2005 2 (2005) (observing a gradual rapprochement with elites). On the widespread extreme left-wing attitudes in Germany, see KLAUS SCHROEDER & MONIKA DEUTZ-SCHROEDER, GEGEN STAAT UND KAPITAL – FÜR DIE REVOLUTION! LINKSEXTREMISMUS IN DEUTSCHLAND – EINE EMPIRISCHE STUDIE (2015); CHRISTIAN GALONKSA, DIE WIRTSCHAFTSELITE IM ABSEITS (2012).

[14] HAUKE BRETTEL & HENDRIK SCHNEIDER, WIRTSCHAFTSSTRAFRECHT 48 (2014).

[15] Urs Kindhäuser, *Voraussetzungen Strafbarer Korruption in Staat, Wirtschaft und Gesellschaft*, 6 ZIETSCHRIFT FÜR INTERNATIONALE STRAFRECHTSDOGMATIK 462 (2011).

situations in which it occurs.[16] Corruption affects not only politics, but also the health sector,[17] the construction industry,[18] and even sports.[19] It can influence public or private decision-making processes, and it can be grand and petty.[20] The various forms of corruption make it difficult to address with quick legislative action.[21] This is particularly problematic because socioeconomic conditions change rapidly, and lawmakers cannot keep pace with the changing conditions.[22] The dynamic nature of economic activities is checked by the static nature of laws.

3. Transnationalizing National Criminal Law Without Globalized Social Morals

Transnational components further complicate the situation. Then, corruption does not only cross internal borders within a society but also external borders to other countries and cultures.[23] In this context, a global anti-corruption fight becomes particularly necessary at the core of transnational bribery: The bribery of foreign public officials.[24] Many international and regional conventions, intergovernmental strategies, and other transnational initiatives exist in this field.[25]

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[16] This is also the reason why corruption is governed variably by the German laws. *See* Thomas Grützner & Nicolai Behr, *Korruption – Strafrecht, Zivilrecht, Steuerrecht, Vergaberecht*, *in* WIRTSCHAFTSSTRAFRECHT, ch. 9, paras. 5–6, 9–10 (Carsten Momsen & Thomas Grützner eds., 2013).

[17] KAI BUSSMANN, MICHAEL BURKHARDT & STEFFEN SALVENMOSER, WIRTSCHAFTSKRIMINALITÄT–PHARMAINDUSTRIE 8 (2013); Taryn Vian, *Review of Corruption in the Health Sector: Theory, Methods and Interventions*, 23 HEALTH POL'Y & PLAN. 23 (2008).

[18] Florian Kienle & Jan Kappel, *Korruption am Bau – Ein Schlaglicht auf Bestechlichkeit und Bestechung im Geschäftlichen Verkehr*, 60 NEUE JURISTICHE WOCHENSCHAU [NJW] 3530 (2007).

[19] For the example of the *Hoyzer* case in Germany, see Bundesgerichtshof [BGH] [Federal Court of Justice] Dec. 15, 2006, BGHST 51, 165; for an in-depth analysis of corruption in sport and the methods used to counteract and prevent it, see GRAHAM BROOKS, AZEEM ALEEM & MARK BUTTON, FRAUD, CORRUPTION AND SPORTS (2013).

[20] Nikos Theodorakis, *Public Corruption*, *in* THE ENCYCLOPAEDIA OF WHITE-COLLAR AND CORPORATE CRIME 757, 758–59 (Lawrence M. Salinger ed., 2013).

[21] Kindhäuser, *supra* note 15, at 468.

[22] Buell, *supra* note 8, at 843.

[23] On the cultural impact of the anti-corruption strategies, see *infra* Part B.I.2.

[24] Acribaldo Miller, *Corruption Between Morality and Legitimacy in the Context of Globalization*, *in* BETWEEN MORALITY AND THE LAW: CORRUPTION, ANTHROPOLOGY AND COMPARATIVE SOCIETY 53, 58 (Italo Pardo ed., 2004).

[25] *See, e.g.*, UNITED NATIONS OFFICE ON DRUGS AND CRIME, COMPENDIUM OF INTERNATIONAL LEGAL INSTRUMENTS OF CORRUPTION (2d ed. 2005).

Although initiatives to combat transnational corruption exist, studies suggest that social-moral views have not yet globalized.[26] This means that despite the fact that politics and economics already work globally, the public's attitude towards corruption has not yet been developed to such an extent. This is hardly surprising considering that even the German federal government opposed a general foreign bribery law in an official statement only ten years ago.[27] This political approach lost its validity as it has been undermined by the development of the global law.

Considering the increasing use of international conventions to harmonize widely varying national laws against corruption, the question raised by Horace is of crucial importance: Is it possible to use the law as a means to implement moral values to societies? Or is it, on the contrary, necessary to model the law after the moral views of a society? The following section addresses these fundamental questions from a national perspective. It is concerned with clarifying the relationship between social morals and laws with respect to anti-bribery provisions. On the basis of these considerations, the section below develops suggestions for improving the linkage of laws and social morals.

II. Laws and Social Morality in the Ever-Changing Field of Foreign Bribery

1. The Theoretic Relationship Between Laws and Social Morality

To understand the present nature of the theoretic relationship between criminal laws and social morality, it is helpful to review some significant evolutionary steps. By way of example, it will be shown that—just like the laws and social morals themselves—the relationship between them has always been a reflection of their respective political and cultural circumstances. The following short summary will give insights into a few of the major phases of the relationship's overall development to the present day.

We have already seen that Horace, as an ancient Roman scholar, was convinced that morals and laws had to be deeply intertwined.[28] Thomas Aquinas is an example for a medieval natural lawyer[29]. In his day, the State as the law-giver and the Church as the

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[26] Celia Moore, *Moral Disengagement in Processes of Organizational Corruption*, 80 J. BUS. ETHICS 129 (2008); James Dungan, Adam Waytz & Liane Young, *Corruption in the Context of Moral Trade-Offs*, 26 J. INTERDISC. ECON. 97 (2014); Adam Waytz, James Dungan & Liane Young, *The Whistleblower's Dilemma and the Fairness-Loyalty Tradeoff*, 49 J. EXPERIMENTAL SOC. PSYCHOL. 1027 (2013). For the foundational social identity theory, see HENRI TAJFEL, SOCIAL IDENTITY AND INTERGROUP RELATIONS (1982).

[27] DEUTSCHER BUNDESTAG: DRUCKSACHEN [BT] 13/642, paras. 4–5, *available at* http://dipbt.bundestag.de/doc/btd/13/006/1300642.pdf.

[28] *See supra* note 2 and accompanying text. Clearly, the dispute between legal positivism and natural law reaches back into ancient times.

[29] The term "natural law" is controversial, though: *See* ERIK WOLF, DAS PROBLEM DER NATURRECHTSLEHRE (1955).

moral-giver were closely connected. Moreover, moral interpretation and knowledge were not commonly accessible but a privilege of the Church. As a result, not only Aquinas but nearly all scholastics were clerics, so that "the boundaries between legal and theological scholarship turn[ed] out to be rather porous,"[30] causing an enormously fruitful "cross-fertilization between the ius commune, the canon law tradition and the moral theological literature."[31] Aquinas came to the conclusion that any human law that defies natural law violates eternal law and, therefore, loses its moral quality, which in turn induces its destruction[32] or, in short: "Lex iniusta non est lex."[33] This view had the potential to constrain power insofar as the law was considered not only human-made but fixed to an extra-positive source. One could even rate this as an early form of checks and balances—very limited, however, due to the large power of the Church and its interlacement with the State.

In the Age of Enlightenment, the traditional authoritarian hierarchies were called into question and began to crumble. The qualitative changes in the structure and framework of society were reflected by jurisprudence. The process included severing ties to the Church's monopolized prerogative of interpretation. Consequently, the decline of the Church's influence also on legal thinking was considerable. However, it was not uncommon to espouse a strong connection between law and social morals. The consistency of law and social morality the natural lawyers envisioned helped to emancipate European societies from the existing authoritarian structures.[34] This is because it had a liberating effect that law was considered not to be imperious but fixed to an extra-positive source. Kant, the Enlightener par excellence, assumed a priori laws to be imposed by reason and, consequently, holds on to an objective source of law.[35] This can be construed as one

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[30] WIM DECOCK, THEOLOGIANS AND CONTRACT LAW: THE MORAL TRANSFORMATION OF THE IUS COMMUNE (CA. 1500–1650) 38 (2013) (discussing the late Spanish scholastics).

[31] *Id.* at 40.

[32] THOMAS AQUINAS, SUMMA THEOLOGIAE I–II, question 95, art. 2 (Fathers of the English Dominican Province trans., Christian Classics 1981). *See also* Georg Wieland, *Gesetz und Geschichte*, *in* THOMAS VON AQUIN: DIE SUMMA THEOLOGIAE 223, 240 (Andreas Speer ed., 2005); Michael Baur, *Law and Natural Law*, *in* THE OXFORD HANDBOOK OF AQUINAS 238, 247 (Brian Davies & Eleonore Stump eds., 2012).

[33] This famous legal saying originates from AUGUSTINE, DE LIVERO ARBITRIO, bk. I, ch. 5, verse 11 (Anna Benjamin & L. J. Hackstaff trans., Prentice Hall 1964) (4th century): "Non videtur esse lex, quae justa non fuerit." GABRIAL NOGUEIRA DIAS, RECHTSPOSITIVISMUS UN RECHTSTHEORIE 44 (2005) gives a general explanation of this basic maxim of natural law. *See also* AQUINAS, *supra* note 32, at question 96, art. 4.

[34] MICHAEL STOLLEIS, ÖFFENTLICHES RECHT IN DEUTSCHLAND: EINE ENFÜHRUNG IN SEINE GESCHICHTE 45 (2014); Matthias J. Fritsch, *Naturrecht und Katholische Aufklärung im 18. Jahrhundert*, *in* MACHT UND MORAL: POLITISCHES DENKEN IM 17. UND 18. JAHRHUNDERT 92, 93 (Markus Kremer & Hans-Richard Reuter eds., 2007). For the development of the natural lawyers from advocates of absolutism to their role as freedom fighters, see MARTIN REULECKE, GLEICHHEIT UND STRAFRECHT IM DEUTSCHEN NATURRECHT DES 18. UND 19. JAHRHUNDERTS 127 (2007).

[35] LEWIS WHITE BECK, A COMMENTARY ON KANT'S CRITIQUE OF PRACTICAL REASON 124 (1960). Kant did, however, obviously have "a basic distinction between law and morality," right, and virtue; on this idea of Kant's The Metaphysics of

approach to narrow down the power of the rulers who had rather absolute control and influence before. The limitation of power is an achievement of the enlightenment which led to positive consequences such as the constitution of human rights, and later, in the nineteenth century, the establishment of basic criminal procedure rules.[36]

With industrialization, the political and economic parameters changed and a devotion to science prevailed. As a result, a central idea was positivism,[37] which was also adopted by representatives of the contemporaneous jurisprudence.[38] This prevalence of legal positivism led to a legal scientific orientation of many legal scholars, who ruled out transcendental elements in the laws, and, accordingly, rejected divine or natural sources of law.[39] The formerly assumed union of law and social morals was opposed or, rather, the separation of law from morals was championed. Hence, it was assumed that even an unjust law retains its binding character. This suggests that, once the cornerstones for Western law as we know it today had been laid, the recourse to natural sources of law seemed to diminish the legal certainty more than it increased it.

But the debate on natural law never ended. In particular, it flared up again in difficult periods of transition when fundamental rights were called into question: In Germany after 1945 and in the early 1990s.[40] The failure of the legal system provoked a call for natural sources of law. But with regard to criminal law only in such extreme cases, when the law unspeakably contradicts justice, can the positivity of law be challenged.[41] For all other

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Morals. *See* STEFANO BERTEA, THE NORMATIVE CLAIM OF LAW app. 2 (2009). Generally on the difficulty of classifying Kant: ERNST LANDSBERG, GESCHICHTE DER DEUTSCHEN RECHTSWISSENSCHAFT. DRITTE ABTEILUNG, ERSTER HALBBAND 503 (1898).

[36] On the genesis of the first reform laws, see ALEXANDER IGNOR, GESCHICHTE DES STRAFPROZESSES IN DEUTSCHLAND 1532–1846: VON DER CAROLINA KARLS V. BIS ZU DEN REFORMEN DES VORMÄRZ 259–88 (2002).

[37] For basic work on the philosophy of positivism, see AUGUSTE COMTE, PLAN DE TRAVAUX SCIENTIFIQUES NÉCESSAIRES POUR RÉORGANISER LA SOCIETÉ (1822).

[38] THOMAS VORMBAUM, EINFÜHRUNG IN DIE MODERNE STRAFRECHTSGESCHICHTE 119–21 (2d ed. 2011).

[39] *Id.* at 121.

[40] LENA FOLJANTY, RECHT ODER GESETZ: JURISTISCHE IDENTITÄT UND AUTORITÄT IN DEN NATURRECHTSDEBATTEN DER NACHKRIEGSZEIT (2013).

[41] The improper law must then be replaced by a just one. For an overview of the so-called Radbruch Formula (*Radbruchsche Formel*), see Gustav Radbruch, *Gesetzliches Unrecht und Übergesetzliches Recht*, SÜDDEUTSCHE JURISTENZEITUNG 105, 107 (1946). This formula was adapted by the Federal Constitutional Court. *See* 3 BVERFGE 225; 6 BVERFGE 132; 6 BVERFGE 389; 23 BVERFGE 98; 54 BVERFGE 53; 95 BVERFGE 96. For a more modern expression of this concept, see European Convention on Human Rights, art. 7, para. 2 (incorporating the principle "no punishment without the law"). *See also* Hans-Ullrich Paeffgen, *Art. 7 EMRK*, *in* SYSTEMATISCHER KOMMENTAR ZUR STRAFPROZESSORDNUNG [SK-StPO] vol. 10, para. 41 (Jürgen Wolter ed., 4th ed. 2011). For a discussion of the so-called "weakened conjunction theory," see ROBERT ALEXY, BEGRIFF UND GELTUNG DES RECHTS 83 (1992).

criminal law cases, legal positivism is nowadays generally acknowledged.[42] This is because social morals cannot define clear and reliable guidelines for behavior. Certainly the legislators should, on the one hand, aim at making laws that reflect existing social morals or which can be internalized by social morals, because such accepted or at least acceptable laws can easily be enforced.[43] On the other hand, however, we cannot look only to social morals for guidance.[44] First, this is due to a multitude of values in our modern society. Second, even in a hypothetical homogenous society, the question whether and to which amount certain acts have to be criminalized cannot always be deduced from social morals. Sometimes scientific measurements or mere consensus give rise to a criminal law provision: For example, in environmental criminal law, but also in public procurement directives and transparency rules.[45] This means that some laws have to be regarded as morally neutral.[46] Both variants show that social morals cannot provide a clear framework—only laws are able to provide a minimum of legal certainty. Thus, it is in the hands of the democratically legitimized legislator to decide which laws to enact—and his decision has a weighty claim to validity.[47]

Hence, laws and social morality have to be separated conceptually.[48] This applies to the bribery of foreign public officials as part of the absolute vast majority of crimes. Principally, laws and social morals are not intertwined at a criminal theoretical level.

2. The Factual Relationship Between Laws and Social Morality

In spite of this finding, criminal law is an area of law with particularly close factual ties to social morality. Criminal law itself communicates a code of conduct;[49] it prescribes future

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[42] *See* Hans-Dieter Assmann, *Recht und Ethos*, *in* WELTETHOS UND RECHT 11, 19 (Anton Pelinka ed., 2011); MANFRED Rehbinder, EINFÜHRUNG IN DIE RECHTSWISSENSCHAFT 28–29 (5th ed. 1995). On the broad definition of legal positivism, see WALTER OTT, DER RECHTSPOSITIVISMUS—KRITISCHE WÜRDIGUNG AUF DER GRUNDLAGE EINES JURISTISCHEN PRAGMATISMUS 106 (1976).

[43] On the theoretical foundations of this objective, see MICHAEL KUBICIEL, DIE WISSENSCHAFT VOM BESONDEREN TEIL DES STRAFRECHTS 60–61 (2013) (referencing Humboldt and Feuerbach).

[44] This is a reason for the state monopoly on the use of force. *See* PFORDTEN, *supra* note 1, at 81.

[45] They might be punishable under Strafgesetzbuch [StGB] [Penal Code], §§ 298, 299, 331–35(a).

[46] MICHAEL FREEMAN, LLOYD'S INTRODUCTION TO JURISPRUDENCE 17 (9th ed. 2014).

[47] CLAUS ROXIN, STRAFRECHT ALLGEMEINER TEIL BAND I, §2, Ch. X, para. 36–37 (3d ed. 1997).

[48] Called the *Trennungsthese* (Doctrine of the Separation of Law and Morals), see H. L. A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 615 (1958).

[49] GÜNTHER JAKOBS, NORM, PERSON, GESELLSCHAFT: VORÜBERLEGUNGEN ZU EINER RECHTSPHILOSOPHIE 53 (3rd ed. 2011).

behavior and thereby influences the social morals.[50] Even though the purpose of criminal law cannot be to shape social morality,[51] law effectively has an impact on social morals due to this reciprocal effect.

Not only are social morals influenced by the law, but also it makes sense to orientate the law toward the social morals. This is for three reasons: First, applying the law to social reality is easier the closer the law is linked to social reality—a functional argument.[52] Second, in line with the general attempt to leave the individual's freedom as unrestricted as possible, the norm addressee's inclination to respect the law should be taken into account.[53] Finally, if criminal punishment aims at restoring the applicable law,[54] it thereby confirms the society's normative identity, effectively saying, "This is how we are!" Consequently, the informal norms of social morality have to be considered when interpreting or applying the law.[55] In the words of the German Federal Constitutional Court in its judgment on the Treaty of Lisbon:

> Every criminal provision contains a decision to penalize a certain behavior based on a social-ethical condemnation furnished with state authority . . . . It is a fundamental decision, to which degree and in which areas a polity employs criminal legislation to enforce its code of conduct, which is pillared on its values. Therefore, the violation has to be considered so grave and unbearable for coexistence in society by the common conviction that it requires punishment.[56]

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[50] This feature of the criminal law was described as *Kulturhebel*, a lever for culture, by the famous German legal scholar Franz von Liszt. *See* Franz von Liszt, *Einheitliches mitteleuropäisches Strafrecht*, 38 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT [ZStW] 1, 3–5 (1917). In contrast to Liszt, the described procedure is not so much meant as a deliberate measure, but as a psychological automatism. *See* BRITTA BANNENBERG, KORRUPTION IN DEUTSCHLAND: PORTRAIT EINER WACHSTUMSBRANCHE 29 (2004) (arguing that not criminalizing a behavior would mean to encourage it).

[51] For more enlightenment on this issue, see KUBICIEL, *supra* note 43, at 22–23 (analyzing Hobbes, Locke, Pufendorf, Kant, Feuerbach, et al.)

[52] *See* MAX ERNST MAYER, RECHTSNORMEN UND KULTURNORMEN 10 (1903). *See also* KUBICIEL, *supra* note 43, at 196–97.

[53] INO AUGSBERG, DIE LESBARKEIT DES RECHTS 180 (2009).

[54] Followers of the theory of positive general deterrence assume this.

[55] On the theory of positive general prevention, see generally Michael Baurmann, *Vorüberlegungen zu einer empirischen Theorie der positiven Generalprävention*, GOLTDAMMER'S ARCHIVE FÜR STRAFRECHT 368–84 (1994).

[56] Bundesverfassungsgericht [BVERFGE] [Federal Constitutional Court] June 30, 2009, 2 BvE 2/08, para. 355 [hereinafter *Judgment of June 30, 2009*]. Author's translation.

This means that by protecting certain legal interests, criminal law conveys fundamental beliefs of a society.[57] For this reason, criminal legislation is considered a national matter, a *domaine réservé,* for the national legislation: For the specific jurisdiction a legal interest is deemed so valuable that even criminal law is a justified means to its protection.[58] In sum, it can be said that there is and should be a factual connection between laws and social morals.

3. Intermediate Conclusion

Notwithstanding that social morality and law have to be distinguished dogmatically, they are closely connected in actual fact. The factual connection is favorable for both and should therefore be harnessed in the application of the law. Thus, the overall aim is clear: The gap between social morals and anti-corruption law has to be bridged. But how can this actually work?

III. Bridging the Gap Between Social Morals and Anti-Corruption Law

The quoted passage from the German Federal Constitutional Court[59] only prods to the strong link between criminal law and social morality, but it does not say anything about how to further develop the two. If socioeconomic conditions change—just as they currently do in relation to globalization—what needs to change first: The law or the social morality? Does the law co-develop the social morality or do social-ethical beliefs shape the law?

> Jede Strafnorm enthält ein mit staatlicher Autorität versehenes sozialethisches Unwerturteil über die von ihr pönalisierte Handlungsweise. . . . Es ist eine grundlegende Entscheidung, in welchem Umfang und in welchen Bereichen ein politisches Gemeinwesen gerade das Mittel des Strafrechts einen in ihren Werten verankerten Verhaltenskodex, dessen Verletzung nach der geteilten Rechtsüberzeugung als so schwerwiegend und unerträglich für das Zusammenleben in der Gemeinschaft gewertet wird, dass sie Strafe erforderlich macht.

For this reason, the German Federal Constitutional Court concludes that criminal law generally is a state matter—an opinion that it mitigated in its subsequent decisions.

[57] HANS HEINRICH JESCHECK & THOMAS WEIGEND, LEHRBUCH DES STRAFRECHTS: ALLGEMEINER TEIL 50–51 (1996). On the protection of social morals—the objectified feeling—by criminal law, *see* KUBICIEL, *supra* note 42, at 69–71.

[58] Michael Kubiciel, *Einheitliches europäisches Strafrecht und vergleichende Darstellung seiner Grundlagen*, 2 JURISTENZEITUNG [JZ] 64, 65 (2015) (providing also further references).

[59] *See Judgment of June 30, 2009* at para. 355.

1. Laws Go First

Whenever new societal problems arise, social and legal norms must be reconsidered. In this context, Franz von Liszt opined that law should be used as *Kulturhebel*, a lever for culture.[60] Laws are made, and the social morals have to assimilate in order to be advanced. This means that the socially shared values are not self-created, but imposed externally. The inevitable assimilation process is characterized by a massive compulsory element.[61] Moreover, psychological findings show that internalized norms are better accepted and obeyed than ones that are forced on a society against their will.[62]

Hence, anti-bribery laws should not be created with the aim to educate and discipline people against their complete will and values. If the social-moral ground is not at all prepared, it is not wise to ratify the international conventions.

2. Social Morals Go First

The German legal philosophers Max Ernst Mayer and Erik Wolf were exponents of the opposite approach. As Mayer put it pointedly, "There is no behavior which is inhibited by the state but not by culture."[63] They were of the opinion that values exist as sociocultural assets in a society.[64] In their view, it is the task of the legislator to pick up "the cultural claims, which have stood the test of time, and pour them into a new mould [sic]; . . . the law."[65] This way, social-cultural assets are transformed into legal assets.[66] Thus, criminal law conceptualization has a "value-referring method."[67]

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[60] Franz von Liszt, *supra* note 50, at 3.

[61] Michael Kubiciel, *Strafrechtswissenschaft und europäische Kriminalpolitik*, ZEITSCHRIFT FÜR INTERNATIONALE STRAFRECHTSDOGMATIK [ZIS] 742, 748 (2010).

[62] DIETER HERMANN, WERTE UND KRIMINALITÄT: KONZEPTION EINER ALLGEMEINEN KRIMINALITÄTSTHEORIE 70 (2003).

[63] MAYER, *supra* note 52, at 20. *See also* ERNST RUDOLF BIERLING, ZUR KRITIK DER JURISTISCHEN GRUNDBEGRIFFE I (1877); GEORGE JELLINEK, ALLGEMEINE STAATSLEHRE (1900).

[64] An idea known as *soziales Kulturgut*. *See* ERIK WOLF, DIE TYPEN DER TATBESTANDSMÄSSIGKEIT: VORSTUDIEN ZUR ALLGEMEINEN LEHRE VOM BESONDEREN TEIL DES STRAFRECHTS 8–9 (1931). For more on Erik Wolf, see KUBICIEL, *supra* note 42, at 73; MAYER, *supra* note 52, at 19.

[65] MAYER, *supra* note 52, at 19. *See also* RUDOLF VON JHERING, GEIST DES RÖMISCHEN RECHTS, Vol. 2, § 1, 45 (1854).

[66] The difference between Wolf and Mayer is that Wolf thinks that the sociocultural assets have to be transferred into state assets before becoming a legal asset. *See* WOLF, *supra* note 64, at 9.

[67] A concept known as *wertbeziehende Methode der strafrechtlichen Begriffsbildung*. *See* WOLF, *supra* note 64, at 8.

This view is no longer convincing. Its prerequisite is a consistent and differentiated canon of values—one that no longer exists in our pluralistic society. Additionally, the business conditions in which white collar crimes are committed do not change so gradually that neither social morals nor the legislator can keep up.[68] Conclusively, the legislator cannot always and exclusively follow social morals and make them precursors for the advancement of the laws.

3. Laws and Social Morals Running Together

Consequently, neither laws nor social morals alone can take the lead role in developing new norms. Instead, a communication process, in which transnational anti-bribery laws and social morals mutually evolve, is necessary. The question is how to realize such a channeled and output-driven communication. For this, I would like to present a hypothesis: The best way to realize this communication process is to create relatively broad criminal provisions and leave it to the legal practitioners to specify the law with the use of case groups, and to translate anti-bribery laws into concrete action instructions or "best practices" for their specific area of business.

As an actual matter of fact, the scopes of most white-collar crime provisions are already ample and characterized by indefinite legal terms.[69] Most certainly, this holds true for anti-bribery statutes. At the moment, the wide scope of these statutes is not appreciated as an advantage but as a common subject of criticism. This happens with a view to the principle of legal certainty and the principle of last resort, which are both traditionally important concepts of the German criminal law due to its significant bearing on constitutional rights.[70] And indeed, as a general rule, the constancy of laws provides mutual trust in the field of law because it ensures the predictability of legal decisions.

The drawback is, however, that narrow criminal provisions balk at a flexible application of the law and occasionally hamper just verdicts more than they promote them. As shown above, this becomes particularly acute when it comes to white-collar crime because rigid laws tend to have difficulties in adjusting to the ever-changing conditions encountered here.[71] The multifarious nature of bribery and its rapidly changing socioeconomic

[68] *See supra* Part B.I.2.

[69] *See* BRETTEL & SCHNEIDER, *supra* note 14, at § 2, para. 6; Gerhard Dannecker, *Die Entwicklung des Wirtschaftsstrafrechts*, *in* HANDBUCH DES WIRTSCHAFTS- UND STEUERSTRAFRECHTS, para. 108 (Heinz-Bernd Wabnitz & Thomas Janovsky eds., 4th ed. 2014).

[70] Claus Kreß, *Nulla Poena Nullum Crimen Sine Lege*, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 1–2 *available at* www.mpepil.com; on criminal law as *ultima ratio* in the business context, *see* ANJA NÖCKEL, GRUND UND GRENZEN EINES MARKTWIRTSCHAFTSSTRAFRECHTS 225–27 (2012).

[71] *See supra* part B.I.2.

conditions continuously produce unforeseeable forms of conduct. Whether a specific act falls under a criminal provision might be a matter of chance if anti-foreign bribery laws are too narrow.

In the context of a highly dynamic, increasingly specialized, and disaggregated landscape, broad criminal provisions leave enough flexibility to bridge the gap to social morals. Legal practitioners then have to function as a communication hinge between laws and social morals. In this regard, the courts and the companies are of paramount importance. Why they can act as communication interface between anti-foreign bribery provisions and social morals is going to be described in the following—both from the legal and the social-moral perspective.

3.1 The Role of the Judiciary from a Legal Perspective and a Social-Moral Perspective

The broad provisions make interpretations necessary, but this also gives the courts the discretion to respond to the changing realities. In applying laws to the specific facts of a case, the courts put the widely conceived provisions into concrete terms by creating case groups in order to adjust the anti-corruption laws to the practical needs.[72] They can thereby empathize with the "vividly developing mind that wants to progress with and to adjust to the conditions of life" instead of reading "dead letters."[73] By applying the criminal provisions to the specific case in question, the courts act as an important communication pivot because they amplify the aims expressed by the laws.

This judicial communication performance is also important from a social-moral point of view. Large trials often trigger public debates, which at their core are processes of self-reflection and updates of the prevailing social morality. The court rulings then confirm the validity of norms and, thus, help to harmonize social-moral and legal standards.

Whenever there is a growing conviction among the citizens that unfair judgments are passed, they have the opportunity to exert political pressure through their representatives. The legislator has the opportunity to react to this in order to make sure that the criminal law does not lose touch with social mores.[74]

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[72] With a view on white-collar crime, *see* BUELL, *supra* note 8, at 858; THOMAS, *supra* note 12, at 976.

[73] Bundesgerichtshof [BGH] [Federal Court of Justice], Jan. 29, 1957, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 718–19.

[74] *See supra* part B.II.2; seeing this danger, *see* HELMUT FIEBIG & HENRICH JUNKER, KORRUPTION UND UNTREUE IM ÖFFENTLICHEN DIENST—ERKENNEN, BEKÄMPFEN, VORBUGEN 17 (2004).

3.2 The Role of Companies from the Employee Perspective

Legal sociologist Kai Bussmann revealed in his research that employees are not as concerned about the legal situation as they are about the business ethics of their company.[75] Assumedly, the same holds true for administrative officers regarding internal administrative guidelines. This means that criminal law, on its own, experiences difficulties in keeping contact with social morals in the business context. For an effective fight against foreign bribery, it is therefore important to include corporations and administrations. They can establish codes of conduct adapted to their field of business. The general advantage is that these rules are tailor-made solutions, which, ideally, hamper innovation and competition less than static laws.[76] The specific advantage for the employee is that he or she knows exactly which business activities are allowed. Thus, internal business or administrative guidelines have a bridging function between laws and social morals.

3.3 The Role of Companies from the Company Perspective

The remaining question is: Why should companies accept their role as communication hinges and enact codes of conduct?[77] In Germany, a corporate criminal law does not yet exist.[78] Thus, corporations cannot be subject to direct criminal investigations. Nevertheless, it is in the interest of corporations that their employees behave compliantly. First, even though it is not punishable under criminal law, a corporation can be fined with administrative penalties for countenancing corruption. But these fines do not regularly exceed the skimmed-off excess profits by a significant amount.[79] From a company's perspective, being publicly identified as a corrupt corporation might sometimes be even more fatal than administrative penalties, because the companies suffer considerably from bad publicity and reputation damages. A study by the World Economic Forum of 2012 showed that a reputation constitutes more than a quarter of a company's market value.[80]

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[75] Kai Bussmann, *Wirtschaftskriminalität und Unternehmenskultur—Empirische Betrachtungen*, *in* DAS VERBOT DER AUSLANDBESTECHUNG: STRAFGRUND, DURCHSETZUNG, PRÄVENTION (Michael Kubiciel & Elisa Hoven eds., forthcoming Jan. 2016).

[76] Kai Bussman, *Business Ethics und Wirtschaftsstrafrecht—Zu einer Kriminologie des Managements*, 86 MONATSSCHRIFT FÜR KRIMINOLOGIE UND STRAFRECHTSREFORM 89, 95 (2003).

[77] *Id.* at 94.

[78] On the ambitions to change this, *see* Michael Kubiciel, *Verbandsstrafe—Verfassungskonformität und Systemkompatibilität*, ZEITSCHRIFT FÜR RECHTSPOLITIK 133, 136–37 (2014); Thomas Fischer & Elisa Hoven, *Unternehmen vor Gericht?*, ZIS 32 (2015).

[79] "Gewinnabschöpfung" in German. *See* Gesetz über Ordnungswidrigkeiten [OWiG] [German Administrative Offenses Act] Feb. 19, 1987, § 130.

[80] Deloitte, *2014 Global Survey on Reputation Risk*, 4 (2014), http://www2.deloitte.com/content/dam/Deloitte/pl/Documents/Reports/pl_Reputation_Risk_survey_EN.pdf.

Thus, reputational risks are the "top strategic business risks."[81] Reducing reputational risks means living by high business ethics.[82] Social-morally unacceptable behaviors, which could annoy the stakeholders, have to be abolished.[83]

This makes corporations an interface between laws and social morals: If they do not act in accordance with legal *and* social-moral standards, they suffer financial losses. For example, joint-stock companies are likely to lose a significant market share of their value due to corruption scandals. Consequently, companies have a strong motivation to put the broad criminal law provisions into concrete terms and specify them for their field of business by giving themselves results-driven codes of conduct. Accordingly, Siemens says on its homepage, "Good corporate citizenship is the basis of our reputation and our long-term success."[84]

Even though companies certainly do not make their business decisions on moral grounds but rather out of economic reasons, they serve as a communication medium between laws and social morals. Out of self-interest and in due consideration of the prevailing social morals, they "translate" criminal law provisions into best practices and, thus, fill them with life.

4. Intermediate Conclusion

Altogether, this means that the judicial branch and the business and administrative directives function as communication interfaces between laws and social morals with the aim of increasingly converging the two by finding new solutions to new problems.[85] The courts have to take the laws as a starting point and limit of any ruling,[86] but they also take "social adequacy" and the "appearance of venality" as a correction possibility to guarantee

[81] *Id.*

[82] *See* Tiago Melo & Alvaro Garrido-Morgado, *Corporate Reputation: A Combination of Social Responsibility and Industry*, 19 CORPORATE SOC. RESPONSIBILITY & ENVTL. MGMT. 11, 11 (2012) ("Corporate social responsibility (CSR) is a key driver of corporate reputation."); Ying Cao, Linda A. Myers & Thomas C. Omer, *Does Company Reputation Matter for Financial Reporting Quality? Evidence from Restatements*, 29 CONTEMPORARY ACCOUNTING RESEARCH 956, 957 (2012–13) (showing the inverse relationship: "companies with higher reputations are less likely to misstate their annual financial statements").

[83] A survey of 1,699 CGMA designation holders in ninety-nine countries revealed that the motivation to embed ethical standards was primarily (eighty percent) driven by the reputational views of the stakeholders. *See* CGMA ETHICS SURVEY (2014), *available at* http://www.cgma.org/magazine/news/pages/201411062.aspx.

[84] *See Corporate Responsibility*, SIEMENS (2014), https://www.siemens.co.kr/en/company/aboutus_citizenship.asp.

[85] On this in more theoretical terms, *see* KUBICIEL *supra* note 43, at 44–45.

[86] In Germany, the precedence of statutes already arises from the constitution *see* GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. I, Arts. 20(iii), 28(i)(1), 97(i).

the reference to social moral standards with regard to corruption.[87] Even though the principle of last resort dictates that criminal law is used as an *ultima ratio* rather than a *prima ratio*, the communication process helps to figure out, negotiate, stipulate, update, and affirm terms of compliant behavior. Indeed, there is no quick and final solution on how to regulate the specific area of white-collar crime, but this approach helps to reach appropriate verdicts without disregarding the legality principle. This makes awareness-raising crucial in the battle against corruption: Both legislators and the public have to constantly scrutinize and develop their views on specific questions of corruption.

Furthermore, the evaluation and measurement of the concrete application and interpretation of the harmonized laws should be considered. Until now, anti-corruption reports and development studies only review the number of corruption cases and whether the international conventions have been enforced. They do not point out which cases have been subsumed under which laws—partly because the number of cases has been very low up to now. Future studies could provide a detailed comparison of the different cases once the anti-corruption measurements are deemed effective and produce a higher number of judgments.

IV. Considerations on "Anti-Corruption Law as Moral Imperialism"

We have already seen that law must not be used as a "lever of culture." In the context of the global anti-foreign bribery policy, it is a common reproach, however, that the transnational legislative efforts are exactly such a lever.

In the following section, I would like to respond to the concerns raised regarding the transnationalization of social moral beliefs: Is there really a potential danger to social morals due to anti-foreign bribery laws? Are these laws tending to restrict the freedom of living out cultural particularities?

1. What is Moral Imperialism?

The mere fact that foreign bribery is tackled globally is sometimes described as imperialistic.[88] Imperialism is generally defined as "the effect that a powerful country or group of countries has in changing or influencing the way people live in other, poorer countries."[89] With respect to the fight against foreign bribery, the reproached imperialism has two components: a legal and a cultural one.

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[87] THOMAS, *supra* note 12, 980-981; on the German concept of social adequacy, see generally THOMAS EXNER, SOZIALÄQUANZ IM STRAFRECHT 58 (2011).

[88] Bernd Schünemann, *Das Strafrecht im Zeichen der Globalisierung*, GA 299 (2003).

[89] MERRIAM WEBSTER DICTIONARY, http://www.merriam-webster.com/dictionary/imperialism.

The first relates to the question of jurisdiction.[90] Enacting the offense of foreign bribery means to criminalize cross-border cases. Even so, the general rule is the so-called "Principle of Territory," which has its reason in protecting the sovereignty of a state.[91] But whether anti-foreign-bribery laws are still in line with international law or have to be defined as an act of legal imperialism cannot be discussed here, but has to be canvassed elsewhere.[92] The issue, which arises with regard to the relationship of social morality and laws in the context of foreign bribery, is moral imperialism. This term is used to criticize the international anti-corruption efforts that undeniably bear unmistakable signs of Western influence.[93] The reproach is that the Western majority forces value-laden standards by legal decree on cultural minorities.[94] It is argued that the rules in the anti-bribery conventions are not in any real sense applicable to other cultural areas. "[S]maller-scale payments, tokens, gratuities, and hospitalities are difficult to characterize with certainty as either corrupt or innocuous across cultures."[95] Criminalizing them would therefore mean to accept "potentially serious social costs."[96] Whether the reproach of moral imperialism is convincing is subject to the following considerations.

It should be stated at the outset that the stigma of cultural imperialism regularly arises in the context of legislative changes that affect more than just one culture. In this context, it must be noted that jurisdictions and cultures are not necessarily congruent. A single state may be decidedly multicultural. In fact, one could argue that nowadays societies with a multitude of cultures are the norm rather than an exception.[97] Further, at the international

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[90] *See* SCHÜNEMANN, *supra* note 88; discussing Schünemann's approach *see* SEBASTIAN WOLF, DER BEITRAG INTERNATIONALER UND SUPRANATIONALER ORGANISATION ZUR KORRUPTIONSBEKÄMPFUNG IN DEN MITGLIEDSSTAATEN 74 (2007).

[91] H. LOWELL BROWN, BRIBERY IN INTERNATIONAL COMMERCE § 4:16 (2003).

[92] *See, e.g.,* H. Lowell Brown, *Extraterritorial Jurisdiction Under The 1998 Amendments To The Foreign Corrupt Practices Act: Does The Government's Reach Now Exceed Its Grasp?*, 26 N.C. J. INT'L L & COM. REG. 239, 319–24.

[93] Jessica A. Lordi, *The U.K. Bribery Act: Endless Jurisdictional Liability On Corporate Violators*, 44 CASE W. RES. J. OF INT'L L., 955, 984–85; Lester A. Myers, *Art. Corruption*, *in* ENCLYOPEDIA OF WHITE-COLLAR AND CORPORATE CRIME 226, 231 (Lawrance M. Saliger ed., 2013); Charles F. Smith & Brittany D. Parling, *"American Imperialism": A Practitioner's Experience With Extraterritorial Enforcement Of The FCPA*, U. OF CHI. LEGAL F. 237, 248 (2012).

[94] Steven R. Salbu, *The Foreign Corrupt Practices Act as a Threat to Harmony*, 20 MICH. J. OF INT'L L. 419, 422 (1999).

[95] Steven R. Salbu, *A Delicate Balance: Legislation, Institutional Change, and Transnational Bribery*, 33 CORNELL INT'L L.J. 657, 684 (2000).

[96] *Id.* at 685; *see also* Joongi Kim & Jong Bum Kim, *Cultural Differences in the Crusade Against International Bribery: Rice-Cake Expenses in Korea and the Foreign Corrupt Practices Act*, 6 PAC. RIM L. & POL'Y J. 549, 578–80 (1997).

[97] Societies with a diversity of indigenous cultures, especially the post-colonial ones like Australia, have a long history of finding solutions to this problem. *See* Sam Garkawe, *The Impact of the Doctrine of Cultural Relativism on the Australian Legal System*, 14 MURDOCH U. ELEC. L.J. Vol. 2 No. 1 (1995).

level, the reproach of cultural imperialism does not only appear in the context of international bribery conventions, but is even more often subject of discussions concerning other areas, particularly human rights.[98] When put in perspective, it becomes clear that in regard to foreign bribery, the problem is actually far less dramatic than in the abovementioned contexts. Nevertheless, it is still a serious accusation that will be discussed critically in the following section.

2. Are Transnational Legislative Efforts Against Corruption "Moral Imperialism?"

For this purpose, the following four groups of cases have to be distinguished: Criminalization of active bribery and passive bribery, as well as criminalization of cases in a member state and of those in a non-member state. The most substantial encroachment would be the criminalization of passive bribery in a state that is not a member of an international anti-corruption convention. Nevertheless, the most important conventions do not contain (obligatory) rules concerning passive bribery.[99]

In contrast, the least culture-intrusive measure is when a state decides to join one of the conventions and become a member state. This instance can on no account be declared as imperialism—even in the most coercive scenario in which a state was under political pressure when it ratified an anti-foreign bribery convention. Even in this case, the concept of sovereignty and maturity of states has to be cherished. Disregarding a state's consent to an international convention would mean to reduce its autonomy. It is in its responsibility to withstand the pressure and to decide whether opposing national cultural characteristics exist and how to deal with them.

3. Specification: Active Bribery in a Non-Member State

Nevertheless, the question remains whether the criminalization of active bribery in a non-member state is an act of moral imperialism. German scholar Sebastian Wolf denies this and thereby refers to the 140 members of the UN Convention, which are mostly developing countries. Not only have they ratified the conventions by their own choice, but they also go far beyond their obligatory scope when transferring it into national law.[100] Following this reasoning, the vast majority cannot be defined as a victim of moral imperialism. But for all that, the reproach of moral imperialism remains relevant in cases to be discussed, in which the state has not ratified the convention. Criminalizing active

[98] David Pimentel, *Rule of Law Reform Without Cultural Imperialism?,* 1, 5 HJRL 2 (2010).

[99] *See, e.g.*, United Nations Convention Against Corruption Arts. 4, Art. 16(i)–(ii) (2005) (protecting explicitly "the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of States").

[100] WOLF, *supra* note 90, at 73.

bribery abroad does not only protect the home country against corruption and its consequences; it also changes the business practices in the other state. A German businessman might refrain from bringing a customary gift for a host public official in Sudan if he fears to be prosecuted for this at home.

First, it has to be noted that corrupt structures cannot be properly declared characteristics of a society. Sociologic studies revealed that corruption is not an integral part of a traditional culture but often merely a lack of development and education.[101] Moreover, the affected societies are only those for which trade plays a significant role, because otherwise the foreign bribery laws would not affect them. It follows: Whenever a society decides to trade with another society, it decides to interact. It exposes itself to the danger that some of its cultural habits and traditions are not only perceived emically but also from an etic point of view. As a result of close ongoing business relationships with other cultures, the business practices may already change or at least get a different meaning. A business interaction always consists of two or more participants—neither of which can claim the right to set the rules unilaterally. Whether a gift is meant as a nice gesture without any ulterior motives or as a straightforward bribe is not only determined by legal decree but also through the interactions of the cultures themselves.

Engaging in business activities means opening up to foreign spheres; the resulting coalescence is the core of globalization. A culture is always in a state of flux and changes in the course of time. Generally speaking, it therefore seems auspicious to perceive global changes not merely as a danger but primarily as an opportunity for economic growth and prosperity, as well as a critical reflection on values and behavior and the development of a cultural identity. Thus, a change in norms does not result from an act of paternalism but from a self-determinative behavior of the state—namely, to enter the world market. This is also because most states have the opportunity to join the international initiatives and take part in their negotiation processes in order to influence the outcome. This would be welcome as it seems likely that anti-corruption strategies in due consideration of cultural idiosyncrasy are more sustainable than those ignoring cultural distinctions.[102] After all, the accusation of moral imperialism due to the conventions that prohibit active foreign bribery

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[101] Dorothea Schulz, *Die Demand Side: Realitäten der Korruptionsbekämpfung in Afrika*, *in* DAS VERBOT DER AUSLANDBESTECHUNG: STRAFGRUND, DURCHSETZUNG, PRÄVENTION (Michael Kubiciel & Elisa Hoven eds., forthcoming Jan. 2016) (discussing the reasons for corruption in Africa—lack of information and lack of experience with the rule of law); *See also* OECD, FIGHTING CORRUPTION IN EASTERN EUROPE AND CENTRAL ASIA: ANTI-CORRUPTION REFORMS IN EASTERN EUROPE AND CENTRAL ASIA, 38 (2013). This is also why Indonesia—one of the most corrupt countries of the world according to Transparency International—focuses in its fight against corruption on education. *See* GOV'T OF INDONESIA, NATIONAL STRATEGY ON CORRUPTION PREVENTION AND ERADICATION 21 (trans. UNODC, 2012), https://www.unodc.org/documents/indonesia//publication/2012/Attachment_to_Perpres_55-2012_National_Strategy_Corruption_Prevention_and_Eradication_translation_by_UNODC.pdf.

[102] *See generally Corruption and Integration. Combatting Corruption Globally: Cultural Imperialism or Integrating Movement towards a World Society?*, U. CONSTANCE, *available at* https://www.exzellenzcluster.uni-konstanz.de/572.html.

in non-member states cannot be sustained. The anti-foreign bribery policies are part of a mutual evolution.

C. Conclusion

Combating corruption is an immense task that occupies a considerable amount of financial and personal resources and can therefore only be achieved with public support. Therefore, it is of great significance to prevent an alienation of criminal law and social morals. However, this seems particularly challenging in regard to foreign bribery. The path to synchronizing social morals and anti-corruption laws suggested in this paper is to focus the attention on the courts and business or administrative directives. These are flexible tools that can easily adapt to the special needs of the various guises of foreign bribery—while a comprehensive legal framework still exists. For the purpose of responding to these processes, it would be crucial to reflect on the concrete applications of the laws not only by the legislative branch and the criminal jurisprudence, but also by anti-corruption evaluation and measurements.

The short analysis of the criticism has shown that the fight against foreign bribery does not have its fundamentals to be called into question. The accusation of cultural imperialism turned out to be groundless. Even though criminal laws that contradict the social morality could turn out to be problematic, the special case of legislation against foreign bribery does not affect countries adversely. Or, to use the words of Horace again: The laws against foreign bribery are neither empty nor without good morals.

Special Issue
Ethical Challenges of Corrupt Practices

Donations Granted Amongst "Friends" in Public Office—Kindness or Corruption?—There Ain't No Such Thing as a Free Lunch

By Holger Niehaus[*]

Abstract

When former state president C. Wulff stood accused of having received benefits from a film producer known to him for several years, he argued: "Is a politician not entitled to have friends?" Before such background, the question of where to draw the line between social life of a public servant or politician and criminal behavior arises. Are such persons subject to permanent threat of criminal prosecution if they accept invitations etc., or is it their obligation to the general public to refrain from accepting donations from persons who have interests in their decisions, even if these persons are long known friends of the public servant?

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A. Introduction

Anyone elected into public office—ranging from a high-ranking representative office, such as the prime minister of a certain German federal state, to a district administrator of a county or a city's head mayor—will certainly come in contact with industry circuits and other interest groups, in which deviating practices compared to the public administration are often concerned. This, in particular, concerns standards of living with respect to both professional and social life. Furthermore, entry into public office does not suddenly terminate the public servant's relationships. The public servant will likely "bring along" private and/or professional relationships to former companions into office. The resulting conflicts are well illustrated by the case of the former German Federal President Christian Wulff ("Wulff"), who in the end had to resign due to the mounting public pressure resulting from the publication of the acceptance of certain benefits while in office.

Wulff, when accused of having received benefits from a film producer known to him for several years, responded: "Is a politician not entitled to have friends?" This, at first, was assessed differently by the public. The disapproval of the receipt of benefits such as a discounted loan by a highly ranked public servant or representative of the state apparently was so severe that the Federal President, in the light of the public pressure, had to resign after only one year of service, thus making him the first president ever to resign during the history of the Federal Republic of Germany. What part of such resignation was in fact the result of the poor conduct of the accused with the allegations as well as the public press is irrelevant for the subject matter in interest though.

In terms of this incident the question arises where to draw the line between social life of a public servant or politician, and criminal behavior. Do such persons live under the permanent threat of criminal prosecution if they accept such gifts, benefits, invitations etc., or is it their obligation to the general public to refrain from accepting such donations from people who have interests in their decisions, even if the donations come from longtime friends?

B. Criminal Proceedings

The Prosecutor's Office of Hannover ("Prosecutor's Office") investigated Wulff for twenty-one counts of corruption. In several cases prosecutions related to the payment of hotel and beverage expenses of the then-prime minister of the State of Lower Saxony, as well as the payment of expenses for vacations or the granting of holiday domiciles by private businessmen.[1] Prosecutors also launched investigations relating to the payment of expenses for a baby-sitter during Wulff's visit to "Oktoberfest" in Munich.

[1] *See* Hans Leyendecker, *21 Nichtigkeiten*, SÜDDEUTSCHE ZEITUNG MAG. 21 (Apr. 8, 2013).

Various of such accusations, finally, were deemed by the prosecutor not to be of any criminal relevance. It has been argued that there were no sufficient indications for the necessary connection between the execution of the office and the receipt of the benefits.[2] Other accusations, according to the Prosecutor's Office, could not have been factually proven.

Finally, after having completed the investigations, the prosecutor's office brought an accusation against Wulff that was not based on the cases in which the accused had in fact received benefits, but in which the context between the execution of the office and the receipt of the benefits could not be proved (according to the prosecutor's office). Essentially, the accusation was based on a case in which a film producer defrayed the Presidential family's expenses of a stay at a hotel during the Oktoberfest in Munich (costing 400 euro), the expenses of a diner (costing 209 euro), and of a babysitter (costing 110 euro). Three months later, the accused campaigned for a project of the film producer in a letter to the chairman of one of Germany's biggest companies.[3]

The regional court of Hannover did not identify probable cause concerning the accusation of bribery, but allowed and opened the main proceedings concerning the minor offense of acceptance of benefits by a public official.[4] During the laborious main proceedings numerous witnesses were heard concerning the question of who had paid which bill and how Wulff and the film producer had dealt with such matters in the past.

After Wulff rejected an offer to a close of the proceedings if the accused accepted a payment obligation (§ 153a German Criminal Procedural Code), the court in February 2014 pronounced a sentence of acquittal.[5] The court was not convinced that the accused had even noticed the compensation by the film producer.[6] Furthermore, the court determined that the covered hospitality expenses for dinner were "socially adequate," and thus, dismissed criminal liability.[7] The assumption of hospitality costs—according to the court—would have been a negligible benefit, taking Wulff's standard of living into account.[8]

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[2] *See id.*

[3] Landgericht [LG] [Regional Court of Hannover], Reference number 40 KLs 6/13 (Feb. 27, 2014), https://openjur.de/u/750690.html.

[4] STRAFGESETZBUCH [STGB] [Penal Code] § 331 (2015).

[5] LG, Reference number 40 KLs 6/13, at paras. 1–3.

[6] *Id.* at recital 207.

[7] *Id.* at recital 268 f.

[8] *Id.*

Therefore, the court was not persuaded of the connection between the execution of the office and the receipt of the benefits.

The Prosecutor's Office originally appealed on points of law but then withdrew its appeal after studying the written grounds for the verdict—which implied that the proceedings ended with a sentence of acquittal.

C. Change in Public Perception

While the popular outrage about the fact that a public officer had accepted money and noncash benefits for his and his family's private life—building a house, expensive vacations, caterings—had first been predominant in public perception, this changed significantly in the course of the ongoing criminal proceedings.

Even in legal publications, some authors spoke of a fighting press (*"Kampfpresse*"), which tried to manipulate public opinion through preset opinions (*"Meinungsvorgaben*") and by leaving out the relevant aspects of the case (*"Weglassen des Relevanten*"). Thereby, the media were leaving the citizens to the opinion hullabaloo of the Internet (*"Meinungs-Tohuwabohu des Internet*").[9]

The investigations by the public Prosecutor's Office of Hannover were said to have been excessive and ruthless and an acquittal, not only the mere closing of the proceedings, was owed to the defendant.[10] Especially were it downright ridiculous to have conducted the investigations with such an effort for the sake of 770 Euro (or, according to a different calculation, for 400 or 370 Euro, respectively, see above). This vigorous investigation would rather impede the fight against corruption rather than promote it.

The defendant did not show that he was aware of possible misconduct, but he was always of the opinion that his behavior was legal. Furthermore, he believed that his resignation from the office as federal president had been redundant, since it had been driven by media pressure.[11]

D. Legal Situation of Public Officers when Accepting Benefits

This affair deserves special attention not only from a legal perspective, but also with regards to the evaluation by the participants and the public. It demonstrates the

[9] *See* Martin Kriele, *The Power of the Media*, 45 ZEITSCHRIFT FÜR RECHTSPOLITIK 53, 55 (2012).

[10] Interview with Heribert Prantl (Deutschlandfunk, Dec. 20, 2013) ("Wulff derserves an acquittal.").

[11] *See* the press report about the presentation of his book "Ganz oben Ganz unten", available at Beck-online: becklink 1032955.

paradigmatic problems of criminal law in the field of corruption and its acceptance in the population and the relevant stakeholders, respectively. This is of no insignificant importance, since only clear rules and a broad consensus on the rightness of punishment following violations of these laws can achieve the positive behavioral impact that criminal law and criminal proceedings seek to promote.[12] Therefore, the most important issues raised by Wulff's trial include:

(1) Does the reprehensibility of an act or the satisfaction of all elements of an offense depend on the amount of "damage" the act caused? Is it, after all, of any meaning, if a public officer in an individual case which might be part of a series of similar events (or maybe not) accepted "merely" a supposedly minor benefit ("costs of the baby sitter", dinner invites etc.)?

(2) Does the minor nature of a benefit depend on the standard of living (*"Lebenszuschnitt"*) of the participants? Is it, after all, of any meaning for the question if all elements of criminal corruption are fulfilled, if the participants practice a luxurious lifestyle in any case? Is it therefore the less critical, if a public officer lets private people grant him benefits, the more expensive he shapes his private life anyway?

(3) Are investigations by the Prosecutor's Office to clear up such accusations petty-minded, possibly even an expression of social envy, and do the investigating authorities thereby misconceive the necessities within the framework of cooperation of administration, politics and economic activity?

(4) Do such investigations possibly even constitute an expression of "lack of respect" for public officials and the offices they represent—federal president, prime minister, etc.?

E. Legal Situation: "There Ain't No Such Thing as a Free Lunch"

I. Minimum Amount Concerning the Value of Questionable Donations?

Due to applicable law, the acceptance of benefits by a public official "for the exercise of an office" is prohibited[13] regardless of the value of the gift. This includes presents presented as insignificant or "socially adequate" presents. Nevertheless, it is a general principle in criminal law—reaching further than corruption—that "socially adequate" behavior cannot constitute criminal liability.[14]

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[12] *See* HARRO OTTO, GRUNDKURS STRAFRECHT, § 1 MARGIN NUMBER 66 (7th ed. 2004).

[13] STRAFGESETZBUCH [STGB] [Penal Code] §§ 331, 333 (2015).

[14] *See* Jörg EISELE IN: ADOLF SCHÖNKE/HORST SCHRÖDER, STRAFGESETZBUCH, preliminary remarks to § 13, margin number 69 f. (29th ed. 2014).

It indeed is the question which behavior in connection with accepting benefits by a public official, if anything, can be deemed as "socially adequate".

Administrations on the federal and state level have issued decrees establishing maximum allowable values for presents received by public officials. The decrees also determine when a public figure is allowed to participate in gratuitous entertainment.

Judging by the federal administration's decrees, one can act on the assumption of the administration's implicit consent if the value of the donation is below twenty-five euros. The equivalent decrees in Berlin set the value to only ten euro. Therefore, criminal proceedings—on account of the acceptance of benefits by a public official—were initiated against a teacher who had accepted a sculpture amounting to 198 Euro as a farewell-gift by her former 10th grade students. Criminal proceedings were closed in return for the acceptance of payment obligations amounting to four thousand euro (§ 153a German Criminal Procedural Code).[15] The maximum permitted value of gifts, however, changes according to the individual's particular governmental position. Berlin's decrees, as pertaining to members of the State's parliament, permit the representatives to accept presents valued no higher than four hundred euros. This discrepancy adds up to an amount forty times higher than the limit applicable to (other) public officials.[16]

Similarly, the administrative decrees of the State of Lower Saxony of 22 May 2007 regarding Section 5 IV of the Minister-Code of the State of Lower Saxony, which are applicable to the Wulff Case, permit a maximum amount of ten euro for the acceptance of presents. Beyond this limit—according to the administrative decree—the value of the gift does not eliminate criminal liability. These principles apply even then, if one would not assume in individual cases that the public official's objectivity would be affected by the acceptance of the benefit. [17]

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[15] *See Gift of Students Accepted: Teacher Has to Pay 4,000 Euro Fine*, SPIEGEL ONLINE (Jan. 7, 2015) [hereinafter *Gift of Students*], www.spiegel.de/schulspiegel/berlin-lehrerin-unter-korruptionsverdacht-wegen-skulptur; STRAFPROZESSORDNUNG [STPO] [Code of Criminal Procedure] § 153(a).

[16] *Gift of Students*, *supra* note 15, at 1.

[17] *See* Hans Herbert von Arnim, *Acceptance of benefits by the former Minister President of Lower Saxony Christian Wulff?*, 31 NEW JOURNAL FOR ADMINISTRATIVE LAW (NVwZ) 141 (2012); Hans Herbert von Arnim, *Warum der Bundespräsident nicht zurücktreten kann*, 31 NEW JOURNAL FOR ADMINISTRATIVE LAW (NVwZ-Extra), 1, 2 (2012), http://rsw.beck.de/rsw/upload/NVwZ/NVwZ-Extra_2012_03.pdf.

II. Connection Between the Execution of Official Duties and the Receipt of Benefits / Legally Protected Interests of Statutes Prohibiting Corruption

One could assume that the aforementioned—quite strict—restrictions for accepting benefits by public officials are relativized by the further precondition of criminal liability under §§ 311 and 333 German Criminal Code that the donation must be granted "for the exercise of the office."[18] In fact, the Regional Court of Hannover based its sentence of acquittal inter alia on the grounds that the incident lacked this nexus.[19]

This assumption, however, is questionable. The statute[20] explicitly does not require that the present be donated as a service in return—quid pro quo—for a certain act of ministration. In fact, a general connection between the execution of the office and the receipt of the benefits is sufficient. This appears to be consistent because § 331 of the German Criminal Code is designed to protect the general public's faith in the integrity and impartiality of the public office.[21] This faith, however, may already be impaired by a public official's acceptance of presents if the donor evidently has economic or other personal interests in the exercise of an office by the favored public official. But, this connection would arguably exist if, for example, a businessman grants a flat rate loan to the prime minster and who participates in official journeys abroad.[22] The same situation occurs when a public official—only months after receiving compensated hospitality costs by a film producer—promotes the film producer's new project in a letter to a company chairman who may consider sponsoring it.

For this reason, criminal liability for corruption does not require someone´s actual damage. For example, criminal liability does not require that public authorities need to pay exaggerated costs by reason of a disadvantageous contract concluded by the favored public official. The harm to the general public's faith in the integrity and impartiality of the public service may arise merely through a public official's acceptance of a gift per se, regardless of any actual injury.

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[18] STRAFGESETZBUCH [STGB] [Penal Code] §§ 331, 333.

[19] Landgericht [LG] [Regional Court of Hannover], Reference number 40 KLs 6/13, recital 268 (Feb. 27, 2014), https://openjur.de/u/750690.html.

[20] STRAFGESETZBUCH [STGB] [Penal Code] § 331.

[21] *See* Bundesgerichtshof [BGH] [Federal Court of Justice] May 11, 2001, ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN STRAFSACHEN [BGHST] 47, pp. 22, 25; THOMAS FISCHER, STRAFGESETZBUCH, § 331, annotation 2 (63nd ed. 2015).

[22] *See* Hans Herbert von Arnim, *Acceptance of benefits by the former Minister President of Lower Saxony Christian Wulff?, supra* note 17.

III. Considerations upon the Circumstances of the Wulff Case and upon the Investigations by the Prosecutor's Office

Applying the aforementioned considerations regarding corruption, it appears to be completely consistent that the Prosecutor's Office of Hannover imposed investigations on C. Wulff and accused him of the offence of acceptance of benefits by a public official. Furthermore, the Prosecutor's Office was legally obligated to act due to the existence of probable cause.[23] Closing the proceedings due to insignificance of the accusations,[24] on the contrary, would have been evidently inappropriate given the existence of a substantial public interest in clearing up the accusations; whether and to what extent one of the highest representatives of the country accepted personal benefits by persons who had personal interests in the way the public official exercises his office. Similarly, there is a substantial public interest in punishing public officials in violation of criminal corruption statutes. It appears to be absurd if the same politicians and media representatives who regularly complain about lowered voter turnouts on elections evenings and about increased alienation between voters and representatives in parliament and administrations, as well as about the general public's lost faith in the integrity of their representatives, claim such activities to be bagatelles and the investigations to be narrow-minded, if not even to be disproportionate intrusions into the legal rights of the public official.

F. Inevitableness of Amalgamation of Public Office with Private "Friendly Turns"?

It could be argued that social intercourse of public officials, particularly high-ranked representatives and functionaries, would be disproportionately restricted by the aforementioned rules. But this point of view has to be objected to.

I. Legal Status of a Public Official / "Grooming" or "Sweetening"

No one is forced to aspire to a public office, or to accept it. But if one chooses to do so, there is an obligation to follow the rules specific to the particular public office entered into, not seldom with great effort and by driving out competitors. If one considers these rules to be narrow-minded or mistaken, everyone is free either not even to aspire to such a public office or to resign and work in the private sector, where such rules do not apply.

That being said, a public official *can* maintain and share friendships; she is only prohibited from gaining benefits from these "friends"—and only in cases where these "friends" have private interests in her decisions as a public official. There is a significant difference between the two transactions! If the public official obviously is not able to recognize the

[23] STRAFPROZESSORDNUNG [STPO] [Code of Criminal Procedure] § 170.

[24] *Id.* at §§ 153, 153(a).

difference, this inability raises serious concerns with regard to the legally protected good that Section 331 German Criminal Code is designed to protect—the faith of general public in the integrity and impartiality of the public service.

Corruption in reality is not conducted by placing a case full of money or an Aston Martin in front of the public official with a request to perform a certain official act in the interest of the donor. Rather there is a longer period of "grooming" or "sweetening" while the donator campaigns for the affection and the supposed friendship of the public official, which is—obviously—completely unbiased by the official position of the public official. This "Grooming" may include shared vacations, dinners, events, etc. Where public officials lack sensitivity for such interrelations and dismiss the acceptance of presents by persons who have interests in the execution of their office as a friendly turn, such behavior only substantiates the necessity and proportionality of a prosecutor's investigations.

II. "Since God has Given us the Papacy, let us Enjoy it." [25]

The same rationale applied to the acceptance of presents applies to the field of the—presumed necessary—participation of public officials in events of all kinds, exercising the "representation" of the authority or even the general public. What interest would the general public of the state of Lower Saxony have in sending high public officials to a series of events called "North-South-Dialogue" which evidently doesn't lead to any results and was likely never intended to do so? In fact, what was declared to be a process of communication for the interest of the public, has simply been a party, whose only purpose was the maintenance of physical wellbeing of the participants. What interest would the general public have in being "represented" by a large number of high public officials attending soccer games—sitting in privileged seats—during the Soccer World Championship in 2006? [26]

In fact, the acceptance of such valuable benefits is clearly not necessary in the public figure's successful representation of the general public and serves to undermine the general public's trust in public officials. The same is true concerning the maintenance or making of political contacts and connections. Even if such connections are made during, for example, sporting events: Why should this not be possible in the course of their official duties and outside luxurious hospitality or events? And if they *are* the only forums in which connections can be made: Why is this the case and in what respect is such a maintenance of contacts of use for the general public?

[25] Remark attributed to Pope Giovanni di Lorenzo de Medici ("Leo X," 1475–1521).

[26] *See the "Claassen-case":* Bundesgerichtshof [BGH] [Federal Court of Justice], Oct. 14, 2008, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2008, 3580.

III. Interdependence of Acceptance of Benefits and Standard of Living of the Persons Involved?

For the abovementioned reasons, the relevance of benefits concerning criminal liability under Section 331 German Criminal Code does not depend on how high the standard of living of the persons involved is, apart from the circumstance that such a high standard of living does not support the conclusion that the public official would not be impressible by presents and other benefits. In any case, the (according to press releases[27]) complete debt financing of Wulff's private home does not support the conclusion that benefits valued at several hundred or thousand euros would have been obviously irrelevant for him.

As described above, before an actual act of corruption is performed, there is usually a period of time of "grooming" and—apparently altruistic—contact maintenance. It is precisely a characteristic of this ("grooming") period of the process of corruption that during this period of time no donations of a worth are granted that increase the assets of the public official noticeably. The purpose of these donations is to create the illusion of personal bounds. Especially such mechanism caused the legislator to penalize such forms of "grooming" and "sweetening" by Section 331 of the German Criminal Code. It would be contrary to the *ratio legis* if criminal liability depended on whether or not the benefit matches with the standard of living of the public official.

In addition, the public understanding for the reasoning that a prime minister is allowed to gain benefits such as luxury vacations, luxury events, etc. while a teacher who accepts a farewell present worth 198 euros from her school class, would be deemed to have committed a criminal offence, can be considered to be quite limited.

G. Need for Legislative Action? Concluding Remarks

Definite rules are required to ensure acceptance of criminal law on corruption by the general public and by all circles involved.

The Wulff criminal proceedings showed that current laws only imperfectly meet these requirements.

Corruption is not a minor offense and does not become one if the benefit gained by the public official in the individual case is not very substantial.
Criminal law on corruption is intended to protect the general public's faith in the integrity and impartiality of the public service.

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[27] *See Personal Loans: Wulff Resists Deception Allegation*, SPIEGEL ONLINE (Dec. 13, 2011), http://www.spiegel.de/politik/deutschland/privatkredit-wulff-wehrt-sich-gegen-taeuschungsvorwurf-a-803353.html.

Against this background, criminal investigations against Wulff were justified. It would mean to misjudge the abovementioned legally protected good and the mechanism of corruption (“grooming”, “sweetening”) if the actions which led to the investigations were trivialized and the prosecutor’s investigations are declared disproportionate.

The sentence of acquittal by the Regional Court of Hannover is open to reservations. Since the Prosecutor’s Office has withdrawn its appeal against the verdict, further sensitization of public official’s actions will be the task of further legal development and also of media reports regarding these contexts.

Special Issue
Ethical Challenges of Corrupt Practices

The Nature of Corruption: An Interdisciplinary Perspective

By Eugen Dimant[*] & Thorben Schulte[**]

Abstract

In response to the many facets of corruption, many scholars have produced interdisciplinary research from both the theoretical and empirical perspective. This paper provides a comprehensive state-of-the-art survey of existing literature on corruption, utilizing these interdisciplinary insights. Specifically, we shed light on corruption research including insights from, among others, the fields of economics, psychology, and criminology. Our systematic discussion of the antecedents and effects of corruption at the micro, meso, and macro level allows us to capture the big picture of not only what drives corrupt behavior, but also its substantial ramifications.

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A. Introduction

Over the last decades, research on corruption—especially on the economic assessments and detrimental effects of its antecedents and detrimental effects has accelerated and corruption has become an established focal point on political agendas. Swelling media coverage, the inception of anti-corruption institutions and anti-corruption laws, and the availability of both micro and macro data has facilitated the visibility of corruption and its adverse effects. Consequently, today's increasingly sensitized society has put pressure on governmental bodies to put this topic on the agenda of politicians to find means and ways to fight the spread of corruption. Now more than ever, scholars have a better understanding of the mechanism of corruption due to the availability of better data giving rise to more eclectic measures.

Corruption is considered one of the biggest threats to humanity in both developing and developed countries because it distorts economic growth,[1] lowers foreign direct investment,[2] and decreases productivity on a firm level due to inefficient allocations of contracts.[3] Corruption also impedes the general societal and economic environment because it reduces voluntary contributions to public goods,[4] increases inequality,[5] facilitates emigration of highly skilled people ("brain drain"),[6] and creates inefficiencies in the sport sector.[7] Research also indicates that corruption rattles a community's public perception, triggers an atrophy of general and political trust, provides an incubator for general crime, dilutes societal norms and values, and distorts both competition and

[1] Toke S. Aidt et al., *Corruption and Sustainable Development*, *in* 2 INTERNATIONAL HANDBOOK ON THE ECONOMICS OF CORRUPTION 3 (Susan Rose-Ackerman & Tina Soreide eds., 2011); Noel D. Johnson, Courtney L. LaFountain & Steven Yamarik, *Corruption Is Bad for Growth (Even in the United States)*, 147 PUB. CHOICE 377 (2011).

[2] *See* Mohsin Habib & Leon Zurawicki, *Corruption and Foreign Direct Investment*, 33 J. INT'L BUS. STUD. 291 (2002); Aparna Mathur & Kartikeya Singh, *Foreign Direct Investment, Corruption, and Democracy* 135 (Am. Enter. Inst., Working Paper, 2007); S. L. Reiter & H. Kevin Steensma, *Human Development and Foreign Direct Investment in Developing Countries: The Influence of FDI Policy and Corruption*, 38 WORLD DEV. 1678 (2010).

[3] Hasan Faruq *et al.*, *Corruption, Bureaucracy and Firm Productivity in Africa*, 17 REV. DEV. ECON. 117 (2011); Virginie Vial & Julien Hanoteau, *Corruption, Manufacturing Plant Growth, and the Asian Paradox: Indonesian Evidence*, 38 WORLD DEV. 69 (2010); Organization for Economic Cooperation and Development, *Consequences of Corruption at the Sector Level and Implications for Economic Growth and Development* (Mar. 25, 2015).

[4] Gonne Beekman *et al.*, *Corruption, Investments and Contributions to Public Goods: Experimental Evidence from Rural Liberia*, 115 J. PUB. ECON. 37 (2014).

[5] *See, e.g.*, Mogens K. Justesen & Christian Bjørnskov, *Exploiting the Poor: Bureaucratic Corruption and Poverty in Africa*, 58 WORLD DEV. 106 (2014); John Christensen, *The Looting Continues: Tax Havens and Corruption*, 7 CRITICAL PERSP. ON INT'L BUS. 177 (2011).

[6] Eugen Dimant *et al.*, *The Effect of Corruption on Migration, 1985–2000,* 20 APPLIED ECON. LETTERS 1270 (2013).

[7] Eugen Dimant & Christian Deutscher, *The Economics of Corruption in Sports: The Special Case of Doping* (Edmond J. Safra, Working Paper No. 55, 2015).

innovation.[8] Interestingly, certain forms of corruption, such as bribing a foreign official, were often viewed as legal and common practice in many countries until the late 1990s.[9] These considerations not only show the economic drawbacks, but also highlight ethical implications on how society as a whole is affected by corruption.

In a recent report, the Organization for Economic Co-operation and Development (OECD) tried to measure and describe international corruption cases that have been unveiled since the introduction of the OECD Anti-Bribery Convention in 1999.[10] The OECD's findings indicate that forty-three percent of the total cases evaluated involved the bribing of public officials from countries ranked either high or very high in terms of human development status. More than half of the infringements were committed by—or at the very least committed with the knowledge of—the management level or higher. The OECD also found that governmental corporations—corporations either owned or controlled by the state—were involved in more than one quarter of all affairs, while public officials were involved in almost another quarter. Shockingly, the total sum of money used for bribing amounted to almost eleven percent of the overall transaction volume that was connected to the analyzed infringements.[11] These figures indicate that corrupt behavior entails a moral component. "The common good of any society consists not only in its material possessions but in its shared ideals. When these ideals are betrayed, as they are betrayed when bribery is practiced, the common good, intangible though it be, suffers injury."[12] Still, it is important to stress that the moral conflict of corrupt behavior is subject to the underlying environment and cannot be assessed purely from the perspective of its economic or societal harm. What is assumed to be moral and along the lines of acceptable behavior in one country or culture may be disapproved of in another.[13] Rather, one should consider, among other things, the existing and relevant norms, and the institutional environment that is key to facilitating deviant behavior. Due to considerable heterogeneity with respect to the understanding of what corruption is, its moral reprehension, and its drivers, we deem it important to approach this topic from an interdisciplinary perspective.

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[8] *See, e.g.*, Sean Richey, *The Impact of Corruption on Social Trust*, 38 AM. POL. RES. 676 (2010); Augusto López Claros, *Removing Impediments to Sustainable Economic Development: The Case of Corruption* (World Bank Policy Research, Working Paper No. 6704, 2013); Eugen Dimant, The Antecedents and Effects of Corruption—A Reassessment of Current (Empirical) Findings (Munich Personal RePEc Archive, 2014).

[9] Vito Tanzi, *Corruption Around the World: Causes, Consequences, Scope, and Cures*, 45 IMF STAFF PAPERS 559 (1998).

[10] Organization for Economic Cooperation and Development, *OECD Foreign Bribery Report: An Analysis of the Crime of Bribery of Foreign Public Officials* (Dec. 2, 2014).

[11] *Id.*

[12] JOHN T. NOONAN, JR., BRIBES: THE INTELLECTUAL HISTORY OF A MORAL IDEA 700 (1987).

[13] Alvaro Cuervo-Cazurra, *Transparency and Corruption*, *in* THE OXFORD HANDBOOK OF ECONOMIC AND INSTITUTIONAL TRANSPARENCY 324 (Jens Forssbæck & Lars Oxelheim eds., 2014).

One point is worth clarifying. There is an enormous amount of existing conceptual, theoretical, and empirical research on the topic of corruption. In particular, empirical research—namely, using survey methods, field and lab experiments—has accelerated over the last twenty years, allowing researchers to contrast theoretical predictions with actual occurrence of corruption. The goal of this Article is to provide a systematic discussion of existing research by shedding light on the different key concepts that explain the spread and diversity of corruption from an interdisciplinary perspective. We deem it important to use this approach and to incorporate theoretical foundations and empirical studies focusing on explaining corrupt behavior at the micro, meso, and macro level. This reasoning results from current and past research evidence indicating that a variety of factors going beyond clear-cut rational decision-making facilitate or attenuate corrupt behavior. Rather, existing results promote the idea that social and institutional factors possess extensive explanatory power. Naturally, inherent to the interdisciplinary approach is the dichotomy of these concepts, more often than not leading to different assumptions, perspectives, and predictions—for example, rational choice versus behavioral concepts. This Article does not attempt to settle the dispute over which approach best explains corrupt behavior. Instead, it offers a comprehensive collection and discussion of existing theories and evidence explaining the antecedents and effects of corruption.

In what follows, Section B provides a brief summary of the historical development of corruption. In Section C, we first discuss the facets of corruption subdivided into an "internal world"—rational choice and behavioral factors, a "meso world"—sociological and criminological determinants, and an "external world"—economic, legal, political, historical, and geographical factors. Applying such an interdisciplinary strategy is essential to construct a well-rounded explanation for corrupt behavior. We conclude in Part D.

B. History of Corruption and Corruption Research

In the past, several institutions and regulations were introduced to strengthen the international fight against corruption. However, corruption is not a new phenomenon, having its origins in ancient history. First, documents on the existence and recognition of corruption date back to Greek philosophers such as Socrates, Plato, Polybius, and Aristotle.[14] Additionally,

> archives recovered from the administrative centre of Middle Kingdom Assyria (c 1,400 B C) refer to civil servants taking bribes, with senior officials and a close relative of the head of state implicated. There are also

[14] John Joseph Wallis, *The Concept of Systematic Corruption in American History*, *in* CORRUPTION AND REFORM: LESSONS FROM AMERICA'S ECONOMIC HISTORY 23 (Edward L. Glaeser & Claudia Goldin eds., 2006).

> references to bribery in the Old Testament scriptures. . . . Corruption must be exposed for what it is, a form of organized crime and a serious abuse of human rights.[15]

Still, for a long time, corruption was mainly a research topic in the fields of political, sociological, historical, and criminal law research. In the 1960s and 1970s, general approaches to assessing the mechanism of corruption created an ambiguous picture of its overall effects. Due to a lack of reliable data and methodological issues, economic research remained largely silent.[16] At that time, conflicting interests between politicians and researchers were preventing corruption research from advancing. For example, trying to receive a visa for a possibly corruption-ridden country was almost impossible at that time if the trip's purpose—a corruption study—was mentioned.[17]

On top of that, research on corruption had suffered from disagreement on a formal definition and the context dependency of an act, which may fall under the definition of corruption in one country but not in another. One of the first oft-recited definitions was coined by Nye: "Corruption is behavior which deviates from the formal duties of a public role because of private-regarding (personal, close family, private clique) pecuniary or status gains; or violates rules against the exercise of certain types of private-regarding influence."[18] One drawback of this definition is the inherent ambiguity, because "all illegal acts are not necessarily corrupt and all corrupt acts are not necessarily illegal."[19] In certain societies, particular actions may already be considered a form of corrupt misconduct, whereas in other societies these acts may well be part of their "formal duties" and "just politics."[20]

Starting in the late 1980s and early 1990s, sound theoretical approaches facilitated the scholarly efforts to study the mechanism of the economics of corruption. Especially in light of the economic acceleration of Asian countries at that time, research was still unsettled on whether corruption exhibits only adverse effects on societies and economics—sanding

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[15] Bryan R. Evans, *The Cost of Corruption: A Discussion Paper on Corruption, Development and the Poor* 20–21 (Tearfund, Discussion Paper, 1999).

[16] Gunnar Myrdal, *Corruption as a Hindrance to Modernization in South Asia*, *in* POLITICAL CORRUPTION: CONCEPTS & CONTEXTS, 265 (Arnold J. Heidenheimer & Michael Johnston eds., 3d ed. 2011).

[17] Joseph S. Nye, *Corruption and Political Development: A Cost-Benefit Analysis*, 61 AM. POL. SCI. REV. 417 (1967).

[18] *Id.* at 419.

[19] John G. Peters & Susan Welch, *Gradients of Corruption in Perceptions of American Public Life*, *in* POLITICAL CORRUPTION: CONCEPTS & CONTEXTS 155 (Arnold J. Heidenheimer & Michael Johnston eds., 3d ed. 2011).

[20] *Id.*

the wheels—or might create positive effects—greasing the wheels—under certain circumstances through the reduction of inefficient red tape.[21] Today, this argument is settled by sound research, indicating that corruption above all is detrimental to the society. These results are now broadly accepted. Through the use of more sophisticated methodological approaches and more reliable data, current research has settled on the fact that the general and long-term detrimental effects of corruption outweigh the context-specific and short-termed positive effects.[22] The broader availability of huge datasets was key for this development. For example, the PRS Group introduced the "International Country Risk Guide" in 1984 and Transparency International established the Corruption Perception Index as one of the most acknowledged measurements in 1995. In the 1990s and after the end of the Cold War, the first global anti-corruption movements occurred along with the democratization process of many developing countries. Ever since, the media has become increasingly involved in a critical assessment of corruption, drawing the public's attention to its consequences.[23]

C. Facets and Determinants of Corruption

The next section centers on the interdisciplinary nature of corruption research. In our attempt to blend different theories from various areas, we introduce a structural framework that allows us to discuss corruption stepwise, from what we refer to as the inner-to-outer-world approach.

For this reason, we start with the analysis of corrupt behavior in the internal world, which comprises a critical discussion of the rational choice theory and behavioral theories. Building on this, we then add an additional level of discussion at the meso level, where we shed light on both sociological and criminological factors. Ultimately, we discuss corrupt behavior from the perspective of the external world, which includes, among others, economic, legal, and political aspects. We believe that such an approach encompasses the breadth of scientific discussion on the topic of corruption and does sufficient justice to the different theories and approaches that contribute to a better understanding of what shapes corrupt behavior. For reasons of convenience, we provide a graphical illustration to guide the reader through the next section's discussion of factors that explain corrupt behavior.

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[21] *See* Axel Dreher & Martin Gassebner. *Greasing the Wheels? The Impact of Regulations and Corruption on Firm Entry*, 155 PUB. CHOICE 413 (2013); Vial & Hanoteau, *supra* note 3.

[22] *See* Toke S. Aidt, *Corruption, Institutions, and Economic Development*, 25 OXFORD REV. ECON. POL. 271 (2009); Pierre-Guillaume Méon & Khalid Sekkat, *Does Corruption Grease or Sand the Wheels of Growth?*, 122 PUB. CHOICE 69 (2005).

[23] Effi Lambropoulou *et al.*, *The Construction of Corruption in Greece: A Normative or Cultural Issue?* 4 (U. Konstanz Res. Grp. Soc. Knowledge, Discussion Paper No. 6, 2007).

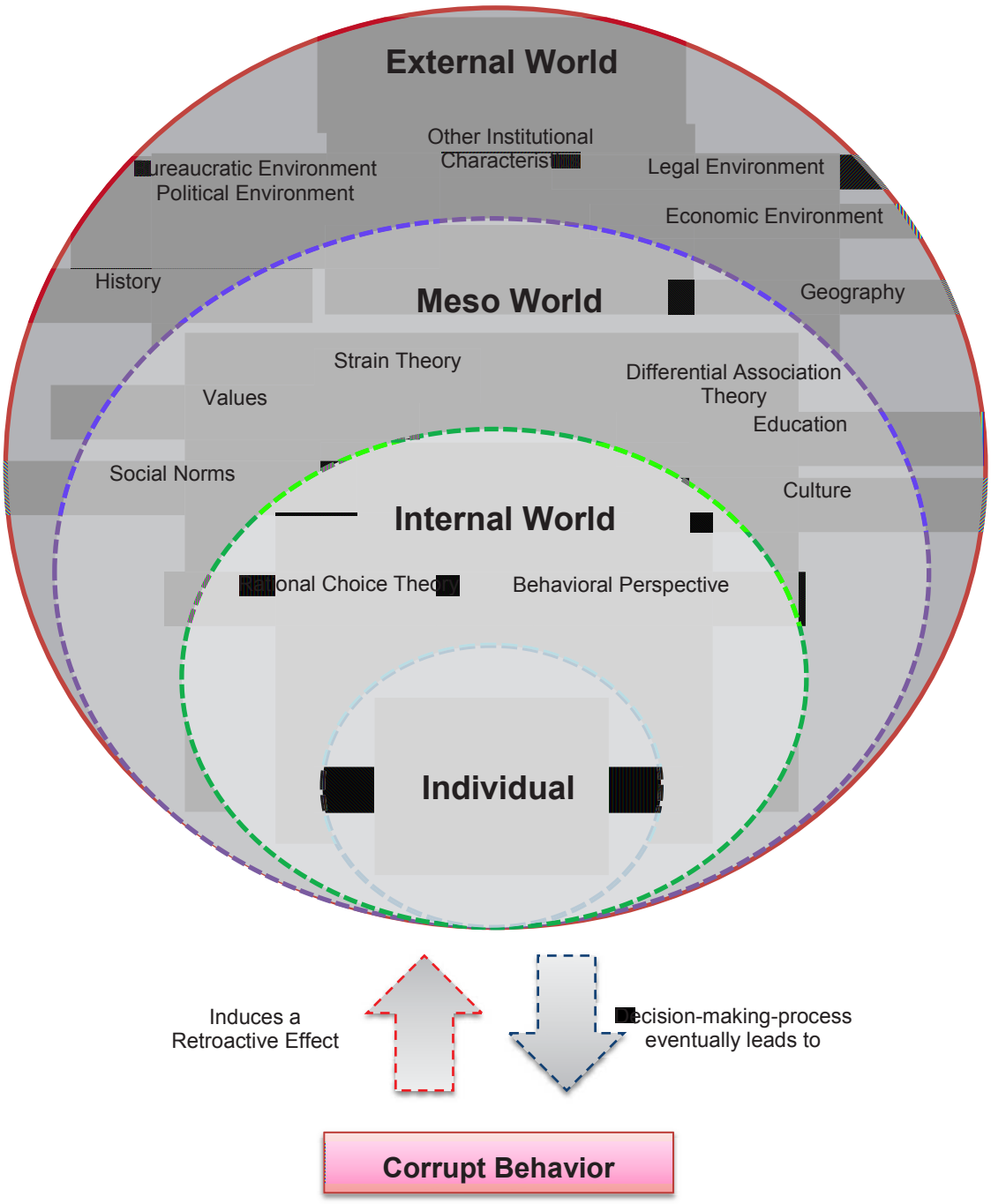

Figure 1 – Interdisciplinary Perspective

I. Internal World—Rational Choice and Behavioral Perspective

The internal world represents a micro perspective that highlights the individual's intrinsic willingness to actively engage in acts of corruption. This aspect comprises purely rational behavior and behavior beyond this clear-cut rationale. Here, light will be shed on aspects that exclusively target the individual perspective. This represents a precise methodological difference in comparison to the aggregate levels that will be analyzed in subsequent sections. We deem it important to include these different perspectives to allow for a well-rounded discussion of the antecedents and effects of corruption. For this purpose, we will start with a pure actor-based perspective and then gradually move towards an aggregate perspective.

Considering rational choice, this particular approach in the context of crime has its roots in the seminal contribution of Gary S. Becker, analyzing the disposition to deviant behavior based on cost-benefit calculations.[24] Encompassing economic theories on crime causation have evolved ever since. The rational choice, whether or not to succumb to corrupt behavior, is based on a decision process in which individuals try to maximize their utility. This is done by weighing expected benefits against expected costs of deviant behavior, including opportunity costs and the risk of being caught or punished. One can use this general approach to understand a subset of criminal behavior, namely corruption, by shedding light on the decision-making process of both the briber and the bribee. Although opportunity costs and risk calculation will certainly differ for each of the parties involved, the basic decision process is similar. (1) Opportunity costs due to time allocation: Whenever time is spent on criminal engagement, less time is available for legal activities. The opportunity costs therefore represent the amount of income, which is given up to attend to the alternative action. (2) Risk calculation: The consideration of the risk of being caught or punished. Certain actions are less likely to be observed and prosecuted and thus drive the individual risk assessment.

Both factors also represent viable ways to deter corrupt behavior—for example, through applying more severe punishments and increasing the probability of detection. Research indicates that both increasing the certainty and the severity of punishment are viable measures to deter criminal behavior, with the former being backed up by more consistent empirical evidence than the latter.[25] Feess et al. report that increasing the magnitude of punishment—for example, up to a death penalty like in China—might even bring about perverse effects.[26] It is reasonable to assume that under such circumstances, judges would

[24] Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968).

[25] Daniel S. Nagin, *Deterrence: A Review of the Evidence by a Criminologist for Economists*, 5 ANN. REV. ECON. 83 (2013).

[26] EBERHARD FEESS *ET AL.*, THE IMPACT OF FINE SIZE AND UNCERTAINTY ON PUNISHMENT AND DETERRENCE: EVIDENCE FROM THE LABORATORY 25 (Munich Personal RePEc Archive, 2014).

tend to be more careful in sentencing, since the condemnation would be associated with high costs for both the defendant and the judge given the risk of a potentially wrong decision. Consequently, irrespective of the corrupt acts detected, percentage of actual convictions might drop, rendering the increased sanction detrimental or useless at the best. From a criminal's perspective, in a situation in which deviant behavior becomes more lucrative due to a *ceteris paribus* decrease in expected costs, such a leeway might induce even more deviant behavior. After all, facing both a drop in convictions and a rising estimated number of unreported cases may tempt the government to impose even harder sanctions, leading to a vicious cycle.[27]

Yet, more often than not, individual behavior goes beyond clear-cut rational decision-making but is bounded in terms of to what extent decisions are thoroughly elaborated.[28] As described before, the pure rational choice approach leaves no room for moral quarrels that may influence the calculus, although real life experience proves morals highly relevant. Yet, morals differ not only from society to society but also on an individual level and even from one situation to another—especially if factors such as emotions are considered. Essentially, a combination of all these aspects is needed to reach a well-elaborated internal view. Thus, in recent years, the behavioral approach, which enriches the rational perspective with the inclusion of psychological aspects and biases, has been incorporated into models trying to better explain deviant behavior in general and corrupt behavior in particular. It has been argued that even a rational decision-maker might end up engaging in seemingly irrational behavior that is guided by more than just a rational calculus, but rather is a function of the underlying environment. This stream of literature has extended the decision space of the so-called "homo oeconomicus" by incorporating factors such as reciprocity, emotions, social image, and the like to draw a *more realistic* picture of human behavior.[29] Clearly, the growing body of approaches represent an addition rather than substitution of the rational choice approach.

Arguably, pure rational choice concerns are incapable of explaining the de facto extent of existing corruption. Lambsdorff argues that the rational choice theory brings about two seemingly conflicting outcomes, one with and one without existing corruption. On the one hand, one should observe corruption more frequently as it is the case since—at least in the absence of norms, values, and the like—criminal behavior is solely driven by rational

[27] Torsten Steinrücken, *Sind härtere Strafen für Korruption erforderlich? Ökonomische Überlegungen zur Sanktionierung illegaler Austauschbeziehungen*, 73 VIERTELJAHRESHEFTE ZUR WIRTSCHAFTSFORSCHUNG 301 (2004).

[28] *See* BOUNDED RATIONALITY: THE ADAPTIVE TOOLBOX (Gerd Gigerenzer & Reinhard Selten eds., 2002).

[29] Nicholas Barberis, Psychology and the Financial Crisis of 2007–2008 (2011) (unpublished manuscript) (on file with the Yale School of Management), http://faculty.som.yale.edu/nicholasbarberis/cp10.pdf.

calculus.[30] On the other hand, because bribery is not a subgame perfect Nash equilibrium,[31] its actual occurrence might already be surprising. In one-shot bribery settings, as is usually the case, reputation does not play any role, suggesting that the bribee has no incentive to reciprocate the behavior of the briber. Consequently, the briber anticipates the bribee's deviant behavior—e.g., pocketing the money without providing the respective service—and, as a result, he should not pay any bribes in the first place. Even in repetitive settings, the exchange will terminate eventually, leading to what is called an endgame effect, suggesting that the bribee will deviate from the reciprocal arrangement at some point. This entails that by using backward induction, the briber will refrain from paying bribes in the first place as well. Accounting for these seemingly conflicting outcomes, current research suggests that one's decision-making process is vastly guided by the social environment and one's peer's behavior.[32] Among other things, theoretical and experimental research suggests that the effect of behavioral contagion is mediated by the social proximity to the peers.[33] A person's traits and behavior are predominantly based on social interaction;[34] people are not born with them, but rather they are learned and adapted through the course of social interaction. These patterns and values can vary and develop as time moves on and they can be considered to be under constant exogenous influence. What is more, existing evidence points at the importance of social norms and values, but also the impact of reputation in repeated game environments, in explaining corrupt behavior.[35] "Reputation is a powerful force for strengthening and enlarging moral."[36]

In sum, the many factors comprising the internal world can be seen as the essential pillars in explaining corrupt behavior. Research indicates, however, that the decision to behave in

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[30] Johann Graf Lambsdorff, *Behavioral and Experimental Economics as a Guidance to Anticorruption*, *in* NEW ADVANCES IN EXPERIMENTAL RESEARCH ON CORRUPTION RESEARCH IN EXPERIMENTAL ECONOMICS 279 (Danila Serra & Leonard Wantchekon eds., 2012).

[31] A well-known game theoretical concept. "A subgame perfect equilibrium is a strategy profile that induces a Nash equilibrium in every subgame." MARTIN J. OSBORNE, AN INTRODUCTION TO GAME THEORY 166 (2004).

[32] *See*, *e.g.*, William N. Evans et al., *Measuring Peer Group Effects: A Study of Teenage Behavior*, 100 J. POL. ECON. 966 (1992); Edward L. Glaeser et al., *Crime and Social Interaction*, 111 Q. J. ECON. 507 (1996).

[33] George A. Akerlof, *Social Distance and Social Decisions*, 65 ECONOMETRICA 1005 (1997); Eugen Dimant et al., *On Peer Effects: Behavioral Contagion of (Un)Ethical Behavior and the Role of Social Identity* (2015) (unpublished manuscript).

[34] Ralph LaRossa & Donald C. Reitzes, *Symbolic Interactionism and Family Studies*, *in* SOURCEBOOK OF FAMILY THEORIES AND METHODS: A CONTEXTUAL APPROACH 135–63 (Pauline G. Boss et al. eds., 1993).

[35] *See, e.g.*, Simon Gächter & Armin Falk, *Reputation and Reciprocity: Consequences for the Labour Relation,* 104 Scandinavian J. Econ. 1 (2002); Manfred Milinski, Dirk Semmann & Hans-Jürgen Krambeck, *Reputation Helps Solve the "Tragedy of the Commons,"* 415 NATURE 424 (2002).

[36] Jonathan Haidt, *The New Synthesis in Moral Psychology*, 316 SCI. 998 (2007).

a corrupt manner is not driven solely by internal factors. Instead, it is the interplay with the social environment that impacts or overrides the internal world. The social nature of humans promotes the consideration of peer group affiliation and reputation, deeming it unlikely that behavior in general—and unethical behavior in particular—is purely self-driven. We now turn to the discussion of meso and macro factors that add to the understanding of corrupt decision-making and build upon the internal world.

II. Meso World—Sociological and Criminological Factors

The meso world focuses on social interaction. It is plausible to assume that, beyond the intrinsic willingness, different components like typical values, rules, and norms within a given society have a strong impact on a person's decision on whether or not to act corruptly. There are many sociological factors and criminological aspects as well as theories that can influence the level of corrupt behavior.

1. Sociological Factors

The general culture within a given country can have a significant impact on individual decisions to engage in corrupt behavior. Husted examines the effect of different cultural aspects and describes "a cultural profile of a corrupt country as one in which there is high uncertainty avoidance, high masculinity, and high power distance."[37] Other studies come to a similar conclusion. For example, Volkema and Getz analyzed power distance and uncertainty avoidance, again showing a significant positive correlation between these cultural factors and the level of corruption.[38] Recent studies also support these results. The two dimensions of national culture (power distance and individualism) moderate the relationship between human development and corruption.[39] This is also true if norms and values are carried over from different cultures through migration. For example, Dimant et al. find some indication for such a footprint effect. In continuing to conduct business as usual, the destination countries experience deterioration in institutional quality and an increase in corruption levels in the short run. But they also find that migrants eventually assimilate to the new environment in the medium run.[40]

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[37] Bryan W. Husted, *Wealth, Culture and Corruption*, 30 J. INT'L BUS. STUD. 339, 354 (1999).

[38] Kathleen A. Getz & Roger J. Volkema, *Culture, Perceived Corruption, and Economics: A Model of Predictors and Outcomes*, 40 BUS. SOC'Y 7 (2001).

[39] Randi L. Sims, Baiyun Gong & Cynthia P. Ruppel, *A Contingency Theory of Corruption: The Effect of Human Development and National Culture*, 49 SOC. SCI. J. 90, 95 (2012).

[40] Eugen Dimant, Tim Krieger & Margarete Redlin, *A Crook is a Crook . . . But is He Still a Crook Abroad? On the Effect of Immigration on Destination-Country Corruption,* 16 GERMAN ECON. REV. 464 (2015).

Aside from the cultural aspects, research also points at the relevance of education in mediating the inclination towards corrupt behavior. Education typically intensifies in the process of economic development within a given country and contributes to lower levels of corruption.[41] A study conducted in Nepal indicates that education is one of the primary determinants of corrupt behavior. Higher education is strongly correlated with the likeliness to condemn corrupt behavior and the reluctance to accept even small bribes.[42]

Research also indicates that the composition of gender in leading positions mediates the extent of corruption.[43] For example, Dollar et al. find that a greater number of women involved in parliament is typically associated with lower levels of corruption.[44] Similar results are common in cross-country evaluations.[45] Typically, women tend to obey society rules and are less likely to take serious risks and therefore less often commit to corruption.[46]

2. Criminological Factors

From a criminological perspective, corruption is at the center of general crime and it facilitates the pervasiveness of the crime.[47] The criminological view on deviant behavior is interdisciplinary in itself. In particular, there is a strong interdependence between the sociological factors and criminology, because aspects like culture and education have an effect on general crime rates and therefore on the level of corruption. The incorporation of rational decision-making also represents an evident link to the internal world.[48]

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[41] Daniel Treisman, *The Causes of Corruption: A Cross-National Study*, 76 J. PUB. ECON. 399 (2000).

[42] Rory Truex, *Corruption, Attitudes, and Education: Survey Evidence from Nepal*, 39 WORLD DEV. 1133 (2011).

[43] *See, e.g.*, Hung-En Sung & Doris Chu, *Does Participation in the World Economy Reduce Political Corruption? An Empirical Inquiry*, 3 INT'L J. COMP. CRIMINOLOGY 94 (2003); Hung-En Sung, *Fairer Sex or Fairer System? Gender and Corruption Revisited*, 82 SOC. FORCES 703 (2003); Hung-En Sung, *Women in Government, Public Corruption, and Liberal Democracy: A Panel Analysis*, 58 CRIME L. & SOC. CHANGE 195 (2012).

[44] David Dollar, Raymond Fisman & Roberta Gatti, *Are Women Really the "Fairer" Sex? Corruption and Women in Government*, 46 J. ECON. BEHAV. & ORG. 423 (2001).

[45] Anand Swamy, Stephen Knack, Young Lee & Omar Azfar, *Gender and Corruption*, 61 J. DEV. ECON. 25 (2001).

[46] *See* Justin Esarey & Gina Chirillo. *"Fairer Sex" or Purity Myth? Corruption, Gender, and Institutional Context*, 9 POL. & GENDER 361, 382–87 (2013); Björn Frank, Johann Graf Lambsdorff & Frédéric Boehm, *Gender and Corruption: Lessons from Laboratory Corruption Experiments*, 23 EUR. J. DEV. RES. 59 (2011).

[47] *See, e.g.*, Wim Huisman & Gudrun Vande Walle, *The Criminology of Corruption*, *in* THE GOOD CAUSE: THEORETICAL PERSPECTIVES ON CORRUPTION 115–45 (Gjalt de Graaf et al. eds., 2010); LOUISE I. SHELLEY, DIRTY ENTANGLEMENTS: CORRUPTION, CRIME, AND TERRORISM 15 (2014).

[48] Eleanor Glueck & Sheldon Glueck, *Unraveling Juvenile Delinquency*, *in* CRIMINOLOGICAL THEORY: PAST TO PRESENT 47–58 (Frances T. Cullen, Robert Agnew & Pamela Wilcox eds., 2014).

Sutherland and Cressey brought forward the differential association theory, concluding that criminal behavior is commonly learned and adopted in interaction with other people.[49] Aspects such as social class, race, and unstable homes are not only factors favoring the commitment to criminal activity, but they also increase the probability that people will socialize with persons of similar character. This theory is widely supported by empirical research that focuses on social learning for both criminal and conforming behavior.[50] At the same time, social learning is not only restricted to small neighborhoods or certain areas, but also entails an aggregate perspective on the societal level. The strain theory, first established by Merton in 1938—a time when the most widely accepted hypothesis attributed criminal behavior to biological disposition—highlights the relevance of social structures and social pressure in the occurrence of criminal behavior.[51] Whenever individuals feel they are being treated unfairly by the society—e.g., restricted access to good schooling—they encounter a stressful situation, which in turn taxes one's self-control.[52] This theory suggests that under these circumstances, people may tend to reverse the goals set by society and create their own goals conflicting with existing norms and values. They are likely to believe that the means justify the ends, which is conducive to their decision to engage in criminal activities.[53] The basic strain theory, however, has been altered over time, eventually leading to a more generalized theory.

Individuals even in a stable personal environment—for example, with a well-paid and secure job—are potentially willing to put everything at risk and choose to engage in criminal behavior. Such behavior might stem from a biased self-perception. Although well-educated white-collar individuals should be able to fully take stock of the consequences of their corrupt behavior, Benson argues that such offenders often do not view themselves as criminals but rather as good employees, justifying their acts solely on the basis of trying to enforce the company's success.[54] This theory seems to hold, particularly for employees in higher positions with ample responsibilities when they see the chance to, for example,

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[49] Edwin H. Sutherland & Donald R. Cressey, *A Theory of Differential Association*, *in* CRIMINOLOGICAL THEORY: PAST TO PRESENT, *supra* note 48, at 136–39.

[50] Ronald Akers, *A Social Learning Theory of Crime*, CRIMINOLOGICAL THEORY: PAST TO PRESENT, *supra* note 148, at 140–53 Albert K. Cohen, *Delinquent Boys: The Culture of the Gang*, *in* CRIMINOLOGICAL THEORY: PAST TO PRESENT, *supra* note 48, at 186–90.

[51] Robert K. Merton, *Social Structure and Anomie*, 3 AM. SOC. REV. 672 (1938).

[52] TRAVIS HIRSCHI & MICHAEL GOTTFREDSON, A GENERAL THEORY OF CRIME (1990).

[53] *See* Cohen, *supra* note 50; Steven F. Messner & Richard Rosenfeld, *Crime and the American Dream*, *in* CRIMINOLOGICAL THEORY: PAST TO PRESENT, *supra* note 48, at 191–201.

[54] Michael L. Benson, *Denying the Guilty Mind*, *in* CRIMINOLOGICAL THEORY: PAST TO PRESENT, *supra* note 48, at 398–406.

secure other people's jobs by acting corruptly.[55] Such a biased self-perception might be the result of both hypocrisy and a different understanding of what is right and wrong. As research indicates, such an understanding of, for example, what is considered a bribe or a gift, is context dependent, varying substantially across countries.[56] However, aside from varying perceptions in different countries, the rationalization process is present in every society and it is a key determinant for white-collar crime and corruption in particular. The ability to rationalize unethical behavior pushes out feelings of guilt and shame, rendering corrupt behavior justifiable if there are enough good reasons.[57] In line with the social learning theory introduced earlier, such work environments can be deemed highly negative. If the supervisors act corruptly without any feelings of guilt, this behavior may affect the other employees' decision-making process. Consequently, further analysis is essential with respect to the extremely high damages involved in white-collar crimes. Prosecution and quantification of such crimes turn out to be extremely tough,[58] and even though numerous cases with extensive damage are known, the actual ramifications remain devious. Furthermore, higher levels of corruption combined with weak institutional structures soak through society and eventually lead to rising general crime rates, creating a hostile environment and breeding ground for even more corruption.[59]

This Article now turns to the external world by shedding light at factors at the macro level that influence the extent of corruption.

III. External World—Economic, Legal, Political, Historical, and Geographical Factors

The external world includes all other elements representing extrinsic opportunities that directly or indirectly have an influence on corruption. Among others, these are economic, legal, political, historical, and geographical factors.

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[55] PETER FLEMING & STELIOS C. ZYGLIDOPOULOS, CHARTING CORPORATE CORRUPTION: AGENCY, STRUCTURE AND ESCALATION 9 (2009).

[56] Andrew Millington, Markus Eberhardt & Barry Wilkinson, *Gift Giving, "Guanxi" and Illicit Payments in Buyer-Suppliers Relations in China: Analysing the Experience of UK Companies*, 57 J. BUS. ETHICS 255 (2005); Paul Steidlmeier, *Gift Giving, Bribery and Corruption: Ethical Management of Business Relationships in China*, 20 J. BUS. ETHICS 121 (1999).

[57] TINA SØREIDE, DRIVERS OF CORRUPTION: A BRIEF REVIEW 29 (World Bank, 2014).

[58] Johan Graf Lambsdorff & Günther G. Schulze, *What Can We Know About Corruption? A Very Short History of Corruption Research and a List of What We Should Aim For*, 235 JAHRBÜCHER FÜR NATIONALÖKONOMIE UND STATISTIK 101 (2015).

[59] Claros, *supra* note 8.

1. Economic Factors

Existing research points at a broad range of economic factors relevant to the extent of corruption. For example, the overall quality of the government in a given country is a well-studied determinant. "Poor governance may affect economic performance through their impact on tax revenue, public spending, and fiscal deficit."[60] Inefficient bureaucracy fuels corruption because it provides a fertile ground for "speed money." Such a mechanism is designed to circumvent impeding regulatory bodies, which represent the major ingredient of the greasing the wheels hypothesis described in Section B. In the context of firm entry in highly regulated countries, Dreher and Gassebner analyzed more than forty countries for several years, concluding that the greasing the wheels hypothesis holds even today.[61] The more inefficient regulations are, the longer the delays for companies being able to start their business. In consequence, such inefficiency, coupled with the risk of losing money and business, trigger their decision to make use of speed money.[62] Whenever the extent and bureaucracy of each public official's decision power are high, people may use their power for personal gain at the cost of general welfare.[63]

Research also indicates the relevance of economic and political freedom. Whenever a country inhabits characteristics such as high protectionism and other significant barriers to trade, corruption appears to breed,[64] whereas countries with a prolonged history of openness to trade are typically characterized by lower levels of corruption.[65] Cross-country comparisons indicate that the extent of economic and political freedom is negatively correlated with corruption levels.[66]

Along these lines, a country's economic growth as measured by the increase in the gross domestic product (GDP) per capita has been found to have a traceable impact on a country's corruption level.[67] For example, Bai et al. analyzed annual firm data from

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[60] Vito Tanzi, *Governance, Corruption, and Public Finance: An Overview*, *in* GOVERNANCE, CORRUPTION, AND PUBLIC FINANCIAL MANAGEMENT 1 (Salvatore Schiavo-Campo ed., 1999).

[61] Dreher & Gassebner, *supra* note 21.

[62] Tanzi, *supra* note 9.

[63] *Id.*

[64] Alberto Ades & Rafael Di Tella, *Rents, Competition, and Corruption*, 89 AM. ECON. REV. 982 (1999).

[65] Daniel Treisman, *What Have We Learned About the Causes of Corruption from Ten Years of Cross-National Empirical Research?,* 10 ANN. REV. POL. SCI. 211, 241–42 (2007).

[66] Abdiweli M. Ali & Hodan Said Isse, *Determinants of Economic Corruption: A Cross-Country Comparison,* 22 CATO J. 449, 461–62 (2003).

[67] *See* Ades & Di Tella, *supra* note 64; Jana Kunicová & Susan Rose-Ackerman, *Electoral Rules and Constitutional Structure as Constraints on Corruption*, 35 BRIT. J. POL. SCI., 573 (2005); Treisman, *supra* note 65.

Vietnam and found that corruption will subside automatically after several years of extensive economic growth.[68] Generally speaking, "corruption vanishes as countries get rich, and there is a transition from poverty to honesty."[69]

2. Legal and Political Factors

Institutions play an important role in both ensuring a sound legal environment and facilitating the companies' business. They set "the rules of the game in a society or, more formally, are the humanly devised constraints that shape human interaction."[70] Whenever an imbalance of power exists, parties are likely to abuse the system and engage in deviant behavior that is detrimental to the society. Typically, weak institutions are responsible for inefficient regulations and the loss of trust on the side of the citizens. Well-functioning institutions therefore represent important factors in the fight against corruption.[71]

Political institutions are indispensable in the fight against corruption because they set the rules and regulations that control the economic environment. Key conditions such as trade openness, competition, and economic development are all influenced by the set of rules imposed by political institutions. Here, transparency and accountability are key in moderating the public officials' inclination to engage in fraudulent behavior, which is likely to be the case under freedom of speech and democratic elections. Lederman et al. find that "corruption tends to decrease systematically with democracy, parliamentary systems, democratic stability, and freedom of press."[72]

Research also points to the relevance of institutional decentralization. Autonomy of states and the ability to enforce this power seems to go hand in hand with breeding corruption.[73] In a cross-national study, Gerring and Thacker[74] find that a centralized government system can have a significant decreasing effect on corruption. Contrary to these findings, Fisman

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[68] *See generally* Jie Bai, Seema Jayachandran, Edmund J. Malesky & Benjamin A. Olken, *Does Economic Growth Reduce Corruption? Theory and Evidence from Vietnam* (2014) (unpublished manuscript) (on file with authors).

[69] Erich Gundlach & Martin Paldam, *The Transition of Corruption: From Poverty to Honesty* 6 (Kiel Inst. for the World Econ., Working Paper No. 1411, 2008). For a more detailed discussion of economic factors, see Dimant, *Antecedents*, *supra* note 8.

[70] DOUGLAS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE, AND ECONOMIC PERFORMANCE 3 (1990).

[71] *See* Axel Dreher, Christos Kotsogiannis & Steve McCorriston, *Corruption Around the World: Evidence From a Structural Model*, 35 J. COMP. ECON. 443, 461–62 (2007).

[72] Lederman *et al.*, *supra* note 72.

[73] *Id.*

[74] Gerring & Thacker, *supra* note 74.

and Gatti find a positive relationship between fiscal decentralization and corruption using indices on a cross-country level.[75]

3. Historical and Geographical Factors

Existing research suggests that historical and geographical factors are highly predictive of a country's corruption level.[76] One distinct determinant is a country's history of colonization. For example, Acemoglu et al. found that, throughout the past five hundred years, colonization had sizable effects on the spread of corruption.

> Civilizations in Meso-America, the Andes, India, and Southeast Asia were richer than those located in North America, Australia, New Zealand, or the southern cone of Latin America. The intervention of Europe reversed this pattern. This is a first-order fact, both for understanding economic and political development over the past 500 years, and for evaluating various theories of long-run development.[77]

Treisman finds support for this argument and argues that the effect of colonization is mediated by the influence of religion.[78]

The geographical disposition appears to have a traceable effect on corruption levels as well. Research suggests that resource endowments, agricultural aspects, and production factors play an important role in overall economic development and, thus, indirectly affect the level of corruption.[79] Extensive resource abundance, however, might also cause perverse outcomes. Bloch and Tang point at numerous examples where resource abundance had detrimental effects on the economy, leading to declining per capita incomes in countries like Venezuela.[80] The exploitation of large resource endowments may often lead to strong income imbalances, political corruption, and property right infringements. These factors tend to contribute to criminal activity due to more profitable

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[75] Fisman & Gatti, *supra* note 75.

[76] *See generally* Jakob Svensson, *Eight Questions About Corruption*, 19 J. ECON. PERSP. 19 (2005).

[77] Daron Acemoglu, Simon Johnson & James A. Robinson, *Reversal of Fortune: Geography and Institutions in the Making of the Modern World Income Distribution*, 117 Q. J. ECON. 1231, 1278–79 (2002).

[78] Treisman, *supra* note 41.

[79] *See* Harry Bloch & Sam Hak Kann Tang, *Deep Determinants of Economic Growth: Institutions, Geography, and Openness to Trade*, 4 PROGRESS IN DEV. STUD. 245, 248–53 (2004).

[80] *Id.*

rent-seeking behavior. In addition, Goel and Nelson find support for the hypothesis that "countries with more geographically concentrated populations (*Urban*) are likely to have lower corruption."[81] The authors show that in densely populated areas corruption is strongly deterred by easier detection and stronger stigmatization.

IV. Interdisciplinary Perspective and Empirical Findings

Combining the factors and different views that have been elaborated throughout this paper, a deeper understanding and intuitive understanding for the figure presented at the beginning of Section C should now be established.

In this section, and throughout this Article, we do not attempt to weigh one approach against the other. Rather, we try to provide a comprehensive view on the factors that are relevant to corrupt decision-making. Existing research indicates that corrupt behavior can be explained by an array of existing theories, stressing the importance of an interdisciplinary approach. Although we provide a rough framework, explaining the underlying mechanism of how all the interdisciplinary concepts are interrelated and build upon each other is beyond the goal of this Article. Instead, we stress the individual, and how individuals are subjected to the interplay of the different worlds. In any given context, an individual's decision to engage in corrupt behavior is subject to interior rationalization, or the internal world, as well as the underlying social or meso world, and institutional context, or the external world. With this, we conceptually unify the approaches and theory that focus on both the individual actor and the aggregate perspective.

In particular, in the internal world, decisions based on pure rational choice mechanisms, as well as the inclusion of behavioral factors, determine the individual's basic inclination to engage in corrupt behavior. At this point, we have shown that using insights from rational choice theory alone cannot sufficiently explain the actual occurrence of corruption. Although the choice whether or not to act corruptly always begins in the internal world, the other layers cannot be excluded from the decision-making process. Thus, it is key to combine this actor-based view with influences from the outside that are almost entirely empirically assessed on an aggregate level. The meso world covers the sociological and criminological factors that add another layer to the decision-making process. Factors like culture, ethical standards, and education are important determinants for deviant conduct. The external world includes economic, legal, political, historical, and geographical determinants, representing factors that individuals are subjected to, but have little power to influence on their own. It is worth noting that these three different layers are not distinct but rather interdependent, thus creating retroactive effects.

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[81] Rajeev K. Goel & Michael A. Nelson, *Causes of Corruption: History, Geography, and Government*, 32 J. POL'Y MODELING 433, 444 (2010) (emphasis in original).

At an individual level, the rational-self reaches the decision to behave corruptly by simply weighing the expected costs against the expected benefits. In addition, the psychological assessment supports this decision because one observes peer behavior of the same kind, thus triggering behavioral conformity. The decision to engage in deviant behavior, however, might go against the norms, values, and moral virtues one was raised with, which could trigger the consideration of long-term consequences such behavior might have in terms of social welfare. Therefore, although corrupt behavior seems to be perfectly rational and justifiable from a pure self-maximization perspective, a more deliberate assessment of the consequences might lead to a different outcome. This argument is in line with previously discussed literature raising the point that the actual occurrence of corruption is in line with what one would expect based on the predictions derived by rational choice theory.

D. Conclusion

Research on the antecedents and effects of corruption has undergone a profound development over the last decades. Studies using theoretical, empirical, and experimental approaches have broadened our understanding of corruption, helping to develop meaningful countermeasures. In this paper, we shed light on the interdisciplinary discussion of corruption at the micro, meso, and macro level, providing ample evidence that corrupt behavior is not only the result of an internal cost-benefit analysis, but is rather a function of the underlying social and economic environment. For this reason, a multidisciplinary approach is required to understand the complex nature of corruption.

Research indicates that corrupt behavior is driven by a multitude of different mechanisms that have their origin at both the individual and the collective level. Moreover, while the decision to engage in corrupt behavior is the result of a deliberative decision—as opposed to an impulsive one when it comes to general acts of crime—there are many conflicting mechanisms at play. Throughout this paper, we have claimed that pure rational choice theories do not sufficiently explain the occurrence, or the lack, of corruption. Using game-theoretic predictions, one would expect corruption to not exist at all or to be observed everywhere. Instead, we observe both corrupt and honest people, and empirical research also points to substantial heterogeneity across, and even within, countries. The inception of more reliable measures of corruption has stimulated a broad variety of research trying to explain the mechanisms of corruption going beyond clear-cut rational decision-making. Rather, in reaching a decision, research has emphasized the importance of bounded rationality; the inherent values and norms one person has been raised with, as well as the institutional and political environment.

In this paper, we focused on discussion of state-of-the-art literature on corruption as well as bridging the gap between different theories and approaches to the understanding of what really drives corrupt behavior beyond rational decision-making. One aspect that we highlighted throughout the different sections of our interdisciplinary approach is the

relevance and influence of moral and ethical considerations on corrupt behavior. As mentioned in the limitations of the internal world, rational choice approaches neglect this aspect entirely and insufficiently explain the non-occurrence of corruption. Adding the consideration of ethical aspects allows us to draw a more balanced picture of the drivers of corruption.

Throughout this paper, we have argued that more than through simple cost-benefit heuristics, individuals are driven by moral and ethical concerns, which are shaped by, and are independent from, the economic, legal, and political environment in which they live. The consideration of moral aspects is essential to understanding the spread of corruption at each level: micro, meso, and macro. Being more sensitized to ethical considerations, and the impact of one's own behavior on others, is likely to increase both self-awareness and control, and moderate the likelihood to engage in inopportune behavior in the first place. Arguably, ethicality is what makes humans distinct from animals and the lack thereof is likely to facilitate a vicious cycle of systemic misdemeanor.

Having been a problem for centuries, one has to be an inveterate optimist to believe that corruption can be entirely annihilated without undermining the fact that this would not be desirable from a welfare perspective, considering the concomitant costs. At best, research on this topic and the implementation of an effective regulatory policy, suitable codes of conduct, political and bureaucratic transparency, and effective anti-corruption measures can help to mitigate the dissemination of corruption.

Special Issue
Ethical Challenges of Corrupt Practices

Personal Gain or Organizational Benefits? How to Explain Active Corruption

By Markus Pohlmann,[*] Kristina Bitsch[**] & Julian Klinkhammer[***]

Abstract

Corrupt practices in organizations are commonly explained via the rational choice of individual employees, with the benefits of deviant actors at the heart of the theoretical approach. This Article challenges the rational choice perspective with reference to cases of corruption in which the organizational benefits are crucial and personal gains negligible. The authors propose to embed the concept of "useful illegality" (Luhmann) into an institutional theory framework and develop a set of indicators for the systematic comparison of individual case studies. Exemplary analyses of two landmark cases of corporate bribery on behalf of German corporations' subsidiaries abroad (*Siemens Argentina* and *Magyar Telekom*) show that active corruption was neither simply a function of individual deviance, nor of personal gain. In contrast, institutional theory allows the modeling of organizational deviance as a function of unwritten rules that lend legitimacy to the deviant behavior of bribe payers. Despite plentiful opportunities in the periphery of these two multinational corporations, the few instances of personal gain were either in line with the organizational incentive structures (as in *Telekom*) or attributable to the loss of membership (as in *Siemens*). Mostly high-ranking employees, loyal to their organization, committed those crimes at high personal risks. The discussion of factors that explain why these "company men" nonetheless complied with the unwritten rules, in support of organizational benefits, leads the authors to conclude with likely consequences for effective regulation. They argue that it is the usefulness of the illegal behavior for the organization, its entrenchment in organizational cultures, and amplified adaptation problems with regard to changing institutional environments that explain what makes corrupt practices so hard to control and to regulate in a formal legal organization.

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A. Introduction

This Article challenges the idea that corrupt practices in organizations are an outcome of rational choices of individual actors by focusing on bribe payers. It aims to clarify the rules that guide the high-ranking employees' strategic decision of whether or not to pay bribes. To this end, we apply the sociological concept of "useful illegality" to the field of corruption in organizations, and we develop a framework for the comparative analysis of individual case studies. The concept of useful illegality was introduced by sociologist Niklas Luhmann in 1964,[1] but it has not been applied systematically to empirical research. Adopting Luhmann's concept for the use within an institutional theory approach, this Article argues that it is particularly suited to understand the phenomenon of active corruption.

Research on corruption usually grapples with the idea of "bad apples" and the complementary role of "rotten barrels." Corrupt behavior is often attributed to individual characteristics such as greed for personal gain, lack of self-control,[2] and deviant personality traits.[3] It is argued that Psychopathy and Machiavellianism mark the personalities of corrupt actors.[4] The basic assumption of such approaches, which are located within the rational choice theory, is that organizations become corrupt through individual deviance—the longing for individual benefit or personal gain. In the case of managers, this means that the very personality traits that help managers advance in the corporate hierarchy also make them more prone to individual deviance.[5] Thus, stricter laws and consistent compliance measures serve as viable deterrents against corruption; they raise both the likelihood of detection of corruption and the costs the deviant actor faces if caught. In this way, corruption is commonly perceived as being adverse to the organization's objectives.[6]

This Article challenges this paradigm by focusing on active corruption from the bribe giver, as opposed to the bribe taker. In this study, most of the bribe givers are high-ranking, well-educated, and well-paid managers. They commit crime at high personal risks without being

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[1] NIKLAS LUHMANN, FUNKTIONEN UND FOLGEN FORMALER ORGANISATION 304 (1964).

[2] MICHAEL R. GOTTFREDSON & TRAVIS HIRSCHI, A GENERAL THEORY OF CRIME (1990).

[3] FRIEDEMANN NERDINGER, UNTERNEHMENSSCHÄDIGENDES VERHALTEN ERKENNEN UND VERHINDERN (2008); Tanja Rabl & Torsten M. Kühlmann, *Understanding Corruption in Organizations—Development and Empirical Assessment of an Action Model*, 82 J. BUS. ETHICS 477 (2008); Ingo Zettler & Gerhard Blickle, *Zum Zusammenspiel von "wer" und "wo": Eine psychologische Betrachtungsweise personaler und situationaler Determinanten kontraproduktiven Verhaltens am Arbeitsplatz*, 6 ZEITSCHRIFT FÜR INTERNATIONALE STRAFRECHTSDOGMATIK 143 (2011).

[4] Thomas Knecht, *Das Persönlichkeitsprofil des Wirtschaftskriminellen*, 60 KRIMINALISTIK 201 (2006); Thomas Knecht, *Persönlichkeit von Wirtschaftskriminellen*, 4 PSYCHIATRIE 25 (2009).

[5] *See* SVEN LITZCKE, RUTH LINSSEN, SINA MAFFENBEIER & JAN SCHILLING, KORRUPTION: RISIKOFAKTOR MENSCH: WAHRNEHMUNG—RECHTFERTIGUNG—MELDEVERHALTEN 19, 20 (2012).

[6] *See, e.g.*, Blake E. Ashforth *et al.*, *Re-Viewing Organizational Corruption*, 33 ACAD. MGM'T REV. 670, 672 (2008).

primarily oriented toward a wealth grab. Until the crime is revealed, the illegal actions are intended to be useful to the organization. Using the concept of useful illegality, we scrutinize whether it is possible to categorize a specific kind of bribery as organizational deviance. The purpose of this Article is not to exonerate those who sustain such organizational actions—especially where an actual crime has been committed—but rather to explain how such deviance takes place and why it is difficult for organizations to prevent the crime.

From a sociological perspective, bribe giving seems more difficult to explain, so the analysis will focus on bribe giving in the corporate sector. In analyzing bribe taking, a rational choice approach might fit well—personal gain is often the driving force behind this category of deviance. In cases of bribe giving, where personal gain is not the main driving force, the rational choice approach is insufficient—instead, an institutional theory or a system theory approach is more appropriate.

Most corrupt practices depend on the supply of bribes from the private sector.[7] This Article applies the case study approach—a field-tested method of research on white-collar crime[8]—to judicial decisions on corporate bribery. Case studies of corporate bribery on behalf of German corporations' subsidiaries abroad, in the *Siemens* and *Telekom* cases, exemplify our analytic approach. The parent companies involved—Siemens AG and Deutsche Telekom—are ranked within the Top Ten largest German companies and are popular icons of the German economy. Both also rank among the largest corporations in Europe with strong operations abroad, generating more than half their revenues outside of Germany.[9] We review cases of corporate bribery carried out by regional subsidiary companies both owned and controlled by their respective parent company. The *Siemens* and *Telekom* cases are recent examples of Foreign Corrupt Practices Act (FCPA) enforcement actions by U.S. government authorities concerning German companies' business conduct abroad. In both cases, the illegal activities were revealed in 2006 and were settled with the U.S. Government in 2008 (*Siemens AG*) and 2011 (*Deutsche Telekom*). We selected the FCPA violations of two regional subsidiaries in South America and in Europe because the publicly available evidence—gathered largely from United States Securities and Exchange Commission (SEC) and United States Department of Justice (DOJ) enforcement actions—allows for a similar degree of internal validity. The legal

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[7] Deborah Hardoon & Finn Heinrich, *Bribe Payers Index Report 2011*, TRANSPARENCY INTERNATIONAL 15 (2011), *available at* http://issuu.com/transparencyinternational/docs/bribe_payers_index_2011/15?e=2496456/2293452.

[8] John Braithwaite, *White Collar Crime*, 11 ANN. REV. SOC. 1 (1985); Gilbert Geis, *The Case Study Method in Sociological Criminology, in* A CASE FOR THE CASE STUDY 200 (J. R. Feagin, A. M. Orum & G. Sjoberg eds., 1991); DAVID FRIEDRICHS, TRUSTED CRIMINALS: WHITE COLLAR CRIME IN CONTEMPORARY SOCIETY (2007).

[9] WULF STOLLE, GLOBAL BRAND MANAGEMENT 7 (2013); MIRKA C. WILDERER, TRANSNATIONALE UNTERNEHMEN ZWISCHEN HETEROGENEN UMWELTEN UND INTERNER FLEXIBILISIERUNG 257, 258 (2010).

scrutiny of Defendants' behavior by social control agents provides social scientists with sufficient evidence to reconstruct the *modus operandi* of active corruption. Concerning the organizational ranks of the bribe payers and the company's advantage derived from bribe paying, it is a debatable issue whether both the *Siemens* and *Telekom* cases represent typical cases of active corruption of German companies and their subsidiaries. According to data from the German Federal Criminal Police Office (*Bundeskriminalamt*), almost sixty percent of bribe payers are high-ranking executives or CEOs.[10] Directors, and even presidents, have been among the defendants in FCPA cases.[11] Vincenzo Dell'Osso's analyses of SEC enforcement actions revealed that in more than seventy percent of FCPA cases, the purpose for giving a bribe was to get a contract or to realize competitive advantages on a company level.[12] Notwithstanding the lack of elaborate information about the population of FCPA enforcement actions (for example, information on the organizational structure of corporate defendants), both cases are typical examples of active corruption. Do they also represent cases of useful illegality?

Section B analyzes prior research, distinguishing rational choice explanations in social sciences from structural and institutionalist accounts. Taking the latter as a starting point, the concepts of organizational deviance and useful illegality are introduced in Section C, along with the indicators for the analysis of our case studies. Sections D and E describe and thoroughly analyze the cases. The questions concerning the internal validity and the generalizability of our findings are raised in Section F. After determining whether the cases are instances of useful illegality, this article uses the conclusions to address the specific challenges in the fight against organizational deviance.

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[10] BUNDESKRIMINALAMT, BUNDESLAGEBILD DER KORRUPTION (2013), *available at* http://www.bka.de/nn_193376/DE/Publikationen/JahresberichteUndLagebilder/Korruption/korruption__node.html?__nnn=true (last visited Nov. 5, 2015).

[11] Vincenzo Dell'Osso, *Empirical Features of International Bribery Practice: Evidence from Foreign Corrupt Practices Act Enforcement Actions*, *in* PREVENTING CORPORATE CORRUPTION 236 (Stefano Manacorda et al. eds., 2014).

[12] *Id.*

B. State of the Art

The "business of bribery" is a persistent problem that has been characterized as an "epidemic" on a discourse level.[13] Corrupt practices have been resilient against tough domestic anti-corruption laws and compliance efforts at the firm-level.[14] Even seventy years ago, Edwin Sutherland[15] observed "the persistence of commercial bribery in spite of the strenuous efforts of business organizations to eliminate it."[16] But the supplying side of corrupt transactions has since received considerably less attention than the demand for bribes in the political sphere. International bribery has only recently generated attention from various social science disciplines, which have developed a number of competing explanations for corporate corruption. From a rational-choice perspective, the persistence of bribery in international business raises the suspicion that corporations are reluctant to control corruption effectively, especially in cases of active corruption that benefit the firm.[17] Criminologists[18] stress the general theoretical distinction between crimes that are attributable to the business organization—for example, corporate crime—and crimes regarded as non-organizational—for example, occupational crime.[19] While mainstream criminology traditionally focuses on the benefits of corruption for the perpetrators, the typical personality traits of these individuals, and the linkage of corruption with organized crime,[20] organizational criminology takes into account the role of structure and social mechanisms within the rotten barrels that make good individuals behave badly.[21]

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[13] James W. Williams & Margaret E. Beare, *The Business of Bribery: Globalization, Economic Liberalization, and the "Problem" of Corruption*, 32 CRIME, L. & SOC. CHANGE 115 (1999).

[14] Miriam F. Weismann, *The Foreign Corrupt Practices Act: The Failure of the Self-Regulatory Model of Corporate Governance in the Global Business Environment*, 88 J. Bus. ETHICS 615 (2009).

[15] Edwin H. Sutherland, *White-Collar Criminality*, 5 AM. SOC. REV. 1 (1940).

[16] *Id*. at 11.

[17] SUSAN ROSE-ACKERMAN, CORRUPTION: A STUDY IN POLITICAL ECONOMY 191–93 (1978).

[18] *See* Braithwaite, *supra* note 8, at 1.

[19] *See* MARSHALL B. CLINARD & RICHARD QUINNEY, CRIMINAL BEHAVIOR SYSTEMS: A TYPOLOGY 188 (1973) (explaining corporate crime encompasses "offences committed by corporate officials for the corporation and the offences of the corporation itself"); *see also* GARY S. GREEN, OCCUPATIONAL CRIME (1990) (describing occupational crime as relating to organizations only in terms of an opportunity structure that serves as the trigger for individual offences committed for private gain).

[20] GOTTFREDSON & HIRSCHI, *supra* note 2; NERDINGER, *supra* note 3; Rabl & Kühlmann, *supra* note 3; Zettler & Blickle, *supra* note 3; Knecht, *supra* note 4.

[21] *See, e.g.*, EDWIN H. SUTHERLAND, WHITE COLLAR CRIME (1949); MARSHALL B. CLINARD & RICHARD QUINNEY, CRIMINAL BEHAVIOR SYSTEMS: A TYPOLOGY (1973); MARSHALL B. CLINARD & PETER C. YEAGER, CORPORATE CRIME (1980); Braithwaite, *supra* note 8, at 1 ; Wim Huisman & Gudrun Vande Walle, *The Criminology of Corruption*, *in* THE GOOD CAUSE: THEORETICAL PERSPECTIVES ON CORRUPTION 115 (Gjalt Graaf et al. eds., 2010); Ronald C. Kramer, *Corporate Crime: An*

In contrast, business ethicists are usually in line with the rational-choice perspective; they argue for the strict condemnation of corrupt practices by management and stress the need for a consistent tone at the top.[22] Josef Wieland calls for a new sort of values management to provide wayward employees with moral incentives that prevent corruption.[23] In this view, even structural corruption is first and foremost a matter of unethical choices made by agents to maximize personal gain. The role of the principal is also faulted if the principal fails in terms of control (for example, with respect to compliance management) or does not sufficiently incentivize "good" employee behavior.[24]

Business economists have pointed to cognitive normalization processes rooted in organizational cultures. Normalization processes might lead morally upright employees down a "slippery slope," to the point where corrupt practices become mindlessly performed aspects of organizational behavior. Blake E. Ashforth and Vikas Anand[25] provide a theoretical framework by explicating the organizational processes and social psychological mechanisms that underpin structural corruption—a popular model that has informed many studies on corruption,[26] including research on the *Siemens* case.[27]

Management scientists[28] and Criminologists[29] have examined the influence of firm and top management team characteristics with regard to crimes against competition. Sally S. Simpson and Christopher S. Koper[30] have found that company structure—for example,

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Organizational Perspective, *in* WHITE-COLLAR AND ECONOMIC CRIME: MULTIDISCIPLINARY AND CROSS-NATIONAL PERSPECTIVES 75 (Peter Wickman & Timothy Dailey eds., 1982).

[22] Diana Ziegleder, *Business and Self-Regulation: Results from a Comparative Study on the Prevention of Economic Crime*, 28 ZEITSCHRIFT FÜR RECHTSSOZIOLOGIE 203 (2007).

[23] Josef Wieland, *Die Governance der Korruption*, *in* KORRUPTION: UNAUFGEKLÄRTER KAPITALISMUS—MULTIDISZIPLINÄRE PERSPEKTIVEN ZU FUNKTIONEN UND FOLGEN DER KORRUPTION 43 (2005).

[24] Josef Wieland, *Die Kunst der Compliance*, *in* WIRTSCHAFTSKRIMINALITÄT UND ETHIK 155 (Albert Löhr & Eckhard Burkatzki eds., 2008).

[25] Blake E. Ashforth & Vikas Anand, *The Normalization of Corruption in Organizations*, 25 RES. ORGANIZATIONAL BEHAV. 1 (2003).

[26] Ashforth et al., *supra* note 6.

[27] PETER GRAEFF, KARENINA SCHRÖDER & SEBASTIAN WOLF, DER KORRUPTIONSFALL SIEMENS, ANALYSEN UND PRAXISNAHE FOLGERUNGEN DES WISSENSCHAFTLICHEN ARBEITSKREISES VON TRANSPARENCY INTERNATIONAL DEUTSCHLAND (2009).

[28] Anthony J. Daboub, Abdul M. A. Rasheed, Richard L. Priem & David Gray, *Top Management Team Characteristics and Corporate Illegal Activity*, 20 ACAD. MGM'T REV. 138 (1995).

[29] Sally S. Simpson & Christopher S. Koper, *The Changing of the Guard: Top Management Team Characteristics, Organizational Strain, and Antitrust Offending*, 13 J. QUANTITATIVE CRIMINOLOGY 373 (1997).

[30] *Id*.

decentralized management structures—increases the likelihood of corporate illegality only in interaction with declining firm performance, which produces organizational strain.[31] Thus, the pressure to perform, on behalf of influential administrative or financial officers, on the subunit level—especially in view of divisional losses—might not only increase the likelihood of antitrust offenses but also increase active corruption—for example, corporate crimes against competition—as well.

Historically, sociologists have viewed corrupt practices in relation to institutional changes that take effect on the organizational level and social networks that may contradict both institutional and organizational rules. Peter Graeff's principal-agent analysis of the *Siemens* case reached the conclusion that close social networks, based on familiarity, interpersonal trust, and group control, were necessary to circumvent the company's formal structure.[32] From an institutional theory perspective, this might indicate that the formal rules were part of the myths and ceremonies of the organization. Changes in the organization's formal front side, however, can also trigger informal dynamics, such as the necessity to live up to the company's standards when faced with external pressure to do so.[33] Bertrand Venard and Mohamed Hanafi[34] also show that corruption on behalf of financial institutions varies among emerging economies, depending on the quality of the business environment and its legal institutions. They also find empirical support for their neo-institutional hypothesis that organizations mimic the behavior of their competitors, and higher competition, as well as the perception of unfair practices in the respective industry, leads to more corruption. While Venard[35] finds multinational companies as generally less inclined to succumb to local corrupt practices in Russia, Hung-En Sung[36] used data from Transparency International's Bribe Payers Survey to argue that the propensity of multinationals to bribe depends on the exporting countries' governance and institutions. In the case of Germany and other major trading powers, a late but rapid and radical legal change occurred at the

[31] *Id.* at 394.

[32] Peter Graeff, *Im Sinne des Unternehmens? Soziale Aspekte der korrupten Transaktionen im Hause Siemens*, *in* DER KORRUPTIONSFALL SIEMENS: ANALYSEN UND PRAXISNAHE FOLGERUNGEN DES WISSENSCHAFTLICHEN ARBEITSKREISES VON TRANSPARENCY INTERNATIONAL DEUTSCHLAND 151 (Peter Graeff, Karenina Schröder & Sebastian Wolf eds., 2009).

[33] STEFANIE HIß, WARUM ÜBERNEHMEN UNTERNEHMEN GESELLSCHAFTLICHE VERANTWORTUNG? EIN SOZIOLOGISCHER ERKLÄRUNGSVERSUCH 17 (2006).

[34] Bertrand Venard & Mohamed Hanafi, *Organizational Isomorphism and Corruption in Financial Institutions: Empirical Research in Emerging Countries*, 81 J. BUS. ETHICS 481, 495 (2008).

[35] Bertrand Venard, *Organizational Isomorphism and Corruption: An Empirical Research in Russia*, 89 J. BUS. ETHICS 59 (2009).

[36] Hung-En Sung, *Between Demand and Supply: Bribery in International Trade*, 44 CRIME, L. & SOC. CHANGE 111 (2005).

end of the 1990s—the criminalization of the formerly tax deductible bribe payments abroad.[37]

C. The Institutional Theory Approach to Organizational Deviance and Useful Illegality

Taking the above-mentioned findings as a starting point, we first have to differentiate between when it is reasonable to classify corruption as a crime of corrupt individuals and when is it to be classified as organizational corruption.[38] This is a difficult task. While it is easier to find corruption cases where the organization as a whole may not have been involved—for example, in the case of granting an undue advantage by officeholders taking bribes—it will be difficult to find cases of organizational deviance where an individual can deny deviant behavior. In our perspective, the most important characteristic of organizational deviance is that the unwritten rules of an organization, the incentives to reach organizational goals, and the actors representing the organizations lay the groundwork for the use of illegal means despite the existence of strict formal compliance rules that ban illegal behavior. On the one hand, this has to be distinguished from individual deviance in organizations (i.e., occupational crime), which is carried out for the sake of personal gain at the cost of the organization's profits. On the other hand, it is not similar to organized crime because the organizations operate on a formal legal basis. Organizational deviance requires that illegal means serve organizational ends—not personal gain, as in organized crime and individual deviance in organizations. The outcome is beneficial for the organization unless and until the illegal behavior is detected. Personal gain is only legitimate if it is backed by the incentives of the organization and does not go beyond conventional compensation.[39]

Borrowing from an institutional approach to organizational analysis,[40] we have to answer the question of whether the organizational rules have been, at least in part, responsible for the criminal activity of an actor. For this diagnosis, it would not be enough to argue simply that the acknowledged rules in an organization have been too loose to prevent the criminal action. We have to show instead that these rules fostered the criminal behavior, although the actors usually work hard to signal compliance with the formal legal front side of an organization. According to the institutional approach, organizations have formal rules

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[37] *Id*.; *see also* Sebastian Wolf, *Modernization of the German Anti-Corruption Criminal Law by International Legal Provisions*, 7 GERMAN L.J. 785 (2006).

[38] *See* Jonathan Pinto, Carrie R. Leana & Frits K. Pil, *Corrupt Organizations or Organizations of Corrupt Individuals? Two Types of Organization-Level Corruption*, 33 ACAD. MGMT. REV. 685, 688 (2008).

[39] Lawrence Lessig, *Institutional Corruptions* 5 (Edmond J. Safra Ctr. for Ethics, Working Paper No. 1, 2013).

[40] John W. Meyer & Brian Rowan, *Institutionalized Organizations: Formal Structure as Myth and Ceremony*, 83 AM. J. OF SOC. 340 (1977); Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, 48 AM. SOC. REV. 147 (1983); MARKUS POHLMANN & HRISTINA MARKOVA, SOZIOLOGIE DER ORGANISATION: EINE EINFÜHRUNG 54 (2011).

as well as unwritten informal rules that are even more important than the formal ones. Formal rules are often myths and ceremonies in organizations.[41] Organizations like to dress their windows to receive legitimacy and subsequently more resources. Their operating procedures are often very different from these formal rules, even deviating from the formal, legal side of an organization. Thus, to define organizational deviance in an institutional perspective, we assume that four criteria are necessary:

(1) An organizational field where the deviant rules are common and acknowledged;
(2) Organizational goals that are incentives to reach organizational objectives by also using illegal means;
(3) Informal rules that promote corrupt action by acknowledging and legitimizing illegal means; and
(4) Actors in high-ranking positions representing the organization.

Although borrowing from Niklas Luhmann's early work,[42] we are not employing the general theoretical frame of systems theory. In his first book, Luhmann deals with formal rules and non-compliance to formal rules. In the chapter on "useful illegality," he declares his interest in the adaptive strategies of actors—i.e., members of organizations—during periods of doubtful legality of organizational actions.[43] For him, grey zones of organizational actions are quite normal because all organizations have to deviate from formal rules. The price one has to pay for a consistent formal order is to accept deviance from that order. This deviance is defined by Luhmann as "useful" if it is in line with the organizational purpose—though such deviance does not necessarily lead to unlawful behavior. By addressing the functions of informal order, his line of reasoning is very close to an institutional approach in his early works. In an institutional approach one would also analyze the functions of the informal order by highlighting the rules, the deviance from formal rules, and how actors adapt in an organization to contradictory and inconsistent norms—like Luhmann did in his early work.[44] Thus, employing his notion of useful illegality, we tailor Luhmann's early idea into a model that helps us analyze active corruption from an institutional theory point of view. Based on this model, we ask whether paying bribes can be categorized as a specific type of organizational deviance that Luhmann called useful illegality. Although Luhmann mostly used examples from the context of public administration to illustrate his concept, he developed a sociology of organizations that applies to business organizations as well.

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[41] Meyer & Rowan, *supra* note 40.

[42] LUHMANN, *supra* note 1, at 304.

[43] *Id*.

[44] *Id*.

Luhmann's idea points to the functional requirement that every organization depends on certain forms of illegal behavior—i.e., behavior that violates formal organizational expectations—in order to survive.[45] A consistent formal structure will then only increase the dilemma for members about how to adapt to contrary expectations in the environment when they are threatened with the loss of their membership—for example, loss of employment. Persistent adaptation problems, such as a demand for bribes ("passive corruption"), thus increase the likelihood for corporate deviance only if the relevant deviant acts—here, active corruption—gain informal legitimacy as "useful" actions for the organization. Revising Luhmann's model in order to fit an institutional approach, we draw on three basic assumptions:

(1) If personnel in an organization strictly work according to rules, the organization cannot survive. Each organization therefore requires its members to deviate from formal rules to some extent. This may include unlawful behavior.
(2) The unwritten rules determine what kind of deviations are useful and legitimate within an organization, and what kind of deviations its members should avoid if they want to stay on.
(3) Due to the fact that these are deviations from formal rules, they cannot be sufficiently controlled by introducing more formal rules.

We extend this basic explanatory frame to encompass organizational deviance and we operationalize our approach by asking the following questions about the behavior:

(1) Whether it is useful according to organizational goals;
(2) Whether it is in violation of a formal rule (i.e., illegal) but legitimized by unwritten rules of an organization and its organizational field;
(3) Whether it is carried out for the sake of organizational gains and covered by the organizational incentive systems; and/or
(4) Whether it is carried out by high-ranking, representative actors who neither take money nor try to boost their own careers.

This sociological concept of organizational deviance interpenetrates criminological accounts of corporate crime[46] and is in line with an organizational strain perspective.[47] It

[45] *Id.* at 305.

[46] Julian Klinkhammer, *On the Dark Side of the Code: Organizational Challenges to an Effective Anti-Corruption Strategy*, 60 CRIME, L. & SOC. CHANGE 191 (2013).

[47] Simpson & Koper, *supra* note 29; Diane Vaughan, *Toward Understanding Unlawful Organizational Behavior*, 80 MICH. L. REVI. 1377 (1982).

emphasizes that cultural factors—especially traditional values—are able to undermine ordinary modes of corruption control in cases of active corruption.[48]

D. Bribery as a "Moral" Obligation in Business Relations—Siemens in Argentina

Within Latin America, "Argentina is perceived as one of the most corrupt"[49] countries with comparatively high levels of structural corruption,[50] which have repeatedly been attributed in part to weak or moderate checks and balances as well as to the persistence of elite cartels.[51] Thus, corporate bribery at Siemens SA (Siemens Argentina) might represent a rather typical case for doing business in Argentina. However, the corrupt practices of Siemens in Argentina bear a lot of resemblance to corruption cases at the company's other divisions. In this section, we compare this case to the findings of Klinkhammer,[52] who reviewed criminal cases that were tried in Germany.

I. The Benefit

One contract alone for the production of national identity cards would have generated revenues for Siemens of approximately one billion U.S. dollars. According to the DOJ's indictment, regional top managers of Siemens Argentina promised that Siemens would eventually pay almost 100 million U.S. dollars in bribes in order to win the DNI contract.[53]

II. The Illegal Behavior

With the help of intermediary Carlos S., the regional top managers of Siemens Argentina—then-CEO and then-CFO, among others—promised money to members of the government, including not only then-president Carlos Menem, but also to members of the opposition

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[48] Markus Pohlmann, *Management und Moral*, *in* INTEGRIERTE SOZIOLOGIE: PERSPEKTIVEN ZWISCHEN ÖKONOMIE UND SOZIOLOGIE, PRAXIS UND WISSENSCHAFT 161 (Tobias Blank et al. eds., 2008); POHLMANN & MARKOVA, *supra* note 40.

[49] Manuel Balán, *Competition by Denunciation: The Political Dynamics of Corruption Scandals in Argentina and Chile*, 43 COMP. POL. 459, 463 (2011).

[50] *Id*. at 459.

[51] ARANZAZU GUILLAN-MONTERO, AS IF: THE FICTION OF EXECUTIVE ACCOUNTABILITY AND THE PERSISTENCE OF CORRUPTION NETWORKS IN WEAKLY INSTITUTIONALIZED PRESIDENTIAL SYSTEMS. ARGENTINA (1989-2007) 30, 196 (2011); MICHAEL JOHNSTON, CORRUPTION, CONTENTION AND REFORM: THE POWER OF DEEP DEMOCRATIZATION 20 (2013).

[52] Julian Klinkhammer, *Varieties of Corruption in the Shadow of Siemens. A Modus-Operandi Study of Corporate Crime on the Supply Side of Corrupt Transactions*, *in* THE ROUTLEDGE HANDBOOK OF WHITE-COLLAR AND CORPORATE CRIME IN EUROPE 318 (Judith Van Erp, Wim Huisman & Gudrun Vande Walle eds., 2015).

[53] United States v. Sharef, No. 1:11-CR-01056 at 14, *indictment filed* (S.D.N.Y. Dec. 12, 2011), http://www.scribd.com/doc/75578125/DOJ-Indictment-Against-Former-Siemens-Executives-and-Agents [hereinafter *Indictment*].

such as likely candidates for office. The government awarded Siemens the contract in 1998. Menem alone allegedly received sixteen million U.S. dollars. When Argentina was struck by the onset of a financial crisis, it suspended the costly DNI contract. Subsequent political turmoil ousted the Menem administration and instead brought Fernando de la Rùa to power. The new administration under de la Rùa maintained the decision to suspend the DNI contract in 1999. By then, work on the DNI project had already begun under the lead of subsidiary Siemens Business Services' (SBS) "major projects" sub-division and only a portion of the promised bribes had been rolled out. With regard to corporate illegality, we even found that a so-called "crisis management team" subsequently used similar means as managers in other Siemens divisions to revive the project and to circumvent administrative controls, such as complex transactions, financial intermediaries, and the use of about seventeen dummy companies. Quite unique was that the 'crisis management' included the corruption of arbitral proceedings between 2002 and 2007.[54] In view of Siemens' strict *Business Conduct Guidelines*, we have to assume that these actions violated formal terms of membership. As of the time of the guideline's revision in July 2001, we may assume that the employees' behavior was deviant and, by and large, illegal.

III. Goals and Incentives

Early in 2000, the board of the Siemens AG assigned Herbert S., a former CEO and then-chairman of Siemens Argentina, the task of reviving the DNI project "whatever the cost," according to internal communication.[55] Later in 2000, he teamed up with a Latin American expert and newly appointed Siemens board member Uriel S., and together they allegedly led Siemens' efforts to reboot the DNI project. Along with others, they decided to fulfill Siemens' prior bribe obligations. In order to continue with the corrupt practices, they persuaded the new administration to continue the DNI project. Whereas the prior practice had largely relied on so-called "black contracts"—unwritten contracts and cash or wire transfer of bribes via top managers—, now the meeting agreed to conceal the future flow of bribe money via sham ("white") contracts. Despite extensive lobbying and continued bribe payments, the Argentine government officially terminated the DNI project around May 2001—about the same time that Siemens AG listed on the New York Stock Exchange, thus becoming subject to U.S. jurisdiction with regard to securities law, particularly the FCPA. In this situation, the crisis management team led by Uriel S. was supposed to

> (i) ensure that Siemens recognized the economic benefits of the contract for the DNI project, notwithstanding its termination and the corrupt manner by which it had been procured, (ii) prevent public disclosure of the bribery associated with the DNI

[54] *Id*. at 22, 32.

[55] *Id*. at 18.

> project, and (iii) ensure Siemens's ability to secure future government contracts in Argentina and elsewhere in the region.[56]

IV. The Unwritten Rules

In contrast to other Siemens divisions, the case in Argentina illustrates not only the known management problems[57] and organizational challenges[58] that render the control of useful illegality difficult, but also it highlights the informal adaptation to dynamic legal and political environments that eventually paved the way to thinking that the corruption of arbitral proceedings in two countries[59] would be useful for the company. The vicious circle of bribery and extortion increasingly blurred the boundaries of "deviant-but-still-legitimate" behavior. This process is less an outcome of supposedly rational cost-benefit calculation; it is rather a function of organizational cultures at Siemens that labeled corruption as "the topic,"[60] bribe agreements as "black contracts,"[61] and the conduit entities as "the project group"[62]—all semantic indications or variations of legitimate business conduct. Herbert S., as a member of the crisis management team, even tried to persuade the newly appointed CFO of SBS, Bernd R., to authorize bribe payments to Argentinean officials in 2002, arguing "that SBS had a 'moral duty' to make at least an 'advance payment' of $10 million to [Carlos S.] and the other payment intermediaries."[63] The disputable moral duty to stand to black contracts was backed by his claim that top managers and employees of Siemens Argentina had received threats because some promised bribes remained unpaid. According to the SEC's complaint, Bernd R.—who was not charged by the DOJ—sought guidance from Siemens' top management on the matter and he subsequently talked to

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[56] *Id*. at 22.

[57] Pohlmann, *supra* note 40.

[58] Klinkhammer, *supra* note 46; POHLMANN & MARKOVA, *supra* note 40.

[59] The corrupt practices undermined both the procedural rules set by the International Chamber of Commerce (an international NGO) as well as the "procedural culture" of the respective jurisdiction. Joe Tirado, Matthew Page & Daniel Meagher, *Corruption Investigations by Governmental Authorities and Investment Arbitration: An Uneasy Relationship*, 29 INT'L CENTRE FOR SETTLEMENT OF INVESTMENT DISP. REV. 493 (2014); SEARCH FOR "TRUTH" IN ARBITRATION: IS FINDING THE TRUTH WHAT DISPUTE RESOLUTION IS ABOUT 77 (Marcus Wirth, Christina Rouvinez & Joachim Knoll eds., 2011).

[60] U.S. S.E.C. v. Sharef, No. 11-Civ.-09073, at 10, 11 (S.D.N.Y. Dec. 13 2011).

[61] *See* Indictment, *supra* note 53; Sutherland, *supra* note 15; Weismann, *supra* note 14.

[62] *See* Jury Trial Demand at 8, 9, U.S. S.E.C. v. Sharef, No. 11-9073 924 F. Supp. 2d 539 (S.D.N.Y. 2013), https://www.sec.gov/litigation/complaints/2011/comp22190.pdf.

[63] *Id.* at 14.

> Siemens' Head of Compliance, Chief Financial Officer, Chief Executive Officer, and two members of the Managing Board, one of whom was defendant [Uriel S.]. In each instance, [Bernd R.] explained that the payment demands lacked any legitimate commercial basis and that he was reluctant to authorize them. In each instance, [Bernd R.'s] superiors gave every indication that they were familiar with the DNI Contract and with the nature of the payment demands. And in each instance, his superiors told [Bernd R.] that it was his responsibility to find a solution to the problem. [Bernd R.] understood these responses from his superiors to be an instruction that he authorize the bribe payments.[64]

As observed in other Siemens divisions, corruption served as the traditional informal remedy to amplified adaptation problems in Argentina. Of course, it is a particularly risky business environment and we have to take the personal gain on the demand side into account as well. It takes two to tango; so what about the personal gain of actors on the supply side?

V. The Actors

Although the above analysis of the DOJ indictment does not allege that Siemens' managers acted primarily for personal gain, we do find that the former Siemens managers Andres T. (Siemens Argentina) and Ulrich B. (SBS) were at the receiving end of shady transactions as well. They were consultants to Siemens at that time and thus, not part of the formal hierarchy anymore. Both individuals received three hundred thousand U.S. dollars after they threatened to compromise their former peers and partners in crime.[65] Their extortive behavior does not help explain the corrupt practices at Siemens Argentina, whereas paying "hush money" to its former employees might even represent useful illegality on behalf of Siemens. Despite the varieties of corruption in the shadow of Siemens' strict formal structure, Klinkhammer[66] found that all Siemens' managers who were tried in Germany had served the economic purposes of the corporation, and that none of them acted primarily for personal gain. Only one other individual experienced secondary personal gain

[64] *Id.* at 14–15.

[65] *Id*. at 47.

[66] Klinkhammer, *supra* note 46, at 202.

similar to Andres T. and Ulrich B., thus here personal gain merely represents an adjunct to the predominant corporate crime on the system level.[67]

We do not find upward mobility among defendants in this case during the relevant period. Instead, all defendants—except the intermediaries—had long tenures with the company, from twenty-two up to forty-one years in 2001.[68] It would be difficult to argue that this case is structurally different from corruption at the center of the system because projects acquired in its periphery were "typically run out of Germany by units within the Siemens AG operating groups, with support, as needed, from regional companies."[69] In this vein, next to middle managers who assumed control and senior managers who executed the "dirty work," we also find top managers who were involved in the decision-making process with regard to corruption in Argentina. Similarly, board members of Siemens played minor parts in corruption cases at the business unit Siemens Automation and Drives (Hermann F., Günter W.) or were informed about the corrupt practices at the business unit Siemens Communications (Thomas G.). Despite the fact that neither the U.S. nor the German authorities were able to establish criminal responsibility at the highest corporate ranks such as Uriel S.,[70] Siemens successfully sought compensation from its former board members, including former CEO Heinrich von Pierer, for their violations of occupational duties with regard to effective anti-corruption.[71]

VI. The Outcome

During the relevant period from 2001 till 2007, Siemens AG lost more than three hundred million U.S. dollars due to corrupt practices in its regional offices or subsidiaries abroad—that is almost twenty-five percent of all dubious payments that were discovered as a result of the investigations. The corruption case at Siemens Argentina provides insight into the close cooperation among Siemens divisions with subsidiaries in Germany and its regional offices abroad. While the criminal cases filed by the DOJ were still pending at the time of writing, the SEC concluded its corresponding civil proceedings against individuals from the Siemens Argentina case. In the Siemens Argentina case, the SEC dropped the lawsuit against Carlos S. for reasons unknown, whereas it settled the charges against Uriel S.,

[67] *See*, Pinto, Leana, & Pil, *supra* note 38; Klinkhammer, *supra* note 46.

[68] Indictment, *supra* note 53, at 5–7.

[69] *Id.* at 3.

[70] The judge who dismissed the case against Uriel S. asserted procedural errors of the prosecution and argued that middle managers downplayed their own part by shifting the blame to superiors. *See* Cornelia Knust, *Richterin macht Sharef-Ankläger lächerlich*, Handelsblatt, May 30, 2014, *available at* http://www.handelsblatt.com/unternehmen/industrie/siemens-prozess-richterin-macht-sharef-anklaeger-laecherlich/9970032.html (last visited Mar. 6, 2015).

[71] Siemens AG, *Legal Proceedings Q4 FY 2012*, 3 (2012).

Andres T., and Bernd R. without them admitting or denying any wrongdoing. Ulrich B. and Stephan S. were both ordered to pay $524,000 in penalties—the highest amount imposed on individuals under the FCPA up to that point. Ulrich B. was further ordered to pay $316,452 in disgorgement and $97,505 in interest for the hush money that he received.

VII. Conclusion

In view of these consistent findings—and drawing on Luhmann,[72] Pohlmann,[73] Pohlmann & Markova,[74] and Klinkhammer[75]—corruption at the system level can be explained as useful illegality by arguing that violations of occupational duties occurred due to their informal legitimacy as profitable actions for the good of the company.

E. How to Avoid Competition?—A Lesson Taught by *Telekom*

The corruption case of Magyar Telekom, the leading Hungarian telecommunications company and an almost sixty percent-owned subsidiary of Deutsche Telekom comprises two complex cases of bribery stretching over two countries (Macedonia and Montenegro, 2005–2006). Internal investigations as well as the investigations of the DOJ and the SEC revealed that besides Magyar Telekom executives, government officials, consultants, intermediaries, and a family member of a government official were engaged in the bribery schemes. For the purpose of this article, we concentrate on the Macedonian case, making just a few remarks on the Montenegro case to illustrate the entanglement of the two.

I. The Benefit

The purpose of the corruption scheme in Macedonia was to resolve concerns about legal changes that jeopardized the market leadership of the company's subsidiary Makedonski Telekommunikacii AD Skopje (MakTel). Hungary, Montenegro, and Macedonia have been in the past and still are today Magyar Telekom's core business regions.[76] In line with developments throughout the entire telecommunications industry, Magyar Telekom faced competitive pressures due to the liberalization of markets and a decline in its services prices, especially in its core regions. The resulting pressure to balance expected losses and to keep the businesses running is particularly evident in the 2005 annual report on Macedonia: "In the Macedonian fixed line operations outgoing domestic traffic revenues

[72] LUHMANN, *supra* note 1, at 304.

[73] Pohlmann, *supra* note 48.

[74] POHLMANN & MARKOVA, *supra* note 40.

[75] Klinkhammer, *supra* note 52.

[76] Magyar Telekom, Annual Report (2007).

decreased due to lower usage, partly compensated by price increases in July 2004 and in August 2005."[77] At the same time the purchase of the former state-owned telecommunications company Telekom Crne Gore A.D. (TCG) in Montenegro seemed an appropriate strategy to compensate for the losses caused by the shift in market: "The consolidation of TCG's revenues in 2005 partly offset these decreases . . . From the second quarter of 2005, the consolidation of TCG's fixed line operation had significant effect on the results of the international fixed line operations."[78] It can be concluded that the bribes, totaling around 12.23 million euros, seemed to be at first a risky but profitable investment and therefore useful for Magyar Telekom's organizational goals.

II. The Illegal Behavior

The Macedonian part of the corruption scheme began its course in early 2005 when the Macedonian parliament enacted an "Electronic Communication Law" to liberalize the Macedonian telecommunications market. This was going to be disadvantageous for the formerly sole supplier, Magyar Telekom and its Macedonian subsidiary MakTel. Alarmed at the new resolution, Elek S., Magyar Telekom's Chairman and Chief Executive Officer (CEO), Andras B., Director of Central Strategic Organization, Tamas M., Director of Business Development and Acquisitions, and Greek intermediaries in their function as "lobbying consultants"[79] arranged a meeting with senior officials from both of the coalition parties of the Macedonian government at the end of January 2005 in Skopje. The executives "informed" the officials "that a third mobile license was not acceptable."[80] On 25 May 2005, after some negotiations, executives resolved their concerns with two secret agreements, entitled "Protocol of Cooperation,"[81] between the executives and the senior government officials. The Protocol of Cooperation stated that the government officials would stall the issue of a further mobile telephone license for the Macedonian telecommunications market or even prevent access to the market. Furthermore, the officials agreed to reduce other adverse effects of the new law on Magyar Telekom by ensuring that MakTel would not be obliged to pay increased duties. In return, the executives of Magyar Telekom arranged bribes of 4,875 million euros and a business opportunity for the officials, and concealed the illegal payments in the company's records by using sham contracts with consultants. The investigations by the company itself, the

[77] *Id.* at 10.

[78] *Id.* at 10, 16.

[79] Deferred Prosecution Agreement (DPA) at para. A–4, 13–14, U.S. v. Magyar Telekom, Plc., No. 11 Cr. 597 (E.D. Va. Dec. 29, 2011).

[80] *Id.* at para. A–7, 22.

[81] *Id.* at para. A–8, 25c.

DOJ, the SEC, and other relevant entities involved[82] clearly demonstrated the illegality of the bribery scheme in a legal sense—e.g., since November 1997 Magyar Telekom was listed on the New York Stock Exchange and thus became subject to U.S. jurisdiction with regard to the FCPA. Nevertheless, it still has to be determined whether the actors' corrupt actions were accompanied by a breach of Magyar Telekom's formally specified conditions of membership.

Those membership rules were published in the form of a "Code of Conduct" by Magyar Telekom. In its 2005 edition, at a time when the bribery scheme already took place, this company sets out the ethical guidelines that ban illegal behavior.[83] Furthermore, with its stock market launch in 1997, Magyar Telekom committed itself to complying with the rules and regulations of the FCPA. We assume that the regulations of the FCPA and associated legal changes were communicated at least to the top-management level.

III. The Unwritten Rules

It remains to be determined how the deviant acts gained informal legitimacy as "useful" actions. As a result of the assumed anchoring in organizational cultures, no direct access to the unwritten rules of behavior is possible. Therefore, the jointly implicit expectations should be reconstructed in the present case with reference to the argument structure[84] of the perpetrators among themselves. Here, as well as the Siemens case,[85] it is striking that the offenders avoided the use of criminally loaded vocabulary to describe their apparently illegal operations. Instead, they always used semantic alternatives, which re-characterized the corrupt actions as economically profitable practices. An example of this is Elek S.'s refusal to reproduce a version of the "Protocol of Cooperation," arguing that the "special circumstances" surrounding the protocol justified his decision.[86] Likewise, one executive's wish "to avoid attracting too much attention,"[87] was the excuse used to obfuscate the true

[82] Financial Supervisory Authority of Hungary, National Bureau of Investigation of Hungary, Public Prosecutor's Office of Macedonia, Supreme State Prosecutor of Montenegro, Central Investigative Chief Prosecutor's Office of Hungary, Bonn Public Prosecutor's Office of Germany. *See* Trace International, *Trace Compendium Magyar Telekom* (2015).

[83] Magyar Telekom, *Magyar Telekom Group Code of Ethics* (2005), *available at* https://web.archive.org/web/20051224144340/http://www.magyartelekom.hu/english/aboutmagyartelekom/sustainability/main.vm (last visited Jan. 26, 2015).

[84] LUHMANN, *supra* note 1.

[85] Julian Klinkhammer, *Korruption powered bei Siemens*, *in* NEUE WERTE IN DEN FÜHRUNGSETAGEN? KONTINUITÄT UND WANDEL IN DER WIRTSCHAFTSELITE 136 (Markus Pohlmann & Georg Lämmlin eds., 2011); POHLMANN & MARKOVA, *supra* note 48.

[86] *See* para. 26d, U.S. v. Magyar Telekom, Plc., No. 11 Cr. 597 (E.D. Va. Dec. 29, 2011).

[87] Complaint, S.E.C.ß v. Elek S., Andras B., and Tamas M., No. 11 Civ. 96459, 21 F. Supp. 2d 244 (S.D.N.Y. 2013) [hereinafter *Complaint*].

purpose of the sham contracts, preventing bystanders from becoming aware of the illegal conduct. The illegal collusions were repeatedly described as "cooperations" in terms of performance and reward, which indicates that the offenders made use of cognitive justification mechanisms that allowed corrupt actions to appear rationally related to the economic purpose of Magyar Telekom. This could also be seen in corrupt actors' use of the terms "logistics"[88] and "Letter of Intent"[89] to designate the coordination surrounding bribes under the sham contracts.

These unwritten rules intervened as a protective mechanism especially at a time when Magyar Telekom was threatened with losses due to liberalization in the telecommunications markets and the interests of the organization were not achievable via formally recognized paths. By means of corrupt actions, Elek S. and other executives managed to defy the general trend towards liberalization of markets, which seemed to affect the telecommunications industry at large. Magyar Telekom was highly respected for these achievements in Germany.[90] Unlike situational corruption, the bribery schemes in both countries extended—network-like and set for repetition—over a long period and included bribes amounting to several million euros. The preceding and subsequent meetings concerning the signing of the "Protocol(s) of Cooperation,"[91] the persistent pursuit of the two-thirds majority in TCG, and the use of intermediaries also demonstrate that the decision to implement corrupt practices was carefully planned and did not arise out of a single situation due to a spontaneous decision. The offenders acted presumably in terms of their long-term intentions to secure benefits for Magyar Telekom and proceeded carefully with the "professional" settlement of the illegal transactions—by giving the secret agreements outside the company into the care of the intermediary[92] and by backdating the sham consulting contracts so as to conceal the illegal actions. It must be admitted—as

[88] *Id.* at 32.

[89] DPA, *supra* note 79, at para. A–7, 24.

[90] Reinhold Vetter, *Elek Straub: Der heimliche Star der Telekom*, Handelsblatt (Apr. 5, 2002), *available at* http://www.handelsblatt.com/archiv/der-57-jaehrige-ist-chef-der-ungarischen-matav-elek-straub-der-heimliche-star-der-telekom/2155012.html (last visted Mar. 6, 2015).

[91] The aspect of absolute secrecy is particularly evident in the following quotes: "At a meeting at the Holiday Inn in Skopje, Magyar Telekom Executive 2 [Andras B.], Magyar Telekom Executive 3 [Tamas M.], Greek Intermediary 2, Greek Intermediary 3, and various Macedonian officials discussed the Protocol of Cooperation and agreed to keep the existence and purpose of the agreement from others, including Magyar Telekom's auditors and the public." *See* Information, *supra* note 86, at para. 26b.

[92] As stated in the documents of the U.S. District Court for the Eastern District of Virginia: "The only executed copies of the two secret Protocols of Cooperation with the government officials were retained by Greek Intermediary 1, and the existence and true purpose of the agreements were unknown to anyone within Magyar Telekom and DT [Deutsche Telekom] other than Magyar Telekom Executive 1 [Elek S.], Magyar Telekom Executive 2 [Andras B.], and a relatively small number of additional participants." *See* Information, *supra* note 86, at para. 30.

other researchers have observed—that Eastern Europe still offers an economically constricted post-socialist context that prompts some people to rely on informal exchange rather than legal channels for attaining prosperity.[93] The Magyar Telekom executives adapted their businesses to this environment by using corruption as a form of corporate strategy in this region. Nevertheless, the actors strived to carry out their actions surrounding the bribes in a way that the detection of illegal actions and subsequent negative consequences of criminal investigations for both the actors and the organization seemed unlikely. Therefore, the usefulness of the bribery scheme for the organization can be considered as independent of the offenders' actual motives.

IV. The Actors

Neither the court documents nor the press coverage reveal evidence of a direct financial gain. Instead, the court always justified the actions of the offenders on the basis of the commercial interests of Magyar Telekom: "During 2005 and 2006, certain senior executives . . . engaged in a course of conduct with consultants, intermediaries and other third parties, including contracting through sham contracts . . . *with the intention of obtaining business and advantages for Magyar Telekom*."[94] And further, "[C]ertain of the Magyar Telekom executives entered into a second Protocol of Cooperation with representatives of Macedonian Political Party B . . . *to obtain the same business and regulatory benefits for Magyar Telekom*."[95]

The plaintiff SEC also embeds criminal acts of the actors within its civil complaint in the entrepreneurial intention of the offenders: "*In their effort to secure the benefits sought by Magyar Telekom*, Elek S., Andras B. and Tamas M. also corruptly promised to provide a valuable business opportunity to the minority political party"[96] and further:

> Elek S., Andras B. and Tamas M. knew that all or a portion of the payments under the seven contracts described above would be used corruptly in furtherance of their offers to pay government and political party officials in Macedonia and Montenegro *for the purposes of influencing their acts and decisions, securing an improper advantage, or inducing them to*

[93] David Jancsis, *Imperatives in Informal Organizational Resource Exchange in Central Europe*, J. OF EURASIAN STUD. 1 (2014).

[94] DPA, *supra* note 79, at A–6, 20 (emphasis added).

[95] *Id*. at A–8, 27 (emphasis added).

[96] Complaint, *supra* note 87, at 9, 29 (emphasis added).

> *use their influence, to assist Magyar Telekom in obtaining or retaining business . . .* [97]

> Elek S., Andras B. and Tamas M. failed to disclose to *Magyar Telekom's* auditors the existence of the Protocol of Cooperation, the Letter of Intent . . . and other documents . . . concerning the scheme to bribe Macedonian government officials and political party officials *to obtain secret competitive advantages and regulatory benefits*.[98]

Because no concrete evidence of direct personal enrichment can be found, it will now be discussed how the offenders could have achieved indirect financial benefits or an intangible benefit. In an organizational context, the latter could first of all be analyzed in terms of upward career mobility and the position sequences of the offenders during and shortly after the bribery took place.

Andras B. went from being an officer in the "Central Strategic Organization" to the head of the same department in 2004. Admittedly, this happened *before* the first major economic event for Magyar Telekom that was apparently linked to the bribery scheme (the acquisition of TCG in Montenegro in the end of 2004). The other alleged criminal events in the years 2005 and 2006 also seemed to have no prompt influence on Andras B.'s career until his exiting from office on 8 August 2006. Rather, the fact that Andras B. remained in his position as head of the Central Strategic Organization for the duration of the criminal events demonstrates that the bribery scheme did not boost his career. Following a rational choice perspective it remains questionable whether the high (criminal) costs that Andras B. was risking by a possible detection of illegal activities could outweigh the expected individual benefit. For Tamas M.—who started his career at MakTel as a member of the Board of Directors in February 2004—the situation was different. He was later appointed head of Business Development, and went on to make two further career moves within the relevant period of bribery. Particularly interesting, he became a member of the Board of Directors in TCG in April 2005, shortly after the successful completion of the two-thirds takeover of TCG by Magyar Telekom had occurred. Although Tamas M. was not accused of any financial enrichment, a (intended) relationship between Tamas M.'s commitment in the bribery affairs and relevant steps in climbing the corporate ladder cannot be denied.

Of particular note is the situation of Elek S., the current CEO of Magyar Telekom, while the bribery scheme took place Elek S. enjoyed high recognition during his ten-year tenure as CEO and Chairman of Magyar Telekom, not only within the Deutsche Telekom-group, but

[97] *Id*. at 19, 66 (emphasis added).

[98] *Id*. at 20, 68 (emphasis added).

also in social circles. In 1999, he was elected "CEO of the Year" in Hungary and, in 2000, "Emerging Markets CEO of the Year" by ING Barings—a financial investments member of the ING bank group—and *Emerging Markets*, a financial journal.[99] Then, in 2004, he was awarded with the First Class Cross of Distinction of the Order of the Federal Republic of Germany and the Officers Cross of the Order of Merit of the Republic of Hungary[100] in the same month by the acting president of Hungary for his valuable contribution to the expansion of the Hungarian information society and telecommunications industry.

Before the bribery scheme took place, Elek S. had already accomplished much and had reached a high position—holding a long-term employment contract to lead Magyar Telekom that was designated to run until he would be close to retirement age. He was widely recognized both inside and outside the company for his accomplishments. This fact weakens the commonly made argument that it might have been his career aspirations, a desire for further power, or pursuit of general fame that motivated him in the bribery scheme.

V. The Outcome

The DOJ charged Magyar Telekom with one count of violating the anti-bribery provisions of the FCPA[101] and two counts of violating the books and records provisions of the FCPA.[102] On 29 December 2011, the board of Magyar Telekom and the DOJ entered into a two-year deferred prosecution agreement. The company agreed to pay a combined $63.9 million penalty to resolve the FCPA investigation and settle the SEC charges, which additionally made up more than $31.2 million in disgorgement and prejudgment interest.[103] No final judgment has yet been made in the civil lawsuits against Elek S., Andras B., and Tamas M.

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[99] Deutsche Telekom, *Press Releases* (Sep. 26, 2000), *available at* http://www.telekom.hu/about_us/press_room/press_releases/2000/september_26 (last visited Mar. 6, 2015).

[100] SEC, *Report of Foreign Private Issuer* (Dec. 5, 2006), *available at* http://www.sec.gov/Archives/edgar/containers/fix049/1047564/000110465906079414/a06-25043_26k.htm (last visited Oct. 16, 2015); Matáv Group, Annual Report, 13 (2004).

[101] 15 U.S.C. § 78dd–1; DPA, *supra* note 79, at 1.

[102] 15 U.S.C. §§ 78m(b)(2)(A), 78m(b)(5) & 78ff(a).

[103] DOJ, *Press Release* (Dec. 29, 2011), *available at* http://www.justice.gov/opa/pr/magyar-telekom-and-deutsche-telekom-resolve-foreign-corrupt-practices-act-investigation-and (last visited Oct. 16, 2015); Final Judgment, SEC v. Magyar Telekom, Plc. and Deutsche Telekom, AG, No. 11CIV9646 (S.D.N.Y. Jan. 3, 2012).

F. Conclusions

This article aimed to clarify which rules take effect when high-ranking employees pay bribes. Although the bribe takers were not themselves analyzed, what has been revealed is that the stories behind active corruption differ from crimes where personal gain is the driving force. While bribe-taking could more simply be explained within the dominant rational choice perspective, an explanation of active corruption requires a radically different approach that offers mechanisms beyond personal gain, wealth grab, or individual greed at the expense of an organization. To this end, it is worthwhile to revive Luhmann's old sociological concept of useful illegality. We embedded it into an institutional theory approach, and subsequently examined its applicability to recent cases of major FCPA violations. Further, we defined a set of indicators that allows us to compare cases of active corruption and to decide whether they qualify as organizational deviance.

The cases above illustrate a similar pattern with regard to their modus operandi: The crimes were committed by members in high-ranking positions and in pursuit of the organizational purpose. Bribe-paying as illegal behavior was usually supported by the unwritten rules within the organizational field and by organizational cultures. What is puzzling is that the actors were complying with the unwritten rules of the organization even though they deviated from its formal rules and from the law. Unlike cases of individual deviance in organizations, the perpetrators here were hardly disloyal, but in fact remained loyal to their employer. If they were not highly committed, they probably would not have resorted to using illegal means on behalf of their organization, given the high stakes and increasing personal risk. Thus, the rules behind this type of organizational deviance are completely different from those behind organized crime. Personal benefits were usually backed by the incentive structures of the organization. The few instances of personal gain occurred in the wake of organizational deviance that provided the necessary opportunity structure. We conclude that both corruption cases are to be classified as organizationally-useful illegality.

In the remainder of this section, we discuss the explanatory power of our approach in view of three methodological issues. We also delineate four theoretical implications for the social control of bribe payers.

First, we are not yet in a position to assert that our findings in the two case studies can be methodically generalized or that they reveal a pattern behind corporate corruption. However, we have collected thirty cases of corporate bribery from the last two decades where the FCPA was violated and sufficient administrative data from U.S. authorities was available. Five of those cases have been analyzed so far. Measured by our set of indicators, all five case studies of bribe-paying reveal the same pattern of organizational deviance, which we call organizationally-useful illegality (see table 1). Only in rare instances were personal gain and upward mobility detected among the already high-ranking defendants. If the same holds true for the remaining twenty-five FCPA cases, this would validate our

concept of useful illegality for known criminal cases of active corruption among big companies listed on U.S. stock markets. Of course, the case study method is vulnerable to the selection biases of the relevant law enforcement agencies in this regard. However, it is of high scientific relevance to find a sound explanation for this partial population of corporate corruption before extending the empirical observation to other jurisdictions, and to populations that we initially excluded from our analyses, such as non-issuers and small and medium-sized enterprises.

Table 1: Comparative Findings from Five Case Studies on Active Corruption[104]

Company (Country) / Indicators	Siemens PG (Italy)	Siemens SA (Argentina)	Magyar Telekom (Macedonia)	Magyar Telekom (Montenegro)	Willbros Group (Nigeria)
Organizational Benefits	✓	✓	✓	✓	✓
Personal Gain (N. of Actors)	0/2	2/7[105]	0/3	0/3	1/6
Upward Mobility	0/2	0/7	1/3	1/3	1/6
Unwritten rules and Incentive Systems	✓	✓	✓	✓	✓

[104] We compare the cases country-wise, even if they were tried as a whole before the court.

[105] Carlos S., the main financial intermediary for Siemens in Argentina, was omitted from this analysis because he was only loosely coupled to Siemens in terms of membership. He probably received about 7.5 million U.S. Dollars—but we do not know to which end, to personal or organizational gain. *See La Nación* (Dec. 27, 2013), http://www.lanacion.com.ar/1651137-el-caso-de-los-dni-procesan-a-17-directivos-de-siemens-por-el-pago-de-sobornos (last visited Mar. 6, 2015).

Second, with regard to methodological issues, it is questionable whether we have sufficient internal validity to make a case for useful illegality. Our five case studies show that we have to take the legal debates and concerns seriously.[106] A document analysis that observes and interprets "social control agent actions to determine what behaviors are wrongful"[107] is definitely a good starting point, but we need additional sources to cross-validate the reconstruction of events. Where first-hand accounts are missing or fragmented in public documents, it would be worthwhile to use complementary methods of qualitative research in the future—for example, post-settlement, problem-centered interviews with the alleged perpetrators. Although it might seem more reasonable to stick with the judicially-validated case law, we believe that the sociological view needs to evolve from the legal interpretation. This enables us to make good use of the facts that help reveal the social mechanisms that, in turn, explain the perpetuation of structural corruption in a formal legal corporate setting.

Third, it is often questioned whether bribe payers act primarily because of altruistic motives, if not for undisclosed personal gain. According to Pinto et al., individuals caught in organizational deviance-type corruption "typically defend their actions by stating that they were doing what was best for others—for example, shareholders, employees—or carrying out the orders of superiors. Both of these fit into a good soldier self-conception."[108] The truth of this is unclear because through analyzing the output of social control agents, we cannot be sure about the true motives of the defendants. What we do know is a lot about what they did and what they did not do. Prosecutors, judges, and private investigators did not find enough evidence to prove that there was undue enrichment of the bribe payers in the cases above. Why then did the perpetrators not take advantage of an often-convenient opportunity structure? Often they had already reached their highest possible rank in the firm but, of course, there are bonus systems, stock options, reputation effects that have to be taken into account too. Thus, we do not argue that personal interest or personal gain should be excluded entirely as a factor that helps to explain bribery. We did find that the personal gain involved was, in most cases, either secondary—for example, unrelated to bribery—or acknowledged by the organization's incentive systems. To quote Lessig again: "As long as they acquire those advantages in ways that do not undermine the organizational goals, they are simply doing their job."[109]

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[106] MIKE KOEHLER, THE FOREIGN CORRUPT PRACTICES ACT IN A NEW ERA (2014). Vincenzo Dell'Osso, *Empirical Features of International Bribery Practice: Evidence from Foreign Corrupt Practices Act Enforcement Actions*, *in* PREVENTING CORPORATE CORRUPTION 204–07 (Stefano Manacorda et al. eds., 2014).

[107] DONALD A. PALMER, NORMAL ORGANIZATIONAL WRONGDOING: A CRITICAL ANALYSIS OF THEORIES OF MISCONDUCT IN AND BY ORGANIZATIONS 31 (2012).

[108] Pinto *et al.*, *supra* note 38, 690; Thomas S. Bateman & Dennis W. Organ, *Job Satisfaction and the Good Soldier: The Relationship between Affect and Employee "Citizenship,"* 26 ACAD. OF MGMT J. 587 (1983).

[109] Lessig, *supra* note 39, at 6.

An institutional explanation does not provide a psychological explanation of true motives. It merely provides a sociological diagnosis of those rules that are acknowledged within an organization that may enforce unlawful behavior. Furthermore, an institutional explanation can make a new post to previous research, which has analyzed the problem of useful illegality and the importance of particularistic or implicit norms in the context of a principal-agent relationship[110] or "strategic ignorance"[111] of the companies' top management. Against this methodological backdrop, we are now able to outline how the emergence of organizational deviance in the form of organizationally-useful illegality in big companies can be explained. Borrowing again from new institutional theory, we stress the following four factors:

(1) The "everybody did it" factor: It is obvious that during the 1990s and early 2000s, bribery was still widely regarded as a both a prerequisite for doing business abroad and a trivial offense, especially because the bribery of foreign officials had long been legal or even tax deductible in Germany and other OECD countries. Like the research group "Crime and Culture," we proceed from the assumption that the perceptions of corruption, determined by "cultural dispositions," have significant influence on a country's or an organization's respective awareness of the problem.[112] Referring to that commonly acknowledged spirit of corruption might help to explain why bribe paying was a highly legitimate and common deviant behavior in businesses like *Siemens* and *Telekom*. Changes within the organizational cultures that had internalized the spirit of corruption did not occur prior to scandals that started in 2006 and even later.

(2) The "To put a ban on bribery will be sufficient" factor: The *Siemens* and *Telekom* cases illustrate how implementing new regulatory institutions with severe negative sanctions may not be sufficient deterrents. They were not able to address the unwritten rules that legitimized this kind of organizational wrongdoing. Regulatory institutions such as laws, formal rules, and codes of conduct can easily be changed by a decision. Cultures, with their unwritten rules, cannot be changed so easily.

(3) The "being a Siemens Man" factor: Even more than Telekom, Siemens was well known for its strong organizational culture. Personnel were very proud to work for Siemens, and many families did so over a number of generations. The stronger the organizational

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[110] Graeff, *supra* note 32.

[111] Rainer Dombois, *Von organisierter Korruption zu individuellem Korruptionsdruck? Soziologische Einblicke in die Siemens-Korruptionsaffäre*, *in* DER KORRUPTIONSFALL SIEMEN: ANALYSEN UND PRAXISNAHE FOLGERUNGEN DES WISSENSCHAFTLICHEN ARBEITSKREISES VON TRANSPARENCY INTERNATIONAL DEUTSCHLAND 131 (Peter Graeff, Karenina Schröder & Sebastian Wolf eds., 2009).

[112] DIRK TÄNZLER, KONSTADINOS MARAS & ANGELOS GIANNAKOPOULOS, THE SOCIAL CONSTRUCTION OF CORRUPTION IN EUROPE 1 (2012).

culture, the more important the unwritten rules in an organization become. Although most companies would like to cultivate such an established culture, they have to consider the associated risks of corruption and organizational deviance.

(4) The "Organization Man" factor: All the high-ranking managers involved in the five cases under scrutiny spent long periods of their careers with their companies. They were loyal insiders without relevant criminal records, well socialized in the company, and committed to organizational goals. These company men internalized the unwritten rules of the company. Although unlawful and extremely risky, these rules became natural for the actors.

These four factors are compatible with some of the predictions of institutional theory and the early Luhmann's works. Organizations are in need of deviant behavior that is useful and legitimate. Formal compliance rules and measures become, in some cases, facades that organizations use as window dressing. According to new institutional theory,[113] the real operations in an organization are supposed to be different from the formal rules that make up the facades. For actors socialized in an institutional environment, the unwritten rules become natural ones. The more "institutionalized" they are, the less they will be questioned.

This is why, according to early Luhmann and institutional theory, it is a challenge to fight against useful illegality. It is an illegal but informal compliant behavior by high-ranking executives that is in line with the organizational purpose. Thus, the successful fight against useful illegality is mainly a function of the self-control of the organization and its self-regulatory capacities. Laws, compliance measures, and formal compliance rules can help but they are not sufficient. According to institutional theory, they do not help because of deterrence and tougher penalties, but they add to the pressure to adapt to their new order. The wider the gap between the formal rules, the laws, and the actual operations in an organization, the higher the probability that deviant behavior will be scandalized. When the pressure arises to adapt to the rules, steps towards delegitimizing the unlawful and unwritten rules at work will be taken. However, deeper and broader organizational development and changed incentive systems will be necessary to support this change in organizational cultures and, as we know, this takes a long time. An optimist may believe that there is just a cultural lag at work and the problem of corruption will eventually vanish in the future, but it is unlikely that organizational deviance will disappear.

[113] Meyer & Rowan, *supra* note 40; Powell & DiMaggio, *supra* note 40.

Special Issue
Ethical Challenges of Corrupt Practices

Corruption: Uncovering the Price of Normative Morality and the Value of Ethics

By Verena Rauen[*]

Abstract

Corruption should be understood as illustrative of an ethical problem that runs deeper than specific immoral actions. This Article sees corruption as an unethical exchange, a view that can shed light on the economic structure of normative morality (as distinguished from ethics which is the theoretical field that underlies normative morality)—a structure that enables the possibility of exchanging moral values against marketable prices in the first place. To go beyond normative morality, this Article will discuss two profound philosophical concepts and their relation to corruption: (1) a non-economic justice as founded by Aristotle's principle of *épieikeia* (equity), and (2) Levinas' notion of the *Third* with the ethical responsibility that is connected to it. In addition, the discussion of the Third will be informed by philosophical theories of gift exchange as proposed by, among others, Marcel Hénaff, who examined the connections between gift exchange, monetary exchanges and corruption. Based on this, a way of thinking about the suspension between ethics and corruption is developed that avoids falling back into the logic of economic exchange which is constitutive for corruption. Instead, an ethical perspective is suggested as the fundamental ability to adequately balance universal normative claims with the individual case. This kind of just balancing opens up new spaces of reflection to confront corruption.

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A. Introduction

"Everyone will readily agree that it is of the highest importance to know whether we are not duped by morality."[1]

Moral values supposedly have timeless validity.[2] It should, therefore, be impossible to subject them to any economy of exchange—they are considered to be priceless. But corruption reveals that moral values can indeed be bought. This has led to some theories of corruption that understand corruption as an immoral exchange[3]—a problem of morality. In fact, many corrupt exchanges operate behind a "moral curtain"; from a philosophical perspective, corruption should be seen as an ethical problem, one in which ethics is the theoretical field that underlies normative morality and that provides concepts which can reach beyond the curtain of normative morality, such as ethical responsibility or a non-economic ethical justice. For this reason, this Article defines corruption as an unethical exchange.

Grasping the causes of corruption from an ethical perspective requires an understanding of how normative morality and economics are intertwined. To the extent that normative morality applies a logic of eternal debt-making and re-balancing to values that are seemingly not for sale, it might be considered to be corrupt itself. To confront corruption by ethical means thus requires an ethical dimension that is, itself, neither based on the principles of economics—i.e., on the compensation of debt or guilt—nor determined primarily by moral judgment.

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[1] EMMANUEL LEVINAS, TOTALITY AND INFINITY: ESSAY ON EXTERIORITY 21 (1969). The famous question of "whether we are not duped by morality" opens Levinas' first major work, *Totality and Infinity*. Levinas distinguishes between morality and ethics. He intends to establish the latter as philosophy's first discipline before metaphysics and, in the tradition of Friedrich Nietzsche's critique of morality, specifically before any normative moral philosophy. While the word ethics stems from the Greek term *ēthikē* and can refer to a theoretical meta-reflection upon morality, and in Levinas' case, a theory that focuses on the relation between the subject and the Other—whose characteristic quality is an irreducible strangeness that cannot be subject to any identification and especially not to moral judgment—the terms morality and morals stem from the Latin word mores, and allude more directly to general norms which are supposed to guide moral behavior. Section D of this essay refers to the relation between ethics and normative morality, which Levinas introduces by the so-called Third—a term that represents the general claims on a subject by moral norms and the general law as it is executed by legal institutions. The Third is seen as introducing a tension with the singular claim by the Other. For an introduction to Emmanuel Levinas' theories, see Bernhard Waldenfels' reflection upon the relation between ethics and normative morality, whereby he suggests an "ethical-moral épochè that takes the self-evidence off morality." BERNHARD WALDENFELS, SCHATTENRISSE DER MORAL 10 (2006).

[2] IMMANUEL KANT, GROUNDWORK OF THE METAPHYSIC OF MORALS 394, 412 (1785) (describing the timeless validity of moral values). On the distinction between value and price in economy, see Immanuel Kant, The Metaphysics of Morals (1797), in which Kant determines the price as the public judgment on the value of something as determined from exchanges. *See also* Simmel, *infra* note 40.

[3] *See* Sighard Neckel, *Der unmoralische Tausch. Eine Soziologie der Käuflichkeit*, *in* 120 KURSBUCH 9–16 (Hans M. Enzensberger ed., 1995).

Several philosophers of the late nineteenth and the twentieth centuries posited that morality can foster corruption. For example, in *On the Genealogy of Morality,* Friedrich Nietzsche studies how morality is conditioned on principles of economics;[4] in *Capitalism as Religion,* Walter Benjamin describes the cross-dependencies between economics, morality and religion;[5] finally, in the light of the catastrophes of the twentieth century, Emmanuel Levinas argues for an ethics that goes beyond the economic, historical, and cultural conditionality of normative morality. In other words, Levinas strives toward an uneconomic ethics that does not provide exchangeable values whose prices could be paid on the markets of corruption.

An ethics that does not stimulate corruption, by using none of the principles of economy—that is, logically prior to cycles of exchange and repayment—would be a means to counter corruption within economics. According to Levinas, such an ethical force against corruption could be described as a basic concept of alterity on which his theory of ethical responsibility for the Other is based, as well as by a certain dimension of ethical justice that is opened by what Levinas calls the *Third*. Further, Marcel Hénaff, referring to Levinas, analyzes the economics of exchange with respect to the possibility of a non-economic gift that would undermine any corrupt exchange.[6]

Corruption should be understood as illustrative of a moral problem that runs deeper than specific immoral actions. Corruption as an unethical exchange can shed light on the economic structure of normative morality—a structure that enables the possibility of exchanging moral values against marketable prices in the first place. To go beyond normative morality, this Article will discuss two profound philosophical concepts and their relation to corruption: (1) a non-economic justice as founded by Aristotle's principle of *épieikeia* (equity), and (2) Levinas' notion of the Third with the ethical responsibility that is connected to it. These ideas offer a way of thinking about the suspension between ethics and corruption without falling back into the logic of economic exchange that is constitutive for corruption.

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[4] *See generally* FRIEDRICH NIETZSCHE, ON THE GENEALOGY OF MORALITY (2006). For an introduction to the critique of morality by Nietzsche and its link to the ethics of Emmanuel Levinas, see Bernhard Waldenfels, *in* DEUTSCH-FRANZÖSISCHE GEDANKENGÄNGE (1995). On the method of a genealogy of morality, see Volker Gerhardt, *Die Perspektive des Perspektivismus*, *in* 18 NIETZSCHE-STUDIEN 260–81 (1989). Last but not least, see Michel Foucault's seminal work on discourse analysis, which is also rooted in his readings of Nietzsche. Michel Foucault, *Nietzsche, Genealogy, History*, *in* LANGUAGE, COUNTERMEMORY, PRACTICE: SELECTED ESSAYS AND INTERVIEWS 139–64 (Donald Bouchard ed., 1980).

[5] Walter Benjamin, *Capitalism as Religion*, *in* THE FRANKFURT SCHOOL ON RELIGION: KEY WRITINGS BY THE MAJOR THINKERS 259 (Eduardo Mendieta ed., 2005) (alluding to the fact that economy and morality are intertwined to the extent that both refer to an eternal logic of rebalancing a debt that can never entirely be compensated for). On this problematic connection between moral guilt and economic debt, see Werner Hamacher, *Guilt History: Benjamin's Sketch "Capitalism as Religion," in* 32 DIACRITICS 81–106 (2002).

[6] MARCEL HÉNAFF, THE PRICE OF TRUTH: GIFT, MONEY, AND PHILOSOPHY 398 (2010).

In what follows, Section B will give a brief overview of theories of corruption that follow the "moral approach," including works from economic ethics such as those from Homann and Wieland, as well as those from political philosophy, including Walzer and Sandel. Following that, this Article will discuss Priddat's view of corruption as an "order of a second kind," leading first to a critical perspective on the relationship between corruption and normative morality. Second, it will show that networks of corrupt actors do not only transform values that are not measurable quantitatively into prices to trade them but also, that they construct a separate moral order and, specifically, a separate system of mutual recognition. Section C takes up both points: It will discuss Nietzsche's view on morality as based on the logic of exchange, connecting philosophical and anthropological theories of the gift exchange to corruption. In particular, the French philosopher Marcel Hénaff analyzed this link by connecting corruption to relationships of mutual recognition—as introduced in section B—in gift-exchange systems. Thus, a non-exchangeable element is not only present but indispensable in every exchange of goods, which allows to refine the definition of corruption presented here: Corrupt exchanges are unethical in the sense that they have lost their original, non-exchangeable element. Finally, section D will review these ideas in the light of Levinas' ethical conception of responsibility and the related dimension of the Third. This lays the groundwork for a perspective on an ethical corrective of corrupt exchanges that is not based on economic principles, but rather upon ethical responsibility, which is understood as a constant challenge to balance the ethical claims of the Other with those of the Third. Section E offers a conclusion.

B. Corruption as an Immoral Exchange?

"We need to ask whether there are some things money should not buy. The reach of markets, and market-oriented thinking, into aspects of life traditionally governed by nonmarket norms is one of the most significant developments of our time."[7]

To shed a light on the problematic relation between corruption and morality, a short overview of the most widespread concepts of corruption in political philosophy and economic ethics that link corruption to an immoral exchange might be helpful. For instance, economic ethicist Josef Wieland describes corruption as "immoral venality (*sittenwidrige Käuflichkeit*) in the sense that it violates the moral consensus of a society about the separation of the public and private domain and about fairness and justice in competition."[8] Karl Homann, referring to Robert Klitgaard's model,[9] understands

[7] MICHAEL SANDEL, WHAT MONEY CAN'T BUY: THE MORAL LIMITS OF MARKETS 7 (2012).

[8] Josef Wieland, *Die Governance der Korruption*, *in* KORRUPTION: UNAUFGEKLÄRTER KAPITALISMUS—MULTIDISZIPLINÄRE PERSPEKTIVEN ZU FUNKTIONEN UND FOLGEN DER KORRUPTION 43, 43 (Stephan Jansen & Birger Priddat eds., 2005) (translation by Author).

[9] Robert Klitgaard, *Gifts and Bribes*, *in* STRATEGY AND CHOICE 211 (Richard Zeckhauser ed., 1991).

corruption as a transaction, which concerns three entities: principal, agent, and client. The agent violates a contract between herself and the principal by an exchange with the client to her advantage.[10] In contrast to these morality-based approaches, Birger Priddat[11] focuses on the ambivalent role that morality plays in the networks that are characteristic for corruption[12] and that make corrupt transactions difficult to trace back to their origins. For him, corruption is subject to an order of secrecy—an order of a second kind (*Ordnung zweiter Art*)[13]—because those who benefit from corruption act within an economy without recognition, which leads them to grow the network continuously:

> The corrupt public official mainly lacks recognition. They may find it with B (the client, VR) and in the money transactions (*Auszahlungen*), but always concealed, never open. Nobody must learn about their special skills that they may imagine. Therefore, monetary transactions do not provide sense alone; additional inclusions into new networks are needed (and they become recognition-transactions themselves: shared holidays, parties, sport etc. . . . in the network with B).[14]

While the previously mentioned authors see corruption as an exchange that violates morality, and try to tackle such exchanges by means of an ethics of order—like Homann—or of governance—like Wieland—Priddat asserts that the reciprocity of exchange is not only characterized by the logic of compensation, but also in particular by relationships of recognition that promote a feeling of community. Within this "second life economy,"[15] agent and client develop their own morals.

This reciprocity of recognition thus mirrors an economic principle of compensation that will be shown in the following sections to be not only characteristic for corruption, but also

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[10] Karl Homann, *Unternehmensethik und Korruption*, 49 ZEITSCHRIFT FÜR BETRIEBSWIRTSCHAFTLICHE FORSCHUNG (ZFBF) 187, 192 (1997).

[11] Birger Priddat, *Schwarze Löcher der Verantwortung, Korruption: Die negative Variante von Public-Private Partnership*, *in* KORRUPTION: UNAUFGEKLÄRTER KAPITALISMUS: MULTIDISZIPLINÄRE PERSPEKTIVEN ZU FUNKTIONEN UND FOLGEN DER KORRUPTION 85 (Stephan Jansen & Birger Priddat eds., 2005).

[12] *See* Dirk Baecker, *Ämter, Themen und Kontakte: Zur Form der Politik im Netzwerk der Gesellschaft*, *in* DER BEWEGTE STAAT 9 (Birger Priddat ed., 2000).

[13] *See generally* KORRUPTION ALS ORDNUNG ZWEITER ART (Birger Priddat & Michael Schmid eds., 2011).

[14] Priddat, *supra* note 11, at 90.

[15] Birger Priddat, *Korruption als Second-Life-Economy*, *in* KORRUPTION ALS ORDNUNG ZWEITER ART 61 (Birger Priddat & Michael Schmid eds., 2011).

for normative morality. The assumption that there might be a morally right" and transparent authority entirely free from corrupt exchanges—from whose perspective the movements of corruption could be judged and condemned—is questionable. Instead, corruption and normative morality are interdependent; only the revelation of this interdependency can open an ethical space of reflection that may be a corrective for both corruption and normative morality. In this light, the view that corruption pollutes values that should not be available for money, as espoused by Michael Walzer[16] and, following him, Michael Sandel,[17] is problematic because it presupposes that corruption and normative morality could follow two separate orders: the order of economy—i.e., of exchange and purchasability—and the order of ethics—i.e., of non-purchasable moral values and ideals. Corruption would then put a price tag to such non-economic values and would make them an object of economic exchange: "We often associate corruption with illicit payoffs to public officials. But . . . corruption also has a broader meaning: we corrupt a good, an activity, or a social practice whenever we treat it according to a lower norm than is appropriate to it."[18] In contrast, the real moral norms would be those that have no price; those that are not for sale according to common consensus and that allow people to resist corrupt deals if they follow them.[19]

It is plausible that the logic of markets ought not to be extended to any and all realms of life. It is not plausible, however, that normative morality and economics follow two entirely different orders. The fundamental role of the logic of exchange and compensation for both has been consistently recognized in the history of moral philosophy and continues to be studied in neighboring disciplines like anthropology and ethnology. For instance, Jeremy Boissevain has provided an anthropology of corruption emphasizing the importance of social networks.[20] Ethnologist Bernhard Streck, referring to Boissevain, follows this approach of analyzing corruption by a paradigm of "giving and taking."[21] Still, Streck does not simply understand morality as a principle that is entirely heterogeneous to corruption. He points out that the norms that are associated with morality often simply conceal corrupt exchanges: "Boissevain compared society's norms to curtains that are drawn to hide improper behavior behind them."[22] These remarks provide the first clues as

[16] MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 97 (1983).

[17] SANDEL, *supra* note 7, at 7.

[18] *Id*. at 46.

[19] *Id*. at 14.

[20] *See generally* JEREMY BOISSEVAIN, FRIENDS OF FRIENDS: NETWORKS, MANIPULATORS, AND COALITIONS (1974).

[21] Bernhard Streck, *Geben und Nehmen. Oder die Korruption in den Tiefen der Menschheit*, 120 KURSBUCH 1, 5 (1995).

[22] *Id*. at 5 (translation by author).

to the double role that morality can play with respect to corruption. In this light, the question that opens Emmanuel Levinas' first major work, *Totality and Infinity*—quoted in the beginning of this essay—becomes ever more urgent. What if we are duped by morality? What if it is not the clear opposite to corruption that it seems to be?

C. The Value of Incorruptibility and the Price of Morality

"So let us give voice to this *new demand*: we need a *critique* of moral values, *the value of these values should itself, for once, be examined*—and so we need to know about the conditions and circumstances under which the values grew up, developed and changed . . ."[23]

Corruption as an "order of a second kind" is not only a principle that counteracts morality: It points to a problem rooted in the deep structure of normative moral philosophy itself. Both normative morality and corruption follow the principles of exchange and compensation, based on a concept of economic justice that can be traced back to Aristotle and results from his notion of equality.[24] For Aristotle, the core function of economics is to satisfy basic necessities, while the ways to achieve this are adequate housekeeping and the wise employment of economic means;[25] all this subject to the prime goal of leading a good life.[26] Yet he also describes the interdependencies between morality and economics, to the extent that a balanced justice is obtained when economic means are distributed equally[27]—in proportion to everyone's needs—among the members of the *polis*.[28] Section D will come back to Aristotle to discuss how he also provides a corrective to this type of justice with his concept of *épieikeia*.[29]

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[23] NIETZSCHE, *supra* note 4, at 7.

[24] ARISTOTLE, NICOMACHEAN ETHICS, BK. II, at 1129 (H. Rackham trans., Loeb Classical Library ed. 1926) (c. 384 B.C.E.).

[25] Peter Seele, *Ökonomische Philosophie: Ein Plädoyer für die Rehabilitierung einer alten Disziplin*, 14/1 INFORMATION PHILOSOPHIE 30, 32 (2014).

[26] VIKTORIA BACHMANN, DER GRUND DES GUTEN LEBENS: EINE UNTERSUCHUNG DER PARADIGMATISCHEN KONZEPTE VON SOKRATES, ARISTOTELES UND KANT 133 (2013).

[27] RAUL HEIMANN, DIE FRAGE NACH DER GERECHTIGKEIT: PLATONS POLITEIA I UND DIE GERECHTIGKEITSTHEORIEN VON ARISTOTELES, HOBBES UND NIETZSCHE 174 (2015).

[28] *See generally* Ludger Heidbrink, Verena Rauen, *Warum Wirtschaftsphilosophie? Eine kontroverse Auseinandersetzung*, *in* 3.3 WAS IST? WIRTSCHAFTSPHILOSOPHISCHE ERKUNDUNGEN (Wolf-Dieter Enkelmann & Birger Priddat eds., 2016) (unpublished manuscript) (on file with author).

[29] ARISTOTLE, *supra* note 24, at 10.

It was Friedrich Nietzsche in particular who developed his critique of morality based on Aristotle's idea of a justice that aims at equality. For him, the economic principles of compensation and exchange provide the basic structure of morality:

> Every thing has its price: *everything* can be compensated for' – the oldest, most naïve canon of morals relating to *justice*, the beginning of all 'good naturedness', 'equity', all 'good will', all 'objectivity' on earth. Justice at this first level is the good will, between those who are roughly equal, to come to terms with each other, to 'come to an understanding' again by means of a settlement – and, in connection with those who are less powerful, to *force* them to reach a settlement amongst themselves.[30]

To Nietzsche, the quantification of values that should not be quantifiable is morality's essence. He understands morality as a discursive construction whose contents are subject to a genealogy, i.e., a continuous change of meaning that is determined by economic and political interests: "Fixing prices, setting values, working out equivalents, exchanging—this preoccupied man's first thoughts to such a degree that in a certain sense it *constitutes* thought . . . ."[31]

The striking structural similarities between morality and economics as pointed out by Nietzsche are crucial for an understanding of the ambivalent role of morality in the treatment of cases of corruption, since Nietzsche shows that morality's timeless values—such as justice—are economically influenced and that every normative moral value—distinguished from an ethical value—can indeed have its price, which makes normative morality vulnerable to corruptive transactions. Still, Nietzsche did not do justice to the question whether an ethical value that cannot be transformed into a price, that is not subjected to the reciprocity of exchange, can exist at all. To answer this, a short detour on philosophical theories of the exchange of gifts will be helpful, because we will need to distinguish between a non-economic ethical value, which does not take part in, although it is constitutive for, the circulation of exchangeable goods, as well as moral norms influenced by economic principles. In particular, the French philosopher and ethnologist Marcel Hénaff, following previous seminal works by Mauss[32] and Malinowski,[33] has

[30] NIETZSCHE, *supra* note 4, at 46.

[31] *Id*. at 45.

[32] MARCEL MAUSS, THE GIFT: FORMS AND FUNCTIONS OF EXCHANGE IN ARCHAIC SOCIETIES (1966). Mauss studied archaic systems of gift exchange. One essential finding is that a thing that becomes a gift takes a power that almost forces the receiver to reciprocate. He refers generally to three types of archaic gift exchange, which often serve as the classical examples in current research on the gift: (1) the kula, the exchange of gifts on the Trobriand Islands; (2) the agonal exchange of potlatsch of indigenous peoples in North America; and, (3) the hau system used by the

developed a theory of the gift in order to point out an ethical concept of recognition that he explicitly links to the problem of corruption.[34]

Hénaff shows that even in an economy that is based on exchange, the circulation of gifts contains a non-exchangeable element that is not based on reciprocity or compensation. He maintains, following Mauss, that compensation is not the primary constitutive element of exchange-based relationships.[35]

Rather, it is mutual recognition or appreciation as established by these exchanges that is most relevant, an idea that links back to Priddat's theory of corruption as an order of a second type. Thus, it is not economic but social reciprocity, the foundation of mutual recognition, that is the most important dimension in archaic societies:

> What the facts discussed by Mauss are about is an intensive binding between the partners, an acknowledged and acquired public recognition, an established alliance. Following his lesson one might say that the ritual gift is no more about profitable exchange than about charitable generosity or contractual relationships.[36]

Maori in New Zealand. For further reading on philosophical conceptions of gift exchange based on the work by Mauss, see THEORIEN DER GABE ZUR EINFÜHRUNG (Iris Därmann ed., 2010). One major problem in the philosophical approaches to gift exchange is the question of whether there can be a gift which is not based on the economic principles of reciprocity and rebalancing to debt. In particular, Jacques Derrida has approached this question in his monograph *Given Time: I. Counterfeit money* (1992). For Derrida, the only gift which would be a "true"—i.e., non-economic gift—could be an unforeseen event, which is not part of any calculation or anticipation of the future and which would open the only possibility for the absolute new that cannot be part of any economic calculation, since it cannot refer to any former experience and thus cannot be anticipated in any way. This conception by Derrida has been criticized by Marcel Hénaff, who claims that Derrida applies the homo oeconomicus model to Mauss' description of archaic gift exchanges (Derrida refers to the potlatsch system in particular); although this economic model of human behavior, according to Hénaff, is inadequate for archaic gift exchanges, because, as will also be discussed in this essay, their goal was the establishment of mutual recognition, an idea which Hénaff transfers into an ethical theory.

[33] *See generally* BRONISLAW MALINOWSKI, ARGONAUTS OF THE WESTERN PACIFIC (1922).

[34] HÉNAFF, *supra* note 6, at 6. Hénaff even applies the logic of exchange that characterizes corruption explicitly to the constitution of philosophy itself by asking to what extent philosophical knowledge can be the object of transactions.

[35] MARCEL HÉNAFF, DIE GABE DER PHILOSOPHEN: GEGENSEITIGKEIT NEU DENKEN 56 (2014). For the original, see LE DON DES PHILOSOPHES: REPENSER LA RECIPROCITE (2012).

[36] *Id.* (translation by author).

This difference between the circulation of economic goods and traditional, social systems of gift exchange, whose primary aim is the establishment of recognition—a so-called pact of recognition[37]—is decisive for a deeper understanding of the link between normative morality and corruption. Corruption mirrors the problem that we must differentiate between the social context that arises from reciprocity and an ethical relationship that is not based on economic principles. Like Mauss who argues that the power of the so-called *sacra*—important sacred objects that provide identity to a community, is not exchangeable as such—Hénaff asserts that it is not economic principles that constitute ethical values, even though moral norms, which are derived from ethical values, may take part in economic exchanges. The advantages that can be gained by corrupt exchanges cannot directly concern ethical values because ethical values are a priori not subject to reciprocity. Hénaff points out that the real, non-purchasable value of ethics is immune against the procurement of tactical advantages by corrupt transactions:

> Could there be a literal price of truth, a situation where truth could be bought and sold? We have to acknowledge that we can find no examples of this, at least not in this form. It is inconceivable that in exchange for a monetary amount one could obtain scientific results, spiritual depth, or legal certainty. At most one could secure indirect tactical benefits that would fall under the category of corruption. We should then conclude that the phrase has no literal content and is metaphorical from the outset.[38]

If knowledge as such, or ethical values as such, cannot be exchanged economically, then mutual recognition is created by exchanging *proxies*—symbols of exchange values—in particular represented by money. The concept of corruption now receives a metaphoric character, in that it does not simply refer to immoral exchanges, but takes place wherever the symbolic character of exchanged goods with respect to the original, non-exchangeable element—which Mauss specifies by the term *sacrum*—is forgotten. Since those entities that are not for sale—that cannot be exchanged—are symbolized by exchangeable goods, they exist in an irreducible relationship to them. For Hénaff, the particular corruptive power of money lies in its ostensible ability, as a general equivalent, to represent a quantitative value for any kind of object: "This is the risk inherent in money. It is not new. It is the correlative of money's power as a sign of value and as an instrument of valuation, exchange, reserve, and investment."[39] But while money, as Georg Simmel has pointed out

[37] *Id*. at 62.

[38] HÉNAFF, *supra* note 6, at 6.

[39] *Id*. at 394.

in his cultural-philosophical study on the philosophy of money,[40] is fluid and flexible enough to put a price tag to any value and to convert originally non-quantifiable values into quantifiable prizes, it serves in a paradoxical way as the means of a fulfillment of the non-fulfillable desire to accumulate capital,[41] and as the general equivalent for values. Prices receive their reality only from the practices of trade since the price always depends on its acceptance by the trading partners.[42] Hénaff concludes that it is precisely because of these conversion structures and because of its ability to raise the desire of accumulation that money can be seen as the most efficient and "the most powerful means of influence and corruption."[43]

In this light, the theoretical approaches from political philosophy, as discussed above, that refer to corruption as an immoral exchange are not comprehensive. For both Walzer and Sandel, the essential problem of corruption lies in the conversion of values that are not measurable by quantitative prices into exchangeable goods. To establish these non-quantifiable values, Walzer gives a list of shared values like individual freedom that ought not to be sold in any form.[44] Hénaff rightly criticizes this approach by pointing out that it can at most fight the symptoms, but cannot come closer to the cause of the problem, because the main ethical questions such as why some ethical values—as distinguished from normative moral values—should not be converted into economic prices, and where the consensus about moral norms that Walzer claims to exist could take its origin, are not at all answered.[45]

Money, as the most important means of corruption, gains its effectiveness from its symbolic character as an empty equivalent of exchange values of tradable goods. This leads to the question concerning the origin of these exchange values: If both corruption and, following Nietzsche, moral norms are subject to the principle of exchange, might the problem of mutual recognition as pointed out by Hénaff be a key to open an ethical dimension of incorruptibility? The reciprocal exchange as an act that can provide communality by trading symbols of recognition refers, as was already pointed out by Mauss, to non-reciprocal elements that are nevertheless constitutive for any reciprocity of exchange. While, in modern societies, the relation between the symbols of exchange and the non-exchangeable *sacra* has been forgotten and the reciprocity of exchanges is often

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[40] *See generally* GEORG SIMMEL, PHILOSOPHIE DES GELDES (1989).

[41] In this context, Hénaff follows Marx' theory on the accumulation of capital. *See* KARL MARX, THE CAPITAL: CRITIQUE OF POLITICAL ECONOMY (1887).

[42] *See generally* KANT, *supra* note 2.

[43] HÉNAFF, *supra* note 6, at 393.

[44] WALZER, *supra* note 16, at 26.

[45] HÉNAFF, *supra* note 6, at 392.

reduced to exchanges of empty equivalents, i.e., monetary transactions, Hénaff points out that the non-reciprocal ethical value—that is at the origin of any moral norm—cannot be part of any transaction. To clarify the function and meaning of such an ethical value, he refers to the necessary establishment of legal institutions and the execution of the general law, in so far as the archaic systems of exchange have been replaced, in political societies, by the equality of all individuals before the law and the norms and contracts that come with it:

> The public recognition of each person is ensured by the law, before which all the members of the citizen community are equal. This status and dignity carry all sorts of rights. They also carry obligations, which are public and collective. Those rights and obligations can, indeed, be called social goods, but this arrangement is not capable of guaranteeing or protecting the bond that connects each member of the community to another or to the entire community. Neither civil membership nor economic interdependence calls on us to recognize the other as a person. This limitation is constitutive of legal societies and of the market system.[46]

The equality of all individuals before the law, and not least before moral judgment based on a normative morality, is based on an understanding of justice that recurs to equality, and to this end also recurs to exchange equivalents and to means of distribution that serve the goal of equality. Following this concept of justice, recognition means the reciprocal recognition of all members of a political community as equal individuals with respect to the law. But how do these notions of equality and exchange refer back to the problem of corruption, or to any ethical value resistant to corruption? As Priddat has pointed out, the networks of corruption do not directly refer to the public order of the law but to the order of secrecy.[47] The essential ethical challenge, however, would be to reintroduce an ethical value that cannot be an object of any transaction, whether the public is involved or not. Personal recognition, according to Hénaff, would create the basis for an ethical relation without requiring a similar kind of reciprocity and without referring to any logic of exchange.[48] Such a new type of recognition would be the only kind that can protect those

[46] *Id*. at 397. An interesting critique of a concept of justice that is based on public order (as presupposed by, for example, JOHN RAWLS, A THEORY OF JUSTICE (1971)) can be found in the following essay: Wolfgang Kersting, *Herrschaftslegitimation, politische Gerechtigkeit und transzendentaler Tausch: Eine kritische Einführung in das politische Denken Ottfried Höffes*, *in* GERECHTIGKEIT ALS TAUSCH? AUSEINANDERSETZUNG MIT DER POLITISCHEN PHILOSOPHIE OTTFRIED HÖFFES 16 (Wolfgang Kersting ed., 1997).

[47] Priddat, *supra* note 15, at 90.

[48] HÉNAFF, *supra* note 6, at 397.

that defy any categorization by normative claims; it would furthermore be the unchangeable constitutive moment of any ethics, even in an order of secrecy.

A pivotal point in any ethics that withdraws itself from the economic logic of exchange as constitutive for corruption, from any binding to commonality and equality, and that could be constitutive for normative morality, is the absolute stranger that does not yet belong to any political or juridical community. This view has been proposed by the French philosopher Emmanuel Levinas, and Hénaff refers to this problem towards the end of his remarks on corruption:

> Yet beyond the support provided by local forms of civility or by universally accepted rules of behavior, the question remains as to the unconditional foundations—those that would be valid at any time and in any place—of the requirement to respect the stranger we meet or the unknown in the familiar event of every encounter.[49]

Which non-purchasable ethical value protects the stranger who cannot be understood from any category of equality or analogy? Such an ethical value would shatter the dimension of the logic of exchange, because it would not presuppose any measure of compensation, or any equality or any reciprocity. According to phenomenologist Emmanuel Levinas, the absolute stranger, the Other, is the origin of the ethical relationship and the foundation for any normative claim. The Other cannot be part of any economic logic of transaction or of any expectation of reciprocity because the absolute difference of the Other is the epitome of the unexpectable—the absolute new—that cannot be derived from any expectation: "The absolutely new is the Other."[50]

Crucially, Levinas' concept of alterity as an absolute difference that cannot be integrated into any procedure of exchange opens a perspective on the non-exchangeable ethical value that any normative moral value—which can be, as has been shown above, converted into a price and become an object of economic exchange—must be related to. While Hénaff tries to translate his concept of recognition into Levinas' ethical terminology, Levinas himself uses quite a different vocabulary to describe the problem of an ethical relationship to the Other that is neither founded in compensation nor reciprocity. He refers to ethical justice through responsibility in this context. This model of ethical responsibility could perhaps be suggested to counteract corruption by ethical means, as will be discussed in the following section. However, ethical responsibility—just like corruption—requires not only two entities, but at least three.

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[49] *Id*. at 398.

[50] LEVINAS, *supra* note 1, at 219.

D. Ethics Beyond Economics in the Light of the Third

> One of the fundamental themes of Totality and Infinity about which we have not yet spoken is that the intersubjective relation is a non-symmetrical relation. In this sense, I am responsible for the Other without waiting for reciprocity, were I to die for it.[51]
>
> It is consequently necessary to weigh, to think, to judge, in comparing the incomparable. The interpersonal relation I establish with the Other, I must also establish with other men; there is thus a necessity to moderate this privilege of the Other; from whence comes justice. Justice exercised through institutions, which are inevitable, must always be held in check by the initial interpersonal relation.[52]

To counterbalance the reciprocity of exchange that makes morality vulnerable to the conversion of moral values into quantitative prices, the conception of justice itself as a system of balancing and compensation that aims for equality needs to be corrected. Aristotle himself, who has been a major reference for Nietzsche's critique on the economically-influenced principles of justice—which are a basis for normative morality—already provides a corrective for economic justice which counterbalances the logic of equality and exchange. He sees justice as a virtue, i.e., "that moral disposition which renders men apt to do just things, and which causes them to act justly and to wish what is just,"[53] and does not simply posit equality before the law as the only basis for this justice.

Because he realizes that the generality of the law can never do full justice to individual cases, Aristotle gives priority to a justice that takes each single case into account, by weighing it in together with the general law, over general justice that aims at equality. This corrective to general justice he calls equity (ἐπιείκεια, *epieikeia*). Equity goes beyond general compensational justice, by attenuating the harshness of its strict application; by sometimes waiving compensational justice, equity comes into its own in particular where the strict application of the law would be unjust or even wrong: "Justice and equity are therefore the same thing, and both are good, though equity is the better. The source of the difficulty is that equity, though just, is not legal justice, but a rectification of legal justice."[54]

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[51] EMMANUEL LEVINAS, ETHICS AND INFINITY—CONVERSATIONS WITH PHILIPPE NEMO 98 (1985).

[52] *Id*. at 90.

[53] ARISTOTLE, NICOMACHEAN ETHICS, V.1, 1129 a3–19 (trans. Rackham).

[54] *Id*. at V.14, 1137 a26–b10.

The principle of equity, according to Aristotle, thus consists in balancing the individual case with the general law; the individual case always takes primacy from an ethical point of view, in particular wherever the general law fails in a concrete application to an individual case.[55]

This foundational concept of an ethical justice in which the general law or common norms do not take priority over individual cases, but must be brought into balance with them, paves the way to Levinas' concept of responsibility. Most importantly, Levinas notably does not refer to a teleological ethics like Aristotle, but to an ethics of alterity, in which the anticipation of ethical goals can only be approached in reflecting upon the relation between the absolute new and unforeseeable claim of the Other and public normative claims. Levinas, who describes the conditionality of occidental moral philosophy by the totality of the metaphysical order of being, understands ethics as an *optics*[56] that provides a view on the continuously changing discourses of moral norms, an idea similar to Nietzsche's genealogy of morality. In contrast to the traditional conception of the Other as an analog to the Self,[57] Levinas points out the irreducible difference between them, a difference that resists any reciprocity or exchange and that is therefore the non-economic, incorruptible origin of any ethics. The incorrupt value of the exteriority[58] of the Other, transcendental to any moral norm, any economic calculation and any corrupt transaction, offers an ethical corrective to the economic constitution of morality.

Crucially, this corrective does not mean to react to the claims—the so-called call—of the Other without taking moral norms into account. Instead, it is this ethical relationship of alterity that opens the social-philosophical dimension in the first place by always simultaneously concerning the so-called Third,[59] who represents the universality of norms and laws as well as the community of all others, i.e., the public: "Everything that takes place here 'between us' concerns everyone, the face that looks at it places itself in the full light of the public order . . . ."[60] The balance between the individual claims of the Other and the generality of the *Third* makes up the essence of responsibility to Levinas. It is what allows the possibility of a non-compensating justice that he denotes by the French term

[55] *Id*.at V.14, 1137 b10–29.

[56] LEVINAS, *supra* note 1, at 23.

[57] Edmund Husserl, CARTESIANISCHE MEDITATIONEN, EINE EINLEITUNG IN DIE PHÄNOMENOLOGIE 97 (1995).

[58] By exteriority, Levinas means an absolute transcendence that cannot be integrated into a synthetic whole by any ontological, dialectical or metaphysical procedure.

[59] *See generally* THOMAS BEDORF, DIMENSIONEN DES DRITTEN: SOZIALPHILOSOPHISCHE MODELLE ZWISCHEN ETHISCHEM UND POLITISCHEM (2003); PASCAL DELHOM, DER DRITTE: LEVINAS PHILOSOPHIE ZWISCHEN VERANTWORTUNG UND GERECHTIGKEIT (2000).

[60] LEVINAS, *supra* note 1, at 212.

équité (equity) in the first place: "Philosophy serves justice by thematizing the difference and reducing the thematized to difference. It brings equity into the abnegation of the one for the other, justice into responsibility."[61]

The absolute difference of the Other, because inequality is its first condition, cannot be reduced to an equality that aims at reciprocity and exchange. The simultaneity of this absolute difference of the Other with the generality of claims represented by the *Third* is, according to Levinas, the only possibility of a corrective to any static, ontological setting of the subject in a universal, timeless order of ontology, and by extension, to any movement of compensating exchange.[62] In short, not equality, but the irreducible exteriority of the other, is the first principle of ethics, the primary incorruptible value and the basis for ethical responsibility.

The changeability of normative claims that Levinas refers to in his famous question "whether we are not duped by morality," quoted in the introduction, thus offers an important orientation for weighing the importance of ethics and the ambivalent status of morality for the problem of corruption. For justice in its ethical sense does not only mean to perform individual just acts, but refers to, as Aristotle has made clear, a virtue—i.e., a fundamental ability to adequately balance universal normative claims with the individual case. It is only by this balance that ethical responsibility can be thought of as a corrective to normative morality and to compensational justice. The challenge of ethics consists in weighing each concrete situation anew with respect to the relationship between the individual claim of the Other and universal claims of moral norms. It is only by creating spaces of reflection for this kind of just balancing, which was already postulated by Aristotle, that corruption can be confronted from an ethical perspective.

E. Conclusion

Referring back to the above models involving at least three entities in exchanges of corruption—principal, agent and client—it can now be seen that this triadic structure, according to Homann's interpretation, refers to a questionable timeless validity of moral norms that has been contested by authors like Nietzsche, Foucault, Hénaff, and Levinas. According to the moral norms that authors like Homann, Walzer, and Sandel refer to, corruptive exchanges must always be judged as morally reprehensible. However, Marcel Hénaff and Emmanuel Levinas have distinguished between ethics and normative morality, and questioned the relevance of reciprocal compensational justice for ethics, for good reasons. Were ethics reduced to the observance of moral norms, it could easily become a stage for moral hypocrisy—a cover for corruption, rather than an instrument against it. But Priddat's emphasis on the relation of corrupt exchanges to recognition-based networks,

[61] EMMANUEL LEVINAS, OTHERWISE THAN BEING OR BEYOND ESSENCE 165 (1981).

[62] LEVINAS, *supra* note 1, at 212; LEVINAS, *supra* note 61, at 165.

Streck's remarks on the hypocritical role of morality in the networks of corruption, and Henaff's critique of reciprocity which leads to Emmanuel Levinas' concept of ethical justice pave the way to a different position regarding the possibility of ethics. From this position, the curtain of morality can be removed by reflecting in each individual case anew upon the balance between general norms and individual claims, or public goods and individual values. The ability to weigh each case of corruption individually as to whether a moral—not a juridical—verdict is appropriate, or whether a moral judgment should not be foregone, is thus the particular strength of ethical justice.