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Anticorruption: How to Beat Back Political & Corporate Graft



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Accomplishing Anticorruption: Propositions & Methods

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Abstract: The insidious practice of corruption cripples institutions, consumes communities, and cuts deeply into the very structure of people's lives. It destroys nations and saps their moral fiber. Corruption is invasive and unforgiving, degrading governance, distorting and criminalizing national priorities, and privileging acquisitive rent-seeking, patrimonial theft, and personal gains over concern for the commonweal. It also costs an estimated \$1 trillion annually – roughly a loss of 2 percent of global GDP – and disproportionately affects the most needy countries and their peoples. This opening essay shows that these baleful results need not occur: the battle against corrupt practices can be won, as it has been in several contemporary countries and throughout history. Ethical universalism can replace particularism. Since collective behavioral patterns and existing forms of political culture need to be altered, anticorruption endeavors must be guided from the apex of society. Consummate political will makes a critical difference. Anticorruption successes are hard-won and difficult to sustain. This essay and this special issue show what can and must be done.

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Confronting and curbing corruption are not impossible. We now know how to transform wildly corrupt countries into largely graft-free polities. We know what works reliably, what works occasionally, and what works only under optimal conditions. We know that talented political will is essential. But we also know that altering corrupting incentives for individuals is less powerful than shifting the contours of behavior collectively.¹

Corruption is a systemic malady, emerging from the top down rather than the bottom up.² That is, the stain of corruption spreads from the attitudes and permissive policies of persons at the top of political and corporate entities downward. Leaders set the tone; misconduct at one level of authority implicitly authorizes the next. Integrity or its absence therefore seeps into the collective societal consciousness: either to make corruption an ongoing social practice and an essential (even if de jure forbidden)

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component of a governing political culture; or more rarely, to accomplish the reverse, creating legal and normative barriers to wholesale approval of corrupt practices.

We know that corruption can be reduced or even nearly extirpated at the national level because a number of nation-states (most of them small and tightly controlled) have in modern times succeeded in transitioning from wholesale corruption to the pursuit of a fully ethical system. One or two small, fully democratic states have also managed to develop successfully without enduring any periods of corruption, in part by introducing widespread changes in their peoples' understandings of corruption. In China, the world's most populous nation, President Xi Jinping's lengthy and aggressive anticorruption campaign may result in the diminution of many enduring corrupt endeavors, even if his foremost goals for the campaign are doubtless political.

Fortunately, to buttress what we have learned from the contemporary experience of those democratic and quasi-democratic entities that have beaten back corruption and effectively altered their prevailing political cultures, we also now understand that today's least corrupt countries were once themselves promiscuously crooked, but shifted incrementally over the nineteenth and twentieth centuries from having widespread to very limited tolerance of corruption. These changes took place thanks to gifted leadership, the influence of the Enlightenment, the spread of mass education, the emergence of autochthonous churches, and the rise of merit-based bureaucratic systems. Bo Rothstein's essay in this volume emphasizes the role of education: "With the introduction of free public education," he writes, "citizens got a stake in a well-functioning public sector and thus found a reason to oppose corruption."³ Education also engendered loyalty to the state and an embryonic sense of nationality.

Effectively, these peoples – mostly European, followed in the twentieth century by a few Asian and African populations – moved away from particularism, wherein "individuals [are] treated differently according to status," to what Alina Mungiu-Pippidi and others call ethical universalism, or the equal treatment of all in the delivery of government services and opportunities. As Mungiu-Pippidi asserts in this volume,

Particularism, rather than ethical universalism, is closer to the state of nature (or the default social organization) and...its opposite, a norm of open and equal access or public integrity, is by no means guaranteed by political evolution.⁴

But when a society does reach that point, acculturative anticorruption efforts have been internalized by the political culture and the body politic. In other words, ethical universalism (hardly a utopian concept) replaces corruption and patrimonialism – malign allocational norms – with public-spiritedness and fairness in governance and politics, corporate behavior, and daily life. Ethical universalism "presumes that all inhabitants of a jurisdiction will be treated fairly, equally, and tolerantly – that minorities are entitled to the same privileges and opportunities as majorities, and that groups large and small can anticipate receiving similar rights and privileges."⁵

In the Nordics, elsewhere in Northern Europe, and even in the Antipodes, there has been a major and profound shift from the societal expectation that position, fortune, and licenses are obtained primarily by buying influence and access from rulers and their bureaucrats to a presumption that such goods can be attained through personal achievement and merit. Collective behavioral responses have evolved toward an anticorrupt norm. In other words, elites, and later entire populations, first in Prussia and the Nordic nations and then

in the Netherlands, Britain, New Zealand, and Canada, gradually discovered that their political and corporate endeavors could succeed optimally only if the temptation to gain power and preferment by virtue of corrupt transactions and influence were reduced as much as possible.

These ineluctable advances in the functioning of these relatively small societies constituted a virtuous circle: empowerment encouraged institutions to function and citizens to use them well. Citizen participation in turn strengthened political institutions. As Matthew Taylor puts it: “In a word, Denmark.”⁶

Elsewhere, by contrast, regional corruption remains. For example, although Chileans’ interactions with their police forces and bureaucrats are free of petty corruption, in nearby Argentina, Bolivia, Peru, and Brazil, that is not always the case. And in all of those South American countries, among others, grand corruption still flourishes, as clearly demonstrated by Brazil’s Odebrecht corporate bribing scandal and the ongoing *Lava Jato* investigation and prosecution of intertwining corrupt Petrobras, Odebrecht, and government officials. (Judge Sérgio Fernando Moro, who presides over the *Lava Jato* cases, writes in his essay in this volume about how today’s Brazilian corruption is being prosecuted and tried.)⁷

Africa, too, has seen mixed success on corruption, with a tiny handful of exemplary anticorruption efforts. There may be residual corruption in Botswana, but its citizens do not anticipate being fleeced at police roadblocks or told that marriage and driving licenses are only available for an extra fee, paid under the counter. In contrast, neighboring Zimbabwe was awash until 2018 with roadblocks manned by machine gun-toting, woefully underpaid policemen; permits were only procured by bribes; and electricity or water only arrived at households by special ar-

rangement.⁸ One expects to be extorted in Kenya, Nigeria, or Zambia; but not in Botswana or Mauritius; and less often nowadays in Benin and Ghana. The striking differences in attitudes in those less corrupt polities come after decades of leader-induced revampings of “standard operating procedures.”

The less corrupt African societies, and those in Europe, Asia, and Australasia, are separated from the run of their peers by critical shifts in prevailing political cultures that took place during the last sixty years, that were engineered from above, and that were orchestrated largely by example and with an emphasis on integrity. Taylor, in his essay in this volume, calls these striking anticorruption improvements “positive equilibrium shifts.” In earlier centuries, the Nordics and other peoples achieved the same radical enhancements in expectations, but over much longer periods and much more gradually. Rothstein’s essay in this collection emphasizes that the Nordic transformation was largely driven “indirectly” (that is, anticorruption was a by-product of robust reforms universalizing public goods), a strategy that Rothstein also recommends to advocates and implementers of twenty-first-century anticorruption efforts.⁹

Canada provides another example of incremental institutional changes to corruption norms. Canada’s first prime minister openly took bribes in exchange for authorizing railway and construction contracts. By the end of the nineteenth century, politicians still profited from their positions at the provincial level, but hardly ever federally. By the post-World War II period, Canadians had ceased to tolerate even most provincial chicanery, which was targeted by major prosecutions. But only in the twenty-first century have Canadians collectively embraced what we might call an absolute intolerance of rent-seeking, in-

fluence peddling, political and official advantage-taking, and overall sleaze in both public and private spheres of endeavor (not that rule-breaking does not here and there persist).

According to Transparency International's most recent Corruption Perceptions Index, Canada is the eighth-ranking least corrupt nation-state, following New Zealand, Denmark, Finland, Norway, Switzerland, Singapore, and Sweden. Tied with Canada are the Netherlands, Luxembourg, and the United Kingdom. Australia and the United States rank as somewhat more corrupt than Canada, according to recent iterations of this well-respected index.¹⁰

We know how to reform societies and eliminate the types of graft that erode society's fabric and impede economic growth. We even know – because British governor of Hong Kong Sir Murray MacLehose, Prime Minister Lee Kuan Yew of Singapore, and President Paul Kagame of Rwanda showed the way – that the inhabitants of city-states up through medium-sized nations can be retrained or resocialized relatively quickly to shun corrupt temptations. President Sir Seretse Khama of Botswana also demonstrated how a thoroughly democratic, tolerant, honest, political leader could encourage his associates, his followers, and the general population to refrain from the common regional acceptance of corruption as a way of life. Whereas Lee and Kagame led by example but also used coercion, Khama socialized his citizens within a totally democratic environment, and so taught them to operate very differently from their peers in neighboring states. So did Prime Minister Sir Seewoosagur Ramgoolam and his successors in Mauritius. They accomplished in modern times what the kings of Denmark and leaders in Sweden, Norway, and Finland managed to do, using a combination of coercive and social-shaming methods, from the late eighteenth century onward. In mod-

ern Europe, Estonia and Georgia have more or less followed the Botswanan and Hong Kong models in their shift from Soviet-style criminalized corruption to Nordic-like paradigms. So have Costa Rica, Uruguay, and Slovenia.

The anticorruption ideal is common to all nations, all traditional cultures. There is very little evidence that the nature and practices of corruption vary from culture to culture or that the corrupt act itself is viewed more permissively in some societies than in others. Nor is there any evidence that the presence of everyday grand or petty corruption helps a modern nation to function effectively; there is no evidence that corruption somehow appropriately greases the wheels of commerce, improves official service delivery, and incorporates outgroups into a political, social, or economic environment from which they would otherwise be excluded. Systematically cleansing an infected country of small-scale extortions helps just as much as jailing venal offenders to demonstrate that corruption is dysfunctional and an impediment to economic and social growth.

In the twenty-first century, in the “global village,” no nation-state permits bribery, graft, and extortion; a diverse collection of states legally defines private, public, and overall abuse congruently; and, most important of all, their diverse citizenries have no difficulty knowing the many ways in which their rulers, as well as the minor officials with whom they deal day-to-day, are corrupt. Even kleptocracies and other excessively corrupt regimes – the largely criminalized states at the bottom end of the Corruption Perceptions Index – all publicly hold that they prohibit and abhor corrupt behavior.

In 2018, no group of citizens anywhere is demanding more corruption, less transparency and accountability, or more compromised service delivery. Only multinational corporations with their eyes on a

resource prize or wealthy, small countries seeking to host a global sporting championship favor outright covert bidding for services or results that (in theory) should be provided on the basis of merit. If at one time the distinctions between corrupt bids and honest competition, or between a bribe and a gift, were poorly illuminated, this demarcation is now increasingly appreciated in urban and middle-class Africa, Asia, and the Americas, even if it is adhered to only indifferently.¹¹

In spite of increasing consensus on the illegitimacy of corrupt principles of allocation, the long hand of corruption nonetheless extends across borders. Louise Shelley's essay demonstrates how it takes both corrupt national officials and low-level professionals – operating not only in developing states or conflict zones but in free trade zones and corporate offices – to facilitate the wholesale pilfering and devastation of illicit trading schemes. Shelley recounts the huge sums of money involved in the smuggling of guns, drugs, and people within and across national borders. But she also makes clear that the trade in rare environmental resources, including ivory and rhino horn provided by poachers and timber harvested from old-growth rain forests, can only flourish because of high- and low-level corruption. Gatekeepers such as customs agents and airport personnel are rewarded when they facilitate the movement of contraband cigarettes, illegally harvested timber, precursor chemicals for synthetic drug fabrication, and all manner of counterfeit goods (including those sold on the Internet or Darknet).

Criminalized syndicates reach high into many governments; corrupt kleptocrats and insurgent groups like Boko Haram and Al Shabaab find funding through such high-level contacts. Unfortunately, as important as stanching the flow of trafficked goods and persons is for national governments, their poor citizens, the tourism in-

dustry, and ultimately the environmental sustainability of the planet, there exist few proven anticorruption initiatives capable of dealing effectively with illicit trade. An International Anti-Corruption Court, perhaps organized analogously to the International Criminal Court, as Judge Mark Wolf proposes in his essay, could help. So could globally exposing money-laundering and cross-border currency movements and the shuttering of those places where ill-gotten gains are stashed, including offshore tax havens.

These transnational flows complement the use of corrupt extractive techniques within individual countries. The most egregiously corrupt are also thoroughly criminalized and, usually, repressive. In the many nations in which leaders prey on their citizens by purloining much of their wealth (including many post-Soviet and African nations), anticorruption efforts are much harder to imagine, and their successful outcomes rare or nonexistent. These are the criminalized or criminal states, where the entire point of a presidency is not to rule for the people, but for oneself, one's family, and one's cronies. These are extractive enterprises where we cannot expect bad rulers to be voted out (although the Gambia is an unusual exception and President Robert Mugabe's removal from Zimbabwe's presidency by a gentle coup may prove positive) or well-meaning foreign donors to have influence. They are family concerns or, as in Afghanistan, fiefdoms arrayed against one another, each to benefit its own followers.¹²

What can be done to pry populations from under the heel of such corrupt despots? World order, in the form of kinetic exercises of power and United Nations Security Council sanctions, can make money laundering and banking difficult, or in some cases impossible, for criminalized states. World powers can place embargoes on imports and exports, seal bank accounts,

and hinder the travel of autocrats outside of their home states. Democratic neighboring entities can shun those who hold illegitimate power, refusing diplomatic dealings or otherwise recognizing them as leaders. The aforementioned International Anti-Corruption Court could also bring the criminally corrupt before a globally legitimated bar of justice. Such a new court would subject those who are above law in their own countries to what the rule of law imposes in most democratic states. An International Anti-Corruption Court could also trace and help to contain the movement abroad of ill-gotten personal wealth and the proceeds of corrupt transactions.

There are a number of conceptual approaches that, if honored and developed, can reduce corruption within nation-states. Foremost is the full functioning of the rule of law. Moro, in his essay in this volume, reiterates that strong laws against corruption are necessary to authorize and propel effective anticorruption actions. He writes:

Better laws can improve the efficiency of the criminal justice system and increase the transparency and predictability of relations between the public and private sectors, reducing incentives and opportunities for corrupt practices.¹³

But reasonable laws are in no way sufficient on their own. Those legal strictures need to apply to everyone, not just the poor and powerless. If not, a country risks “a progressive erosion of trust.”

For many decades, politicians and powerful businessmen were largely immune from effective prosecution for corruption in Brazil, as in so many other seriously corrupt nations. In Brazil, grand corruption was systemic; it had become a “standard operating procedure” at the state and national political and corporate levels. But gradual changes in the law, as well as growing pressure for more effective judicial ac-

tion, culminated in the first conviction of a sitting federal politician in 2012, followed by a number of high-profile corruption sentences in subsequent years. Congress also authorized the use of plea bargains to obtain evidence of corruption, and of pretrial detention to prevent new offenses. These rule-of-law reforms enabled Brazilian prosecutors and Moro and his fellow judges to pursue charges of corruption against individual politicians, political parties, and corporations, strengthening the rule of law in Brazil and helping to bring the impunity that politicians had long enjoyed to an unceremonious end.

These are among the important lessons for anticorruption efforts everywhere, not just Brazil. Furthermore, whereas the United States has recently retreated from its long prohibition against lavish corporate contributions to domestic politicians’ electoral efforts, Brazil’s Supreme Court, recognizing the pernicious role of unlimited monies in elections, has now outlawed corporate transfers of cash to political forces until Brazil’s troubled legislative and executive branches can set reasonable limits.¹⁴

Singapore long ago severely restricted electoral campaign expenditures, thus theoretically obviating the need for politicians to seek help in paying for such costs. European and South American nations do the same and, like Singapore and many other parliamentary systems, permit only abbreviated preelection periods of vote solicitation. Greatly curtailing the amount of money needed to win a legislative seat turns out to be a powerful anticorruption tool, as Lee Kuan Yew presumed. In his contribution to this volume, Rotimi Suberu writes, also, of how significant electoral institutional reforms can contribute to a reduction of Nigeria’s predilection toward corrupt behavior.

Creating special anticorruption commissions or agencies to investigate and com-

bat corrupt activities within specific political jurisdictions was an institutional invention of the 1950s and 1970s. Implicitly using a principal-agent model of how corruption worked, political executives and legislatures may have thought that the existence of such commissions would lead, after hard forensic investigation of crooks in governmental or paragonmental activities, to the prosecution and elimination of much corruption. But, as we now know, only when such a new institution is backed by abundant political will can it succeed in accomplishing its mandated task.

Jon S.T. Quah's essay reviews how the Singapore and Hong Kong anticorruption commissions – the most successful in history – helped to carry out the mandates of hard-charging executives who were determined to break corrupt practices within their city-states. Their regimes provided sufficient funding and manpower to make the commissions powerful. They also gave them independence and protected them from political and gangster pushback (unlike the comparable body established in Indonesia in 2002). In other words, an abundance of political will contributed to their efficacy.

Quah contrasts successes in those two jurisdictions with the failure of the commission model to bolster anticorruption efforts in the Philippines (even before the presidency of Rodrigo Duterte) and India. I indicate elsewhere, too, that of the fifty or so anticorruption commissions established in Africa and Asia, only a handful proved effective. Most were led by well-intentioned judges or prosecutors, but only in Botswana and Mauritius, and for a time in Zambia and Nigeria, were these commissions permitted to act in an unfettered manner. Unlike the commissions in Singapore and Hong Kong, their investigations were often negated by attorneys-general or by heads of state. Some culprits were just too powerful (as in Brazil, which had no such commissions before

2012) to be taken to court and punished; ironically, some of the accused were able to buy their way out of investigation. And in a few places (such as Malawi and Zambia in this century), heads of state naturally refused to permit anticorruption commissions to investigate their own persons. As a result, most of the African commissions ended up concerning themselves with the small fry, not major embezzlers, as Namibia's anticorruption commission is currently doing.¹⁵ Rothstein's Quality of Government Institute at the University of Gothenburg concluded after extensive survey research (cited in Rothstein's essay in this volume) that the establishment of special institutional anticorruption arrangements have proved effective anticorruption instruments only in special cases. Mungiu-Pippidi advances additional evidence that

countries that adopt autonomous anticorruption agencies, restrictive party finance legislation, or whistleblower protection acts make no more progress on corruption than countries that do not.¹⁶

For these reasons, Suberu's anticorruption recipe emphasizes the enhanced autonomy of critical Nigerian federal oversight bodies and offices and would devolve authority (and power) to subfederal entities. To some extent, what Suberu advocates resonates with Paul Heywood's plea for the disaggregation of corruption statistics and awareness: he cautions us against regarding corruption as only a nation-based problem, rather than one that also infects subsidiary regions and operates transnationally.¹⁷

Holding rule-makers and government actors accountable is also essential: accountability is the rubric under which Matthew Taylor and others wish to place the equilibrium-shifting activities that will bring about meaningful anticorruption advances. For Taylor, accountability encompasses oversight and sanctions.

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With respect to transparency – widespread information sharing – Taylor applauds the reforms in Georgia that made governmental functions less opaque, civil-service examinations competitive, university entrance tests truly fair, and interactions with bureaucrats more automated.¹⁸ As Moro states in his essay, making the evidence and procedure of the courts in the Lava Jato corruption cases fully public produced “the popular support necessary for the enforcement of the law.” It also hindered the obstruction of justice by “powerful defendants.”¹⁹

Moro also reveals that oversight – the evaluation of a government’s performance by publics and special auditors – was enhanced in Brazil by greater monitoring of local government functioning and by improved municipal auditing mechanisms. In South Africa, where the state (as Sarah Bracking’s essay discloses) was captured by corrupt entrepreneurs in cahoots with the chief executive, critical oversight was advanced by the public prosecutor (an ombudsperson), a free media, and unfettered political opposition.

Sanctions – the demonstration that societal norms work – included the sacking of vast numbers of official offenders and thousands of presumably corrupt policemen. Sanctions of this kind enhance social trust, their most important contribution to the anticorruption endeavor.

All of these management enhancements led in Georgia to greater institutional effectiveness – enhanced bureaucratic capacity combined with broad engagement by citizens – and, importantly, improved tax-collection abilities. They also included the creation of several anticorruption agencies to prosecute further the war against prevailing (inherited from Soviet times) corrupt practices. In Georgia, however, these “accountability” reforms also led to the kinds of regime domination and “hyper-centralization” that eventually worked against the

completion and sustainability of Georgia’s anticorruption drive. Elsewhere, “accountability” has advanced according to Taylor’s formula without the loss of momentum and the ultimate equilibrium-shift failure (abbreviated or aborted acculturation) that he describes.

Strengthened rule-of-law regimes and improvements to accountability theory and mechanisms depend on active political will. Rarely do effective, sustainable, remedial actions against the scourge of corruption occur without the exercise of consummate political will on the part of a national or regional political chief executive. As Quah’s essay indicates (and other literature supports), successful anticorruption endeavors depend on transformative leaders and civil-society reformers working separately or together to establish or reconfigure existing political cultures. That is what happened in Botswana, Hong Kong, Singapore, and Rwanda. This is what Xi Jinping in China and Crown Prince Mohammed bin Salman in Saudi Arabia may also be trying to do.

Minxin Pei doubts very much that Xi wants or can accomplish such an objective:

Xi’s anticorruption crackdown is less unusual than it appears. What separates it is its ferocity and length, which are largely the result of Xi’s political motivation of conducting a de facto and full-scale purge under the guise of an anticorruption drive.²⁰

If Xi really wanted to reduce Chinese corruption, Pei reminds us, he would empower civil society and the media, two customary watchdogs, and not crack down harshly as he has on nearly all free expression and criticism of the state.

Exercising political will means leadership from the front, not from behind; it means diagnosing societal ills and articulating solutions that, after careful analysis and broad explanation, can be sold to

skeptical publics and opponents. Political will is active, not passive, leadership. Often it is bold and courageous, politically risky. It puts a leader at any level squarely behind public policy choices that may not immediately be popular, may be difficult to accomplish, and may ultimately fail. Exercising political will exposes vulnerabilities. Political will means that a leader sets integrity standards, adheres to them, and attempts by a variety of mostly democratic means to overcome opposition. But what does *integrity*, often positioned as the force opposing corruption, contribute? In his essay, Heywood writes at length about the meaning of integrity and what it contributes to the anticorruption endeavor.

To enunciate a novel policy direction for a state or a region is one thing. But to put the full weight of high public office or to stake the legitimacy of a presidency or premiership on an unproven proposition for societal reconfiguration, and to threaten established interest groups and criminalized elites, constitutes the essence of political will. Additionally, political will encompasses resolve. Expressing political will is never enough, however; no amount of bluster and exhortation can translate a change agenda into an acceptable and functional national program. The goals of an energetic political will are only achieved as a result of deep teaching, committed persuasion, and the effective mobilization of large arrays of peoples behind a clearly defined and intelligible project attractive to whole communities and legions of voters. This is the essence of the anticorruption agenda in polities, contemporary or historical, that have been shifted by leadership action from a deep acceptance of corrupt behavior toward a robust approval of new noncorrupt norms.²¹

In addition to these relatively large-scale attitudinal changes that are fundamental to any anticorruption campaign, now there are a number of ways in which em-

ploying modern technology can assist battles against the corruption scourge.

Alongside committed political will, technological innovations can be effective in tackling grand corruption, but they are best positioned to assist efforts to minimize corruption at the petty level.²² Indeed, in many corrupt settings, the ubiquitous smartphone enables even the least privileged to access rules and regulations and thus to match wits and knowledge, for the first time, with bureaucratic insiders. Needing to bribe for services that are a citizen's by right, not favor, could in this manner become an impost of the past.

Putting nearly all licensing or permitting operations online is the simplest and most direct use of modern technology to moderate or defeat petty corruption. If interactions are completed online via user-friendly interfaces (preferably on a mobile telephone), a client can obtain birth certificates, marriage licenses, and all kinds of documents from what in India is called the permitting Raj without being hit up for bribes or "tea money." In theory, all supplicants seeking a bureaucratic transaction would be treated equally, by an algorithm or a computer. Because none could be favored, no application process could be expedited or slowed down without direct interference with the program. Applicants could also file for a permit using a number, rather than their names, which would mean that it would be even harder to discriminate for or against a particular person or group. This is the method that post-Soviet Georgia employed to end bribery and favoritism in university entrance examinations.

When routine bureaucratic interactions are automated and human oversight is reduced or eliminated, corruption recedes. This new method of limiting and enhancing a state's dealings with its citizens and clients could also be extended to immigration services and customs halls; there, processes of naturalizing citizens or im-

porting goods might be treated with more impartiality by nonhuman-mediated interactions. Advanced, algorithmically driven computer programs can limit the very discretion that has long enabled corrupt practices to flourish.

Extortionate efforts – by hospital clerks to admit an injured person, a principal to permit a pupil to enroll, or a policeman to wave a car with bald tires through a barrier, all for a fee – might also, with some clever technological adaptations, be reduced, if not eliminated, given sufficient political will from above. Petty corruption could be overwhelmed or greatly reduced if available modern technological resources were employed to substitute for face-to-face encounters (especially if they are in user-friendly formats such as smartphone apps).

Handheld devices and webcams can also permit citizens to gather audiovisual evidence of attempts at extortion by officials, by policemen at roadblocks, or by physicians and nurses in government hospitals selling medicines and supplies to patients. If a high- or low-ranking official asks for a bribe, a citizen can surreptitiously record the incident. Indeed, the very act of capturing these illegal but common abuses of authority can empower citizens and change their political consciousness even if the process only rarely leads to punishment.

Even though NGOs and civil society, working on behalf of citizens, do not always know exactly how to translate this sort of documentation into reform, it has helped to make parts of South and Central Asia and sections of sub-Saharan Africa more corruption-free than before. Mobile-telephone services such as Ushahidi (“Testimony”; a mobile data-gathering app used in nine countries) and Frontline SMS give local citizens the ability to track human rights violations and violators, note violent acts in real time, and reveal security breaches. Bribespot.com (which originated in Estonia) allows users to send anon-

ymous texts reporting bribes in eight languages, with compatibility for additional languages and nations coming soon. Ipaidabribe.com is well-used in India.

In future years, governments and civil-society operatives will increasingly utilize handheld devices to empower anticorruption endeavors. (Pakistan is a pioneer already.) As smartphones get smarter and as 4G and 5G (and perhaps one day 6G) wireless networks are extended, those technological advances will become less expensive and more accessible. The hope, therefore, is that their deployment will make it possible to disseminate information about corruption widely and to collect hard data about corruption and corrupt acts almost instantaneously. In Afghanistan, for example, the United States Agency for International Development (USAID) has sponsored an extensive scheme to track and monitor governmental financial transactions via mobile technology in an effort to deter officials from the wildly corrupt dealings that are otherwise common there.

When official data of all kinds are made accessible, astute civil-society actors can also uncover previously unknown corruption trends via data analysis. In Mexico, for example, a think tank examined the rolls of the public educational system and discovered more than 1,400 teachers who had allegedly been born on the same day in a single year. The ghost teachers were then purged from the rolls, depriving officials who had been pocketing their pay of easy money. Similarly, in Nigeria, investigators discovered evidence of serious money laundering by poring over property and company registers. Tax authorities in many countries are able to discover the real owners of more than eighty-five million companies worldwide by searching OpenCorporates, a British-founded web compendium of property registers from more than one hundred nations and political entities. The more data appear online, the more they

can be analyzed to expose – and hopefully to end – corrupt practices. (See the Panama and Paradise Papers, for example.) As Mungiu-Pippidi suggests, civil-society organizations and others can then monitor “how many public contracts go to companies belonging to officials or how many people put their relatives on public payrolls.”²³ Making data sources like these open and universally accessible through public or semipublic entities (such as governments or registers of commerce) always helps.

The use of modern opinion-polling methods can reveal how citizens evaluate local corruption and whether they see progress being made in reducing it. Transparency International’s Global Corruption Barometer Survey performs this function in a number of countries. The Latinobarometro and Afrobarometer instruments both also assess citizens’ views of graft on their continents. The Gilani Research Foundation does the same in Pakistan. More specialized surveys, such as Cyprus’s bribery survey, provide information that assists civil societies, governments, and donors in assessing the extent and varieties of corrupt behavior in a particular political jurisdiction. The international charity Oxfam provides trusted surveys about public services that help deter the proliferation of corrupt practices.

There is no end to the relevant and helpful data that can be accumulated through judicious polling of mobile-telephone subscribers, pedestrians on the street, shoppers in a market, and people gathered around a village water pipe. In one context after another, such data provide abundant evidence of public discontent with the corrupt practices of those who rule over societies and citizens smothered by the sleaze and alarmed by the stench of corruption. The question for civil-society and political reformers in each of those affected nation-states thus quickly becomes how best to transform mass resentment and mass

resignation (or resilience) into anticorruption energy that will bring about meaningful change for the better.²⁴

Most of the anticorruption initiatives discussed in this issue of *Dædalus*, and in the many books and articles previously published by its contributors, focus on the public and political spheres, in which private profiteering from official positions is both illegal and everywhere frowned upon culturally. For a long time, the academic discussion of corruption and anticorruption, where it existed at all, accordingly focused primarily on that public sphere. So did the international lending institutions and most foreign aid donors. More recently, however, both scholars and practitioners have come to realize that private corruption (primarily corporate corruption, but also corruption in quasi-public bodies such as the key athletic federations like FIFA and the International Olympic Committee) is as pernicious and destructive to citizen rights as purely state-based corruption. Impartiality – often honored only in the breach – is important in all of those spheres. Transparency International, in its definition of corruption, rightly refers to abuses of entrusted power rather than abuses only by persons in public positions.

Susan Rose-Ackerman’s essay in this volume seeks to distinguish between behavior that is unproblematically “corrupt” – petty payoffs, massive kickbacks, vote buying – and a host of other situations in which private wealth influences public (and private) choices. “I reject,” she writes,

an expansive notion of corruption that covers all cases in which private wealth affects public choices, either directly or indirectly. That is an impossibly broad definition.²⁵

She also notes that private wealth “distorts the exercise of public power, directing it away from majoritarian preferenc-

es and values.” But, she continues, labeling all such “distortions” as corrupt “sets an idealized standard of purity, implying that virtually all politicians and officials are guilty of corruption.”²⁶

Zephyr Teachout, by contrast, builds a much more expansive and critical argument. Her essay regards the largest multinational global corporate entities – such as Amazon, Google, and Facebook – as inherently monopolistic, and therefore corrupt because of the baleful influence that they and their vast wealth can exert on the actions and policies of nation-states. (Smaller corporations simply do not have the capacity for such corrupting influence.) Teachout argues forcefully for limiting the monopolistic power of those twenty-first-century trusts, at a minimum shielding the body politic from the untrammelled power of such behemoths. Amazon and Apple should be limited, she argues, in their ability to drive market prices lower or unfairly to prioritize search results. Comcast and Monsanto should be broken up. For Teachout, being monopolistic means being corrupt, since distorting public goods is often in the best interest of corporate expansion. “Corporate monopolies are a result,” Teachout explains,

of legal frameworks that enable excessive concentration of private power, limit the freedom to engage in moral action by officers and directors, and create overwhelming incentives to bend public power to selfish ends.... Multinational corporations, at a certain size and with enough power, are built to corrupt.²⁷

At a lesser scale, the acknowledgement of harm from business-to-business corruption, and its early curbing, flowed from Governor Sir Murray MacLehose’s reform efforts in Hong Kong in the 1970s. His pathbreaking Independent Commission Against Corruption (ICAC) was established to rid the then-British colony of graft, to end official and police collu-

sion with Chinese criminal gangs, and to destroy both tender and permit fraud. But MacLehose and his associates also realized that what happened within the corporate sector – within law firms and manufacturing and service enterprises – was equally destructive of the public trust. For those reasons, the ICAC was instructed to investigate both forms of venality equally. In an additional breakthrough innovation by MacLehose, the ICAC was given a mandate to educate businessmen, officials, and schoolchildren about the varieties and dangers of corruption. Quah’s essay develops that theme well. Heywood, in another geographical setting, emphasizes the importance of preventing corruption well before it emerges. Pei reminds us, too, that Xi’s campaign against corruption focuses exclusively on punishment, not on prevention; Xi need not learn from Hong Kong because he has other, not necessarily anticorruption, goals in mind.

It is obvious that multinational companies are also among the biggest bribe payers globally. The U.S. Foreign Corrupt Practices Act; the British, Canadian, Dutch, and French antibribery acts; and the OECD Convention Against Corruption curtail and catch some of this supply-side graft. The Extractive Industries Transparency Initiative, a global initiative to make foreign corporate payments to governments in the mining and petroleum and gas exploitation arenas open to inspection, tries to expose as much influence and concession buying as possible. As Moro’s essay makes clear, joining Teachout’s admonitions:

Companies must therefore do their homework, denouncing requests or demands for bribes, as well as implementing mechanisms of internal control and accountability that make it difficult or impossible to pay or receive them. It is also important for private-sector actors to work collectively so that

companies involved in corrupt practices are identified and isolated from the market and not allowed to assume a preeminent position.²⁸

The contributors to this issue of *Dædalus* do not uniformly embrace all of the above-mentioned frameworks or ingredients of anticorruption success. Indeed there is some spirited disagreement between authors, nearly all of whom are acknowledged and well-published authorities in the study of corruption as a phenomenon, regarding corruption as a social malady, as a weighty drag on development, and as a major contributor to the societal ills suffered by millions of the world's most impoverished peoples. Despite their different approaches to combating corruption, debates about the best way of effecting real improvements in corrupt nations, and concerns that prescribing exact curing remedies is premature, most of our writers consider a number of the factors already discussed in this essay as necessary, if not

sufficient, for the pursuit of an efficacious and responsible anticorruption program. *Robert I. Rotberg*

In addition to agreeing on some basic principles, our authors also suggest imaginative ways of advancing the anticorruption agenda. Rothstein prefers to make “war” on corruption and to let game and strategic military theory guide our efforts. Michael Johnston favors “deep democratization” – involving citizens fully in governing themselves – as the only path to defeating corruption. Mungiu-Pippidi wants international donors to contribute to the anticorruption project by imposing conditionality measures on their clients (such as compelling recipients to reveal the names and amounts of all procurement beneficiaries).

Overall, our authors combine theory and practice in order to offer a multifaceted anticorruption agenda of unparalleled ingenuity and promise that, when realized, could help to provide better social and economic outcomes to the many millions of people who live in deeply corrupt societies.

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ENDNOTES

- ¹ For a discussion of corruption as a collective action problem, see Bo Rothstein, “Fighting Systemic Corruption: The Indirect Strategy,” *Dædalus* 147 (3) (Summer 2018): 35–49.
- ² For a good explanation of what systemic corruption entails, see Sérgio Fernando Moro, “Preventing Systemic Corruption in Brazil,” *Dædalus* 147 (3) (Summer 2018): 157–168.
- ³ Rothstein, “Fighting Systemic Corruption,” 45.
- ⁴ Alina Mungiu-Pippidi, “Seven Steps to Control of Corruption: The Road Map,” *Dædalus* 147 (3) (Summer 2018): 23.
- ⁵ Robert I. Rotberg, *The Corruption Cure: How Citizens and Leaders Can Combat Graft* (Princeton, N.J.: Princeton University Press, 2017), 37.
- ⁶ This is Matthew Taylor's formulation in his essay in this volume. He draws on Bo Rothstein, Alina Mungiu-Pippidi, and Francis Fukuyama, among others. See Matthew Taylor, “Getting

- to Accountability: A Framework for Planning & Implementing Anticorruption Strategies,” *Dædalus* 147 (3) (Summer 2018): 66.
- ⁷ Moro, “Preventing Systemic Corruption in Brazil.”
- ⁸ Robert I. Rotberg, “Roadblocks and Bribes: Zimbabwe is Africa’s Shakedown State,” *Globe and Mail*, October 19, 2017, <https://www.theglobeandmail.com/opinion/roadblocks-and-bribes-zimbabwe-is-africas-shakedown-state/article36657279/>.
- ⁹ Rothstein, “Fighting Systemic Corruption.”
- ¹⁰ Despite its high rating by the CPI and other indexes, Canada still suffers from various kinds of corruption. For the details, see Robert I. Rotberg and David Carment, eds., *Canada’s Corruption: At Home and Abroad* (London: Routledge, 2018). For the Corruption Perceptions Index, see www.transparency.org/.
- ¹¹ This paragraph draws on Rotberg, *The Corruption Cure*, 27 – 28.
- ¹² The phenomenon is well described in Sarah Chayes, *Thieves of State: Why Corruption Threatens Global Security* (New York: W. W. Norton, 2015).
- ¹³ Moro, “Preventing Systemic Corruption in Brazil,” 162 – 163.
- ¹⁴ Susan Rose-Ackerman discusses corruption and electoral contributions trenchantly in her essay in this volume. See Susan Rose-Ackerman, “Corruption & Purity,” *Dædalus* 147 (3) (Summer 2018): 98 – 110.
- ¹⁵ Rotberg, *The Corruption Cure*, 109 – 175.
- ¹⁶ Mungiu-Pippidi, “Seven Steps to Control of Corruption,” 30.
- ¹⁷ Paul M. Heywood, “Combating Corruption in the Twenty-First Century: New Approaches,” *Dædalus* 147 (3) (Summer 2018): 83 – 97.
- ¹⁸ In his contribution to this volume, Michael Johnston is skeptical of transparency as an effective anticorruption strategy. See Michael Johnston, “Reforming Reform: Revising the Anti-corruption Playbook,” *Dædalus* 147 (3) (Summer 2018): 50 – 62.
- ¹⁹ Moro, “Preventing Systemic Corruption in Brazil,” 163.
- ²⁰ Minxin Pei, “How Not to Fight Corruption: Lessons from China,” *Dædalus* 147 (3) (Summer 2018): 225.
- ²¹ Rotberg, *The Corruption Cure*, 45 – 49. Johnston is again skeptical regarding the value of emphasizing political will in combating corruption. See Johnston, “Reforming Reform.”
- ²² Johnston and Mungiu-Pippidi argue against the utility of distinguishing or separating petty from grand corruption. See Johnston, “Reforming Reform;” and Mungiu-Pippidi, “Seven Steps to Control of Corruption.”
- ²³ Mungiu-Pippidi, “Seven Steps to Control of Corruption,” 28.
- ²⁴ This section draws, in part, on Rotberg, *The Corruption Cure*, 272 – 284.
- ²⁵ Rose-Ackerman, “Corruption & Purity,” 103.
- ²⁶ *Ibid.*
- ²⁷ Zephyr Teachout, “The Problem of Monopolies & Corporate Public Corruption,” *Dædalus* 147 (3) (Summer 2018): 112.
- ²⁸ Moro, “Preventing Systemic Corruption in Brazil,” 163.

Seven Steps to Control of Corruption: The Road Map

Alina Mungiu-Pippidi

Abstract: After a comprehensive test of today's anticorruption toolkit, it seems that the few tools that do work are effective only in contexts where domestic agency exists. Therefore, the time has come to draft a comprehensive road map to inform evidence-based anticorruption efforts. This essay recommends that international donors join domestic civil societies in pursuing a common long-term strategy and action plan to build national public integrity and ethical universalism. In other words, this essay proposes that coordination among donors should be added as a specific precondition for improving governance in the WHO's Millennium Development Goals. This essay offers a basic tool for diagnosing the rule governing allocation of public resources in a given country, recommends some fact-based change indicators to follow, and outlines a plan to identify the human agency with a vested interest in changing the status quo. In the end, the essay argues that anticorruption interventions must be designed to empower such agency on the basis of a joint strategy to reduce opportunities for and increase constraints on corruption, and recommends that experts exclude entirely the tools that do not work in a given national context.

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The last two decades of unprecedented anticorruption activity – including the adoption of an international legal framework, the emergence of an anticorruption civil society, the introduction of governance-related aid conditionality, and the rise of a veritable anticorruption industry – have been marred by stagnation in the evolution of good governance, ratings of which have remained flat for most of the countries in the world.

The World Bank's 2017 Control of Corruption aggregate rating showed that twenty-two countries progressed significantly in the past twenty years and twenty-five regressed. Of the countries showing progress on corruption, nineteen were rated as either "free" or "partly free" by Freedom House (a democracy watchdog that measures governance via political rights and civil liberties); only seven were judged "not free."¹ Our governance measures are too new to

allow us to look further into the past; still, it seems that governance change has much in common with climate change: it occurs only slowly, and the role that humans play involuntarily seems always to matter more than what they do with intent.

External aid and its attached conditionality are considered an essential component of efforts to enable developing countries to deliver decent public services on the principle of ethical universalism (in which everyone is treated equally and fairly). However, a panel data set (collected from 110 developing countries that received aid from the European Union and its member states between 2002 and 2014) shows little evolution of fair service delivery in countries receiving conditional aid. Bilateral aid from the largest European donors does not have significant impact on governance in recipient countries, while multilateral financial assistance from EU institutions such as the Office of Development Assistance (which provides aid conditional on good governance) produces only a small improvement in the governance indicators of the net recipients. Dedicated aid to good-governance and corruption initiatives within multilateral aid packages has no sizable effect, whether on public-sector functionality or anticorruption.² Countries like Georgia, Vanuatu, Rwanda, Macedonia, Bhutan, and Uruguay, which have managed to evolve more than one point on a one-to-ten scale from 2002 to 2014, are outliers. In other words, they evolved disproportionately given the EU aid per capita that they received, while countries that received the most aid (such as Turkey, Egypt, and Ukraine) had rather disappointing results.

So how, if at all, can an external actor such as a donor agency influence the *transition of a society from corruption as a governance norm*, wherein public resource distribution is systematically biased in favor of authority holders and those connected with them, *to corruption as an exception*, a state that is

largely independent from private interest and that allocates public resources based on ethical universalism? Can such a process be engineered? How do the current anticorruption tools promoted by the international community perform in delivering this result?

Looking at the governance progress indicators outlined above, one might wonder whether efforts to change the quality of government in other countries are doomed from the outset. The incapacity of international donors to help push any country above the threshold of good governance during the past twenty years of the global crusade against corruption seems over- rather than under-explained. For one, corrupt countries are generally run by corrupt people with little interest in killing their own rents, although they may find it convenient to adopt international treaties or domestic legislation that are nominally dedicated to anticorruption efforts. Furthermore, countries in which informal institutions have long been substituted for formal ones have a tradition of surviving untouched by formal legal changes that may be forced upon them. One popular saying from the post-Soviet world expresses the view that “the inadequacy of the laws is corrected by their non-observance.”³

Explicit attempts of donor countries and international organizations to change governance across borders might appear a novel phenomenon, but are they actually so very different from older endeavors to “modernize” and “civilize” poorer countries and change their domestic institutions to replicate allegedly superior, “universal” ones? Describing similar attempts by the ancient Greeks – and also their rather poor impact – historian Arnaldo Momigliano writes: “The Greeks were seldom in a position to check what natives told them: they did not know the languages. The natives, on the other hand, being bilingual, had a

shrewd idea of what the Greeks wanted to hear and spoke accordingly. This reciprocal position did not make for sincerity and real understanding.”⁴

Many factors speak against the odds of success of international donors’ efforts to change governance practices, especially government-funded ones. One such factor is the incentives facing donor countries themselves: they want first and foremost to care for national companies investing abroad and their business opportunities; reduce immigration from poor countries; and generate jobs for their development industry. Even if donor countries would prefer that poor countries govern better, reduce corruption, and adopt Western values, they also have to play their cards realistically. Thus, donor countries often end up avoiding the root of the problem: when the choice is between their own economic interests and more idealistic commitments to better governance, the former usually wins out.

The first question a policy analyst should ask, therefore, is not *how* to go about altering governance in developing countries, but *whether* the promotion of good governance and anticorruption is worth doing at all, self-serving reasons aside. I have addressed these questions in greater detail elsewhere; this essay assumes a donor has already made the decision to intervene.⁵ The evidence on the basis of which such decisions are made is often poor, but realistically, due to the other policy objectives mentioned above (such as the exigencies of participation in the global economy), international donors will continue to give aid systematically to corrupt countries. As long as one thinks a country is worth granting assistance to, preventing aid money from feeding corruption in the recipient country becomes an obligation to one’s own taxpayers. For the sake of the recipient country, too, ensuring that such mon-

ey is used to do good, rather than actually to funnel more resources into local informal institutions and predatory elites, seems more of an obligation than a choice.

While our knowledge of how to establish a norm of ethical universalism is still far from sufficient, I will outline a road map toward making corruption the exception rather than the rule in recipient countries. To do so, I draw on one of the largest social-science research projects undertaken by the European Union, ANTICORRP, which was conducted between 2013 and 2017 and was dedicated to systematically assessing the impact of public anticorruption tools and the contexts that enable them. I follow the consequences of the evidence to suggest a methodology for the design of an anticorruption strategy for external donors and their counterparts in domestic civil societies.⁶

Many anticorruption policies and programs have been declared successful, but no country has yet achieved control of corruption through the prescriptions attached to international assistance.⁷ To proceed, we must also clarify what constitutes “success” in anticorruption reforms. Success can only mean a consolidated dominant norm of ethical universalism and public integrity. Exceptions, in the form of corrupt acts, will always remain, but if they are numerous enough to be the rule, a country cannot be called an achiever. A successful transformation requires both a dominant norm of public integrity (wherein the majority of acts and public officials are noncorrupt) and the sustainability of that norm across at least two or three electoral cycles.

Quite a few developing countries presently seem to be struggling in a borderline area in which old and new norms confront one another. This is why popular demand for leadership integrity has been loudly proclaimed in headlines from countries such as South Korea, India, Brazil, Bulgaria, and

Romania, but substantially better quality of governance has yet to be achieved there. While the solutions for each and every country will ultimately come from the country itself – and not from some universal toolkit – recent research can contribute to a road map for more evidence-based corruption control.

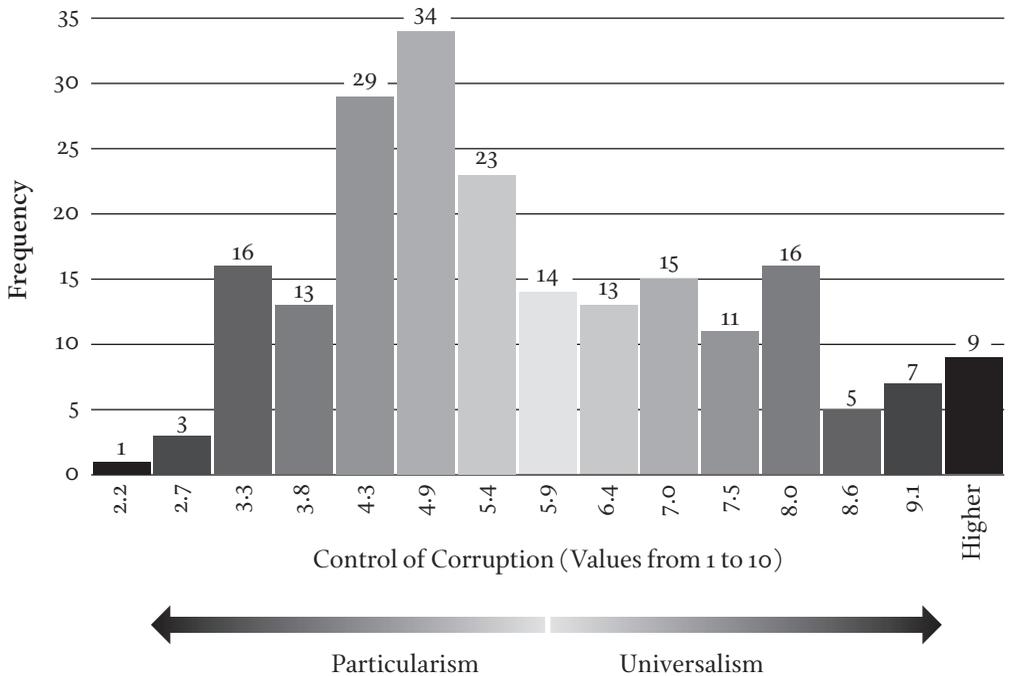
The first step is to understand that with the exception of the developed world, control of corruption has to be built from the ground up, not “restored.” Most anticorruption approaches are built on the concept that public integrity and ethical universalism are already global norms of governance. This is wrong on two counts, and leads to policy failure. First, at the present moment, most countries are more corrupt than noncorrupt. A histogram of corruption control shows that developing countries range between two and six on a one-to-ten scale, with some borderline cases in between (see Figure 1). Countries scoring in the upper third are a minority, so a development agency is more likely than not to be dealing with a situation in which corruption is not only a norm but an institutionalized practice. Development agencies need to understand corruption as a social practice or institution, not just as a sum of individual corrupt acts. Further, presuming that ethical universalism is the default is wrong from a developmental perspective, since even countries in which ethical universalism is the governance norm were not always this way: from sales of offices to class privileges and electoral corruption, the histories of even the cleanest countries show that good governance is the product of evolution, and modernity a long and frequently incomplete endeavor to develop state autonomy in the face of private group interests.

Institutionalized corruption is based on the informal institution of particularism (treating individuals differently according to their status), which is prevalent in col-

lectivistic and status-based societies. Particularism frequently results in patrimonialism (the use of public office for private profit), turning public office into a perpetual source of spoils.⁸ Public corruption thrives on power inequality and the incapacity of the weak to prevent the strong from appropriating the state and spoiling public resources. Particularism encompasses a variety of interpersonal and personal-state transaction types, such as clientelism, bribery, patronage, nepotism, and other favoritisms, all of which imply some degree of patrimonialism when an authority-holder is concerned. Particularism not only defines the relations between a government and its subjects, but also between individuals in a society; it explains why advancement in a given society might be based on status or connections with influential people rather than on merit.

The outcome associated with the prevalence of particularism – a regular pattern of preferential distribution of public goods toward those who hold more power – has been termed “limited-access order” by economists Douglass North, John Wallis, and Barry Weingast; “extractive institutions” by economist Daron Acemoglu and political scientist James Robinson; and “patrimonialism” by political scientist Francis Fukuyama.⁹ Essentially, though, all these categories overlap and all the authors acknowledge that particularism rather than ethical universalism is closer to the state of nature (or the default social organization), and that its opposite, a norm of open and equal access or public integrity, is by no means guaranteed by political evolution and indeed has only ever been achieved in a few cases thus far. The first countries to achieve good control of corruption – among them Britain, the Netherlands, Switzerland, and Prussia – were also the first to modernize and, in Max Weber’s term, to “rationalize.” This implies an evolution from brutal material interests (espoused,

Figure 1
Particularism versus Ethical Universalism:
Distribution of Countries on the Control of Corruption Continuum



Source: The World Bank, Worldwide Governance Indicators, Control of Corruption, <http://info.worldbank.org/governance/wgi/#home> distribution. Distribution recoded 1 – 10 (with Denmark 10). The number of countries for each score is noted on each column.

for instance, by Spanish conquistadors who appropriated the gold and silver of the New World) to a more rationalistic and capitalistic channeling of economic surplus, underpinned by an ideology of personal austerity and achievement. The market and capitalism, despite their obvious limitations, gradually emerged in these cases as the main ways of allocating resources, replacing the previous system of discretionary allocation by means of more or less organized violence. The past century and a half has seen a multitude of attempts around the world to replicate these few advanced cases of Western modernization. However, a reduction in the arbitrariness and power discretion of rulers, as occurred in

the West and some Western Anglo-Saxon colonies, has not taken place in many other countries, regardless of whether said rulers were monopolists or won power through contested elections. Despite adopting most of the formal institutions associated with Western modernity – such as constitutions, political parties, elections, bureaucracies, free markets, and courts – many countries never managed to achieve a similar rationalization of both the state and the broader society.¹⁰ Many modern institutions exist only in form, substituted by informal institutions that are anything but modern. That is why treating corruption as deviation is problematic in developing countries: it leads to investing in norm-enforcing instru-

ments, when the *norm-building* instruments that are in fact needed are quite different. Strangely enough, developed countries display extraordinary resistance to addressing corruption as a development-related rather than moral problem. This is why our Western anticorruption techniques look much like an invasion of the temperance league in a pub on Friday night: a lot of noise with no consequence. Scholars contribute to the inefficacy of interventions by perpetuating theoretical distinctions that are of poor relevance even in the developed world (such as “bureaucratic versus political” or “grand versus petty” corruption), which inform us only of the opportunities that somebody has to be corrupt. As those opportunities simply vary according to one’s station in life (a minister exhorting an energy company for a contract is simply using his grand station in a perfectly similar way to a petty doctor who required a gift to operate or a policeman requiring a bribe not to give a fine), such distinctions are not helpful or conceptually meaningful. In countries where the practice of particularism is dominant, disentangling political from bureaucratic corruption also does not work, since rulers appoint “bureaucrats” on the basis of personal or party allegiance and the two collude in extracting resources. Even distinguishing victims from perpetrators is not easy in a context of institutionalized corruption. In a developing country, an electricity distribution company, for instance, might be heavily indebted to the state but still provide rents (such as well-paid jobs) to people in government and their cronies and eventually contribute funds to their electoral campaigns. For their part, consumers defend themselves by not paying bills and actually stealing massively from the grid, and controllers take moderate bribes to leave the situation as it is. The result is constant electricity shortages and a situation to which everybody (or nearly everybody) contributes, and which has to

be understood and addressed holistically and not artificially separated into types of corruption.

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The second step is diagnosing the norm. If we conceive governance as a set of formal rules and informal practices determining who gets which public resources, we can then place any country on a continuum with full particularism at one end and full ethical universalism at the other. There are two main questions that we have to answer. What is the dominant norm (and practice) for social allocation: merit and work, or status and connections to authority? And how does this compare to the formal norm – such as the United Nations Convention against Corruption (UNCAC), or the country’s own regulation – and to the general degree of modernity in the society? For instance, merit-based advancement in civil service may not work as the default norm, but it may in the broader society, for instance in universities and private businesses. The tools to begin this assessment are the Worldwide Governance Indicator Control of Corruption, an aggregate of all perception scores (Figure 1); and the composite, mostly fact-based Index for Public Integrity that I developed with my team (which is highly correlated with perception indicators). Any available public-opinion poll on governance can complete the picture (one standard measure is the Global Corruption Barometer, which is organized by Transparency International). Simply put, the majority of respondents in countries in the upper tercile of the Control of Corruption indicators feel that no personal ties are needed to access a public service, while those in the lower two-thirds will in all likelihood indicate that personal connections or material inducement are necessary (albeit in different proportions). Within the developed European Union, only in Northern Europe does a majority of citizens believe that the state and markets work impartially. The United States, developed Commonwealth

countries, and Japan round out the top tercile. The next set of countries, around six and seven on the scale, already exhibit far more divided public opinion, showing that the two norms coexist and possibly compete.¹¹ In countries where the norm of particularism is dominant and access is limited, surveys show majorities opining that government only works in the favor of the few; that people are not equal in the eyes of the law; and that connections, not merit, drive success in both the public and private sectors. Bribery often emerges as a substitute for or a complement to a privileged connection; when administration discretion is high, favoritism is the rule of the game, so bribes may be needed to gain access, even for those with some preexisting privilege. A thorough analysis needs to determine whether favoritism is dominant and how material and status-based favoritism relate to one another in order to weigh useful policy answers. Are they complementary, compensatory, or competitive? When the dominant norm is particularistic, collusive practices are widespread, including not only a fusion of interests between appointed and elected office holders and civil servants more generally, but also the capture of law enforcement agencies.

The second step, diagnosis, needs to be completed by fact-based indicators that allow us to trace prevalence and change. Fortunately for the analyst (but unfortunately for everyone else), since corrupt societies are, in Max Weber's words, *status societies*, where wealth is only a vehicle to obtain greater status, we do not need Panama-Papers revelations to see corruption. Systematic corrupt practices are noticeable both directly and through their outcomes: lavish houses of poorly paid officials, great fortunes made of public contracts, and the poor quality of public works. Particularism results in privilege to some (favoritism) and discrimination to others, outcomes that can both be measured.¹²

Table 1 illustrates how these two contexts – corruption as norm and corruption as exception – differ essentially, and shows that different measures must be taken to define, assess, and respond to corruption in either case. An individual is corrupt when engaging in a corrupt act, regardless of whether he or she is a public or private actor. The dominant analytic framework of the literature on corruption is the principal-agent paradigm, wherein agents (for example government officials) are individuals authorized to act on behalf of a principal (for example a government). To diagnose an organization or a country as “corrupt,” we have to establish that corruption is the norm: in other words, that corrupt transactions are prevalent. When such practices are the exception, the corrupt agent is simply a deviant and can be sanctioned by the principal if identified. When such practices are the norm, corruption occurs on an organized scale, extracting resources disproportionately in favor of the most powerful group. Telling the principal from the agent can be quite impossible in these cases due to generalized collusion (the organization is by privileged status groups, patron-client pyramids, or networks of extortion) and fighting corruption means solving social dilemmas and issues around discretionary use of power. Most people operate by conformity, and conformity always works in favor of the status quo: if ethical universalism is already the norm in a society, conformity helps to enforce public integrity; if favoritism and clientelism are the norm, few people will dissent. The difference between corruption as a rule and corruption as a norm shows in observable, measurable phenomena. In contexts with clearer public-private separation, it is more difficult to discover corrupt acts, requiring whistleblowers or some time for a conflict of interest to unfold (as with revolving doors, through which the official collects benefits from his favor by getting a cushy

Table 1
Corruption as Governance Context

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Mungiu-
Pippidi

	Corruption as Exception	Corruption as Norm
Definition	Individual abuses public authority to gain undue private profit.	Social practice in which particularism (as opposed to ethical universalism) informs the majority of government transactions, resulting in widespread favoritism and discrimination.
Visibility	Corruption unobservable; whistleblowing needed.	Corruption is observable as overt behaviors and flawed processes, as well as through outcomes/consequences; monitoring and curbing impunity needed.
Public-Private Separation	Enshrined. Access is permitted via lobby, and exchanges between the sides are consequent in time (revolving doors).	Permeable border, with patrimonialism and conflict of interest ubiquitous. Exchanges between the sides are synchronous (one person belongs to both sides at the same time).
Preferred Observation Level	Micro and qualitative (for example, lobby studies).	Macro (how many bills are driven by special interest, how many contracts awarded by favoritism, how many officials are corrupt, and so on).

job later with a private company). In contexts where patrimonialism is widespread, there is no need for whistleblowers: officials grant state contracts to themselves or their families, use their public car and driver to take their mother-in-law shopping, and so forth – all in publicly observable displays (see Table 1).

Efforts to measure corruption should aim at gauging the prevalence of favoritism, measuring how many transactions are impersonal and by-the-book, and how many are not. Observations for measurement can be drawn from all the transactions that a government agency, sector, or entire state engages in, from regulation to spending. The results of these observations allow us to monitor change over time in a country's capacity to control corruption. Even anecdotal evidence can be a good way to gauge changes to corruption over long periods: twenty years ago, for example, it was customary even in some developed countries for companies bidding for public contracts to consult among themselves;

today this is widely understood to be a collusive practice and has been made illegal in many countries. These indicators signal essential changes of context that we need to trace in developing countries and indeed to use to create our good governance targets. If in a given country it is presently customary to pay a bribe to have a telephone line installed, the target is to make this exceptional.

In my previous work, I have given examples of such indicators of corruption norms, including the particularistic distribution of funds for natural disasters, comparisons of turnout and profit for government-connected companies versus unconnected companies, the changing fortunes of market leaders after elections, and the replacement of the original group of market leaders (those connected to the losing political clique) by another well-defined group of market leaders (those connected with election winners). The data sources for such measurements are the distribution of public contracts, subsidies, tax breaks, gov-

ernment subnational transfers; in short, basically any allocation of public resources, including through legislation (laws are ideal instruments to trade favors for personal profit). If such data exist in a digital format, which is increasingly the case in Eastern Europe, Latin America, and even China, it becomes feasible to monitor, for example, how many public contracts go to companies belonging to officials or how many people put their relatives on public payrolls. Ensuring that data sources like these are made open and universally accessible by public or semipublic entities (such as government and Register of Commerce data) is itself a valid and worthy target for donors. The method works even when data are not digitized: through simple requests for information, as most countries in the world have freedom of information acts. Inaccessibility of public data opens an entire avenue for donor action unto itself: supporting freedom-of-information legislation also supports anticorruption efforts, since lack of transparency and corruption are correlated.

Now that targets have been established, the fourth step is solving the problem of domestic agency. By and large, countries can achieve control of corruption in two ways. The first is surreptitious: policy-makers and politicians change institutions incrementally until open access, free competition, and meritocracy become dominant, even though that may not have been a main collective goal. This has worked for many developed countries in the past. The second method is to make a concerted effort to foster collective agency and investment in anticorruption efforts specifically, eventually leading to the rule of law and control of corruption delivered as public goods. This can occur after sustained anticorruption campaigns in a country where particularism is engrained. Both paths require human agency. In the former, the role of agency is small. Reforms slip by with little

opposition, since they are not perceived as being truly dangerous to anybody's rents, and do not therefore need great heroism to be pushed through; just common sense, professionalism, and a public demand for government performance. The latter scenario, however, requires considerable effort and alignment of both interests favoring change and an ideology of ethical universalism. Identifying the human agency that can deliver the change therefore becomes essential to selecting a well-functioning anticorruption strategy.

Changing governance across borders is a difficult task even under military occupation. Leaving external actors aside, a country's governance can push corruption from norm to exception either through the actions of an enlightened despot (the king of Denmark model beginning in the eighteenth and nineteenth centuries), an enlightened elite (as in the British and American cases), or by an enlightened mass of citizens (the famous "middle class" of political modernization theory). Enlightened despots do appear periodically (the kingdom of Bhutan is the current example of shining governance reforms, after the classic example of Botswana, where the chief of the largest tribe became a democratically elected president). Enlightened elites can perhaps be engineered (this is what George Soros and the Open Society Foundation have tried to do, with one of the results being a great mobilization against elites in less democratic countries), and countries that have them (like Estonia, Georgia, Chile, and Uruguay) have evolved further than their neighbors. Enlightened and organized citizens must reach a critical mass; and regardless how strong a demand for good governance they put up, they cannot do much without an alternative and autonomous elite that is able to take over from the corrupt one. As the recent South Korean case has proved, entrusting power at the top to former elites leads to an immediate return

to former practices; however, in that case, the society had sufficiently evolved in the interval to defend itself.

In principle, donors can work with enlightened despots, attempt to socialize enlightened elites to some extent, and help civil society and “enlightened” citizens. But, in practice, this does not go so well. Donors seem by default to treat *every* corrupt government as though it were run by an enlightened despot, entrusting it with the ownership of anticorruption programs. These, of course, will never take off, not only because they are more often than not the wrong programs, but because implementing them would run counter to the main interests of these principals. Additionally, this approach is not sustainable: pro-Western elites are so scarce these days that checking their anticorruption credentials often becomes problematic. Take the tiny post-Soviet republic of Moldova, which could never afford to punish anyone from the Russian-organized crime syndicates that control part of its economy and even a breakaway province thriving on weapons smuggling. Due to international anticorruption efforts, a prime minister was jailed for eight years for “abuse of function” – actually for failing to prevent cybercrime – despite the fact that he held pro-EU policy goals. The better and less repressive approach – designing anticorruption interventions that include society actors as main stakeholders by default, not just working with governments – is rather exceptional, although such an approach might greatly enhance the effectiveness of aid programs in general.

The remaining option, building a critical mass from bottom up, is not easy either, as it basically means competing with patronage and client networks that have a lot to offer the average citizen. “Incentivizing,” another anticorruption-industry buzzword, is really a practical joke. No anticorruption incentive can compete with a

diamond mine, a country’s oil income, or, indeed, its whole budget, including assistance funds. Despoilers generally control those rents and distribute them wisely to stay in control. Anticorruption is not a win-win game, it is a game played by societies against their despoilers, and when building accountability, not everybody wins. But if in contemporary times countries like Estonia, Uruguay, Costa Rica, Taiwan, Chile, Slovenia, Botswana, and even Georgia are edging over the threshold of good governance through their own agency, we must maintain hope that others can follow.

We see all around the world that demand for good governance and participation in anticorruption protests have increased – just not sufficiently to change governance. Perhaps there was not enough middle-class growth in the last two decades for that: the Pew Research Center found that between 2001 and 2011, nearly seven hundred million people escaped poverty but did not travel far up enough to be labeled middle-class.¹³ Fortunately, the development of smartphones with Internet access provides a great shortcut to fostering individual autonomy and achieving enlightened participation.

Any assistance in increasing the percentage of “enlightened citizens” armed with smartphones is helpful in creating grassroots demand for government transparency; this is why both Internet access and ownership of smartphones are strongly associated with control of corruption.¹⁴ But for our transition strategy we need more: careful stakeholder analysis and coalition building. Brokers of corrupt acts and practitioners of favoritism are not hidden in corrupt societies. Losers are more difficult to find; today’s losers may be tomorrow’s clients. As a ground rule, however, whoever wishes to engage in fair, competitive practices – whether in business or politics – stands to lose in a particularistic society.

He or she faces two options: to desert for a more meritocratic realm (hence the close correlation between corruption and brain drain) or to fight. These are our recruitment grounds. It is essential to understand who is invested in challenging the rules of the game and who is invested in defending them; in other words, who are the status quo losers and winners? Who, among the winners, would stay a winner even if more merit-based competition were allowed? Who among the losers would gain? These are the groups that must come together to empower merit and fair competition.

By now, enough evidence should exist to support a theory of change, which in turn informs our strategy. To understand *when* the status quo will change, we need a theory of *why* it would change, who would push for the desired evolution, and how donors can assist them to steer the country to a virtuous circle. The main theories informing intervention presently are very general: *modernization theory* (the theory that increases in education and economic development bring better governance) and *state modernization* (the belief that building state capacity will also resolve integrity problems). But as there is a very close negative correlation between rule of law and control of corruption, it is the case more often than not that rule of law is absent where corruption is high, so legal approaches to anticorruption (like anticorruption agencies or strong punitive campaigns) can hardly be expected to deliver.¹⁵ The same goes for civil-service capacity building in countries where bureaucracy has never gained its autonomy from rulers. Good governance requires autonomous classes of magistrates and of bureaucrats. These cannot be delivered by capacity-building in the absence of domestic political agency or some major loss of power of ruling elites that could empower bureaucrats.¹⁶ This is why the accountability tools that work in our statistical assessments are those associated with civil-society agency.

Voluntary implementation of accountability tools by interested groups (businesses who lose public tenders, for instance, or journalists seeking an audience) works better than implementation by government, which is always found wanting by donors.

In our recent work, my colleagues and I tested a broad panel of anticorruption tools and good governance policies from the World Bank's Public Accountability Mechanism database. The panel includes nearly all instruments that are either frequently used in practice or specified in the UNCAC: anticorruption agencies, ombudsmen, freedom of information laws (FOIs), immunity protection limitations, conflict of interest legislation, financial disclosures, audit infrastructure improvements, budgetary transparency, party finance restrictions, whistleblower protections, and dedicated legislation.¹⁷ The evidence so far shows that countries that adopt autonomous anticorruption agencies, restrictive party finance legislation, or whistleblower protection acts make no more progress on corruption than countries that do not.¹⁸ The comprehensiveness of anticorruption regulation does not seem to matter either: in fact, the cleanest countries have moderate regulation and excessive regulation is actually associated with more corruption; what matters are the legal arrangements used to generate privileges and rents. In other words, it may well be that a country's specific anticorruption legislation matters far less in ensuring good control of corruption than its overall "regulatory quality," which might result precisely from a long process of controlled rent creation and profiteering.¹⁹

Actually, as I have already argued, the empirical evidence suggests corruption control is best described as an equilibrium between *opportunities* (or resources) for corruption, such as natural resources, unconditional aid, lack of government transparency, administrative discretion, and obstacles to trade, and *constraints* on corruption, whether

legal (an autonomous judiciary and audit) or normative (by the media and civil society).²⁰ Not only is each element highly influential on corruption, but statistical relationships between resources and constraints are highly significant. Examples include the inverse relationship between red tape and the independence of the judiciary and between transparency in any form (fiscal transparency, existence of an FOI, or financial disclosures) and the direct relationship between civil society activism and press freedom. Using this model, my colleagues and I designed an elegant composite index for public integrity for 109 countries based on policy determinants of control of corruption (which should be seen as the starting point of any diagnosis, since it shows at a first glance where the balance between opportunities and constraints goes wrong). While even evidence-based comparative measures can be criticized for ignoring cross-border corrupt behavior (like hiding corrupt income offshore), from a policy perspective, it still makes the most sense to keep national jurisdiction as the main comparison unit. Basically every anticorruption measure that would limit international resources for corruption is in the power of some national government.

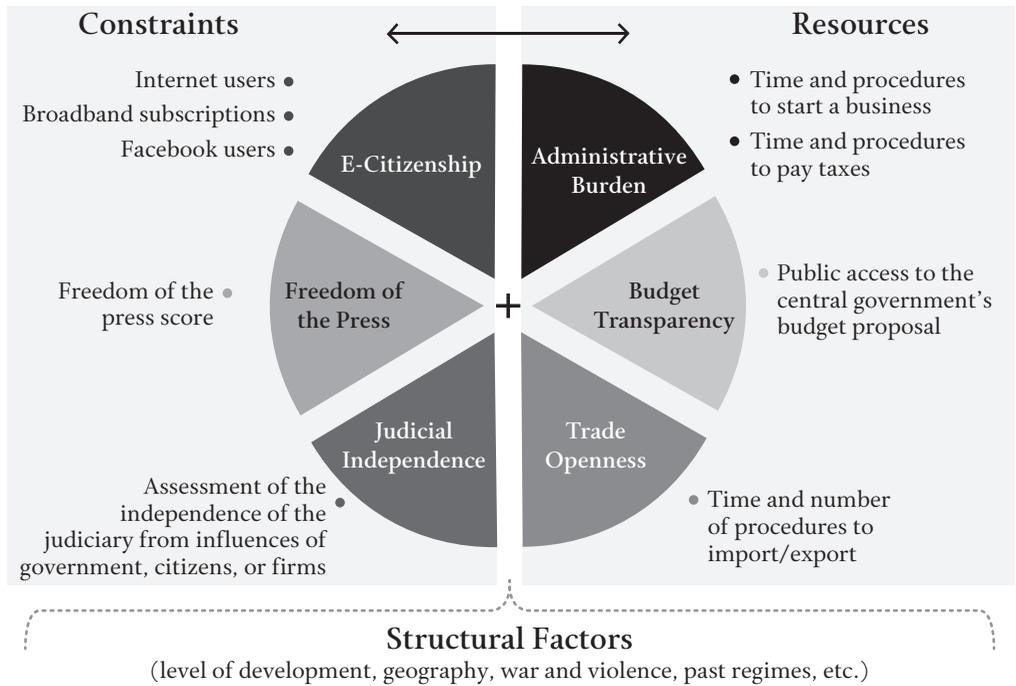
Let's take the well-known example of Tunisia, whose revolution was catalyzed in late 2010 by an unlicensed street vendor who immolated himself to protest against harassment by local police. Corruption – as inequity of social allocation induced and perpetuated by the government – was one of the main causes of protests. Has the fall of President Ben Ali and his cronies made Tunisians happy? No, because there are as many unemployed youths as before, equally lacking in jobs and hope, and the maze of obstructive regulation and rent seekers who profit by it are the same. If we check Tunisia against countries in its region and income group on the Index of Public Integrity, we see that the revolution has only

brought significant progress on press freedom and trade openness. On items such as administrative burden, fiscal transparency, and quality of regulation, the country still has much to do to bring the economy out of the shadows and restore a social contract between society and the state (see Table 2). To get there, policies are needed both to bring the street vendors into the licensed, tax-paying world and to reduce the discretion of policemen.

Examples of specific, successful legislative initiatives exist in the handful of achievers we identified through our measurement index: Uruguay and Georgia, for instance, which have implemented soft formalization policies, tax simplification, and police reform. This is the correct path to follow to control corruption successfully. In a context of generalized law-breaking fostered by unrealistic legislation, selective enforcement becomes inevitable, and then even anticorruption laws can generate new rents and protect existing ones, reproducing rather than changing the rules of the game. One cannot expect isolated anticorruption measures to work unless opportunities and constraints are brought into balance. For instance, one cannot ask Nigeria to create a register for foreign-owned businesses in order to trace beneficial ownership (as is the standard procedure for anticorruption consultants) without formalizing and registering (hopefully electronically) *all* property in Nigeria, a long-standing development goal with important implications for corruption. It is quite important, therefore, that we understand and act on both sides of this balance. Working on just one side only creates more distance between formal and informal institutions, which is already a serious problem in corrupt countries.

The sixth step on the road map is for international donors to get together to implement a strategy to fix this imbalance. In the same way the Millennium Devel-

Figure 2
Control of Corruption as Interaction between Resources and Constraints



Source: Alina Mungiu-Pippidi and Ramin Dadasov, "Measuring Control of Corruption by a New Index of Public Integrity," *European Journal on Criminal Policy and Research* 22 (3) (2016).

Table 2
Tunisia's Public Integrity Framework

	Component Score	World Rank (of 109)	Regional Rank (of 8)	Income Group Rank (of 28)
Judicial Independence	5.34	55	5	11
Administrative Burden	8.77	47	3	8
Trade Openness	7.1	76	3	21
Budget Transparency	6.79	71	2	20
E-Citizenship	5.22	60	5	19
Freedom of the Press	5.16	65	1	14

Note: On the Index of Public Integrity, Tunisia scores 6.40 on a scale of 1 to 10, with 10 as the best, and ranks 59th out of 109 countries. Source: Index of Public Integrity, 2015, <http://www.integrity-index.org>.

opment goals required coordination and multiyear planning, making the majority of transactions clean rather than corrupt requires long-term strategic planning. The goals are not just to reduce corruption with isolated interventions, but to build public integrity in many countries – a clear development goal – and to refrain from punishing deviation. The joint planners of such efforts should begin by sponsoring a diagnostic effort using objective indicators and subsequently launch coordinated efforts to reduce resources and increase constraints. This collaboration-based approach also allows donors to diversify their efforts, as some may have strengths in building civil society, others in market development reforms, and others still in increasing Internet access. Freedom of the press receives insufficient support, and seldom the kind it needs (what media needs in corrupt countries is clean media investment, not training for investigative journalists).

Finally, international donors must set the example. They should publicize what they fund and how they structure the process of aid allocation itself. Those at the apex of the donor-coordination strategy ought to

agree upon aid-related good-governance conditions and enforce them across the board. Aid recipients – including particular governments, subnational government units or agencies, and aid intermediaries – should qualify for receiving aid transfers only if they publish in advance all their calls for tenders and their awards, which would allow monitoring the percentage of transparent and competitive bids out of the total procurement budget. Why not make the full transparency of all recipients the main condition for selection? Such indicators could also be useful to trace evolution (or lack thereof) from one year to another. On top of this, using social accountability more decisively, for instance by involving pro-change local groups in planning and audits of aid projects, would also empower these groups and set an example for how local stakeholders should monitor public spending. These gestures of transparency and inclusiveness toward the societies that donors claim to help – and not just their rulers – would bring real benefits for both sides and enhance the reputation of development aid.

ENDNOTES

- ¹ Count based on the Worldwide Governance Indicator Control of Corruption recorded on a scale of 1 to 10, with the best performer rated 10.
- ² Ramin Dadasov, “European Aid and Governance: Does the Source Matter?” *The European Journal of Development Research* 29 (2) (2017): 269 – 288.
- ³ Cited in Alena V. Ledeneva, *How Russia Really Works: The Informal Practices that Shaped Post-Soviet Politics and Business* (Ithaca, N.Y.: Cornell University Press, 2006).
- ⁴ Arnaldo Momigliano, *Alien Wisdom: The Limits of Hellenization* (Cambridge: Cambridge University Press, 1975), 8.
- ⁵ See Alina Mungiu-Pippidi, *A Quest for Good Governance: How Societies Develop Control of Corruption* (Cambridge: Cambridge University Press, 2015).
- ⁶ See Alina Mungiu-Pippidi and Ramin Dadasov, “When Do Anticorruption Laws Matter? The Evidence on Public Integrity,” *Crime, Law, and Social Change* 68 (4) (2017): 1 – 16. I am grateful to Sweden’s Expert Group for Aid Studies (EBA) for funding this research and for helpful comments on an earlier version of this article. See Alina Mungiu-Pippidi, *Seven Steps to Evidence-Based Anticorruption: A Roadmap* (Stockholm: Swedish Expert Group for Aid Studies, 2017), http://eba.se/wp-content/uploads/2017/11/2017_10_final-webb.pdf.

- ⁷ An ampler discussion of this issue can be found in Robert Klitgaard, *Addressing Corruption Together* (Paris: Organisation for Economic Co-operation and Development, 2015), <https://www.oecd.org/dac/conflict-fragility-resilience/publications/FINAL%20Addressing%20corruption%20together.pdf>.
- ⁸ For the intellectual genealogy of these terms, see Mungiu-Pippidi, *A Quest for Good Governance*, chap. 1 – 2; and Talcott Parsons, *Introduction to Max Weber, The Theory of Social and Economic Organization* (New York: The Free Press, 1997), 80 – 82.
- ⁹ Daron Acemoglu and James A. Robinson, *Why Nations Fail: The Origins of Power, Prosperity, and Poverty* (New York: Crown Business, 2012); Francis Fukuyama, *Political Order and Political Decay: From the Industrial Revolution to the Globalization of Democracy* (New York: Farrar, Straus and Giroux, 2014); and Douglass C. North, John J. Wallis, and Barry Weingast, *Violence and Social Orders: A Conceptual Framework for Interpreting Recorded Human History* (New York: Cambridge University Press, 2009).
- ¹⁰ A fuller argument roughly compatible with mine appears in North, Wallis, and Weingast, *Violence and Social Orders*.
- ¹¹ For evidence, see Mungiu-Pippidi, *A Quest for Good Governance*, chap. 2; and Mungiu-Pippidi and Dadasov, “When Do Anticorruption Laws Matter?”
- ¹² For a more extensive argument, see Robert Rotberg, “Good Governance Means Performance and Results,” *Governance* 27 (3) (2014): 511 – 518; and Alina Mungiu-Pippidi, “For a New Generation of Objective Indicators in Governance and Corruption Studies,” *European Journal on Criminal Policy and Research* 22 (3) (2016): 363 – 367.
- ¹³ Rakesh Kochhar, *A Global Middle Class Is More Promise than Reality* (Washington, D.C.: Pew Research Center, 2015), <http://www.pewglobal.org/2015/07/08/a-global-middle-class-is-more-promise-than-reality/>.
- ¹⁴ See Niklas Kossow and Roberto M. B. Kukutschka, “Civil Society and Online Connectivity: Controlling Corruption on the Net?” *Crime, Law and Social Change* 68 (4) (2017): 1 – 18.
- ¹⁵ Lant Pritchett and Michael Woolcock, “Solutions when the Solution is the Problem: Arraying the Disarray in Development,” *World Development* 32 (2) (2004): 191 – 212.
- ¹⁶ Robert Rotberg makes a similar point in “Good Governance Means Performance and Results.”
- ¹⁷ See Mungiu-Pippidi and Dadasov, “When Do Anticorruption Laws Matter?”
- ¹⁸ *Ibid.*
- ¹⁹ See updated evidence in Mihaly Fazekas, “Red Tape, Bribery and Government Favouritism: Evidence from Europe,” *Crime, Law & Social Change* 68 (4) (2017): 403 – 429.
- ²⁰ For the full models, see Mungiu-Pippidi, *A Quest for Good Governance*, chap. 4; and Alina Mungiu-Pippidi and Ramin Dadasov, “Measuring Control of Corruption by a New Index of Public Integrity,” *European Journal on Criminal Policy and Research* 22 (3) (2016): 415 – 438.

The Problem of Monopolies & Corporate Public Corruption

Zephyr Teachout

Abstract: Defining corruption as the exercise of public power for private, selfish ends, many theorists have argued that individuals can be corrupt even if their actions are legal. This essay explores the knotty question of when legal corporate action is corrupt. It argues that when corporations exercise public power, either through monopolistic control of a market or through campaign contributions and support of governmental actors, they are subject to the same responsibilities of anyone who exercises public power. Therefore, as a theoretical matter, we should call corporations corrupt when they exercise public power selfishly, in a way that puts their own interests over the public's interests. Because they make legal corporate corruption less likely, global anticorruption campaigns should therefore emphasize antimonopoly laws and campaign finance laws.

Should we call legal corporate political behavior corrupt? If so, when?

It is a tricky issue. Of course, in some cases, corporate actors engage in *illegal* bribes of public officials, and we can easily label this behavior corrupt.¹ But more frequently, corporate actors use sophisticated legal means to exercise power over public officials: by making campaign contributions, lobbying, exerting media influence, funding nonprofits, sponsoring think tanks, paying speaking fees, or even cornering the market on key goods and services, creating public dependencies on the corporation. These kinds of behaviors make up what Michael Johnston has termed “influence markets,” which he identifies as the primary mode of corruption in developed democracies.² These behaviors are also explored in depth in the works of sociologist Amitai Etzioni.³ All of these behaviors are not only legal in the United States, but are encouraged and taught as essential strategies in business schools. They also have the tendency to spread. Having built their power within

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the United States or similar legal systems, corporations then use legal tools to exert influence in other countries. Depending on which side of the law they stand on, corporate actors may push to legalize the most powerful of their mechanisms of control, criminalizing the tools used by weaker societal agents, or they may exercise their influence to decriminalize their behaviors in a new market. The question is, which of these behaviors should we call corrupt, and which are merely corrupting?

In 1820 America, it was not illegal for a corporation to give money to a member of Congress in explicit exchange for that congressperson's vote. In 2017 America, because of *Citizens United*, it is not illegal for a corporation to spend millions of dollars to punish a congressperson who voted against its interests. We can certainly agree that the former is corrupt; I think most would accept that the latter is also corrupt. But if legality is not the line between corrupt and noncorrupt corporate political behavior, what is?

I argue that we should use the same test for corporations as we do for public officials, condemning selfish behavior as corrupt when it accompanies the exercise of public power, regardless of whether that public power derives from formal office-holding. Elected officials who exercise public power in the service of private ends are corrupt irrespective of the legality of their behavior. By extension – with understanding that it is not easy to identify what constitutes “public power” or even “selfish behavior” – all selfish exercise of public power is corrupt. The key theoretical point is this: public power, not public office-holding, ought to be our marker for determining who may be guilty of public corruption. Corporate actors are corrupt when they exercise public power in a way that serves selfish ends at the expense of public ends, regardless of whether it is illegal, and regardless of whether they formally hold office.

The descriptive implications of this conclusion are substantial: it means that some of the great drivers of contemporary corruption around the world today are large multinational corporations engaging in legal behavior. The practical implications are also substantial, and flow from the improved description: our anticorruption strategies must include antimonopoly laws, not because antitrust violations are themselves corrupt or because mergers are themselves corrupt, but because corruption is more likely when economic power is centralized. Failure to name legal corporate behavior as public corruption in global anticorruption campaigns to date has led to a focus on passing criminal laws and transparency laws, instead of examining problems of market structure and monopolization with global and domestic impacts. As Lord Acton famously put it: “Power tends to corrupt.” Power is especially likely to corrupt when it is unconstrained by democratic accountability.

This kind of corporate and multinational corruption is a tragedy of design. It flows from our failure to protect markets from concentrated economic power. Corporate monopolies are a result of legal frameworks that enable excessive concentration of private power, limit the freedom to engage in moral action by officers and directors, and create overwhelming incentives to bend public power to selfish ends. Unlike small companies that have limited incentive or capacity to corrupt – because they do not exercise public power – multinational corporations, at a certain size and with enough power, are built to corrupt.

The critical strategic solution to this design flaw is to engage antimonopoly laws in anticorruption efforts. The antimonopoly approach is prophylactic instead of punitive; in this way it resembles elections, another prophylactic anticorruption tool. New antitrust enforcement should not seek to punish corrupt behavior, but to encour-

age structures of power that make corruption less likely. Open markets, free from dominant players, are not only important for a thriving economy and innovation, but for limiting corruption.

This essay proceeds in two sections. The first makes a theoretical argument and shows that a surprising formalism pervades many approaches to understanding public corruption. This formalism appears in two ways: First, discussion of public power often stops with a formal analysis of who holds a particular office, instead of who wields power over that office. Second, even those anticorruption analysts and activists who claim not to tie a definition of corruption to legality tend to use legality as an important marker in separating the corrupt from the noncorrupt. Building on these theoretical points, the second section highlights antimonopoly and campaign contribution laws as critical sets of tools for dealing with this crisis of corruption.

To be clear, I do not make accusations about corrupt behavior by particular modern corporate multinationals. An approach of identifying after-the-fact bad actors is always going to be a weak strategy. Instead, I lay out a theoretical framework for enabling accusations against modern corrupt corporations and a practical road map for deterring future corruption via structural changes.

Aristotle laid out six kinds of government: three ideal forms and three corrupt forms. The rule of one he described as either monarchy or tyranny; the rule of a few as either an aristocracy or an oligarchy; and the rule of the many as either a polity or mob rule. The fundamental difference between the good and corrupted government, according to Aristotle, was the psychological orientation of those who governed: corrupt governments were selfish; ideal governments sought the public good. Explaining the difference between a tyr-

anny and a monarchy, he wrote, “the tyrant looks to his own advantage, the king to that of his subjects.” A tyrant is a king who “pursues his own good”; an oligarchy is an aristocracy that pursues its own good; and mob rule is a publicly governed polity whose constituent parts each pursue their own selfish interests.⁴

This framework, which I have adopted, suggests there are two key features of corruption: the exercise of governing power and selfish intent. The implication of this framework is that private actors engage in public corruption when they wield governing power selfishly.

Within the anticorruption field, there are those who describe corruption in terms of the violation of formal roles and obligations, and those who see corruption in terms of the illegitimate pursuit of private interest at the expense of the public interest.⁵ The former ties itself in knots of positivism. As political scientist Richard Mulgan has recently argued:

By taking existing duties and rules as given, such definitions are too closely tied to a particular institutional context. They do not provide an external standard by which to assess whether the duties or rules themselves prohibit actions that should be regarded as corrupt.⁶

All parties appear to agree that public power is an important feature of public corruption, though this has been given short shrift in some of the literature.⁷ For instance, a recent article appearing in the *UCLA Law Review* observes that most definitions of corruption involve the abuse of public office for private gain. The article continues: “The term ‘public office’ is relatively clear. It includes, among others, those persons whom the electorate has entrusted with power to advance the public interest.”⁸ Accompanying this assertion is a link to a judicial decision about the scope of a bribery statute, making the easy error of conflating statutory law and definitions

of corruption in one area but not in another. If one does not confine oneself to statutes, it is not at all clear that office, instead of power, is the key question.⁹

For much of industrial history, private parties were viewed as corrupt when they exercised public power, regardless of whether they held office.¹⁰ In the 1874 case *Trist v. Child*, an old man hired a lobbyist to help collect a debt from Congress. After the lobbyist succeeded, the old man refused to pay him; in response, the lobbyist sued the man for money owed. The case came before the Supreme Court, which had to decide whether contracts to lobby were legitimate and enforceable in court. The Court concluded that they were not, writing that “If any of the great corporations of the country were to hire adventurers who make market of themselves in this way [for] the promotion of their private interests, the moral sense of every right-minded man would instinctively denounce the *employer and employed* as steeped in corruption.”¹¹ The Court’s language indicates that corporations could themselves be corrupt, not merely a means by which public entities are corrupted.

But over the last forty years of anticorruption efforts, many academics and journalists have treated private companies as corrupt only when engaged in what is sometimes called “private corruption”: namely, accepting internal bribes or kickbacks.¹² Much of the discussion about private entities – big multinational companies like Monsanto, Google, or Siemens – concerns whether we should recognize a category of private-to-private corruption.¹³ To address these concerns, some definitions of corruption focus on “entrusted power” instead of public power. Transparency International, for instance, defines corruption as “the abuse of entrusted power for private gain,” in order to include private-to-private relationships within the definition. But Transparency International does not have

a clear scope of what constitutes entrusted power for purposes of public corruption, nor does it examine whether multinational corporations can be seen as having “entrusted power” because of their enabling statutes. Alternatively, private companies are seen as corrupting when they induce behavior on the part of elected officials, or perhaps when they break existing anticorruption laws. They are not treated as corrupt for their use of legal mechanisms, even when that use is for self-serving ends.

Some modern definitions openly rely on public office, instead of public power, as a central feature of corruption. Political scientist Joseph Nye’s influential definition of corruption begins with a claim about the centrality of formal roles, arguing that corruption is either rule violation or “behavior which deviates from the *formal duties of a public role* because of private-regarding (personal, close family, private clique) pecuniary or state gains.”¹⁴ Several other scholars have placed public office at the center of the definition, but even those who do not privilege the phrase “public office” or “formal duties” often implicitly limit the accusation of public corruption to those with formal public power.¹⁵

How should we approach this question? It is perhaps easiest to divide the possible approaches into a formal approach and a functional approach. The formal approach limits the accusation of public corruption to those who hold an official position. The functional approach looks at whether public power is exercised, regardless of office-holding.

A formal approach leads to peculiar results. Imagine a rich business owner in a small town. He consciously chooses to use his wealth to elect a town council and mayor that will serve his interest and lower his taxes. He is shameless about his desires: he readily announces that he is only interested in himself, and will use whatever means he can to serve himself. A formal

approach would treat the business owner as not corrupt because he is not an elected official. It would not ask how he uses his wealth, whether in fact he has public power, or whether he is being selfish. Instead, it looks merely at his status: since he was neither appointed nor elected, it treats him as someone who might be involved in private corruption (accepting bribes in his business) or someone who might lead to the corruption of public officers, but not someone who might be corrupt in his own right.

On the other hand, a functional analysis would treat this business owner as engaged in public corruption because he is using public power, and using it to serve private ends without regard to the public good. That he may also be corrupting the local government is a secondary question. This business owner is not unlike Aristotle's king (or oligarch), who chooses to rule over others in a way that benefits himself. That he uses the mechanisms of democracy does not change the fundamental combination of his ruling others and his moral orientation.¹⁶

Another thought experiment in formalism also leads to the mangling of language. Imagine a king who has inherited absolute power over his country. He is selfish and cares only for his own interests, not the interests of the public. Because he is worried about revolt, he chooses to install an elected government, but creates laws allowing for only one party on the ballot, and establishes informal mechanisms that ensure that he is the only person who can select who runs for office. He then officially steps down from his position and abolishes the monarchy. But there is no doubt that he controls who gets "elected" and what decisions they make in office. A formal approach would say that only those elected officials can be guilty of public corruption. A functional approach would consider the actual power dynamics, not the form.

As these examples show, a functional analysis is the more natural approach: formalism seems to simplify the concept, but adds a requirement to public power of public office-holding that is hard to justify. Ruling is what creates moral obligations, regardless of how that rule is exercised. The strongest argument against the formal approach is that there is no a priori reason to limit the scope of public corruption to those holding elected, appointed, or inherited office. The selfish interests in a corrupt government *might* be the interests of the people holding formal power in the government, but – critically – they can also be the private interests of someone or something that exercises informal power over the official government from outside it.

The best defense of a formal approach is that it is more administrable and renders corruption easier to measure. But we should not confuse the administrability of criminal and civil laws with the correct definition of a nonlegal term like corruption, just as we should not refuse to call something corrupt because it is difficult to measure. The functional approach would be inappropriate for defining criminal laws of corruption; it would require a fact-finder to make determinations of influence and power in a political society, beyond a reasonable doubt.¹⁷ But we are not rewriting legal definitions, and inadequacy in criminal law does not make the functional approach inadequate in our efforts to locate corruption.

Another possible objection to the functional approach might be that it seems harsh: it subjects private actors who have never run for public office or sought to be appointed to public office to accusations of public corruption and obligations to the public good that they never wanted. But on the individual level, this problem does not exist. Individuals are not required to exercise public power, even when they have the capacity to do so. And most CEOs of most companies, like individuals, simply

have no capacity to exercise public power. They are free to suggest ideas, set up meetings, and occasionally lobby officials, but no one would argue that in so doing they are exercising public power. Success in private business creates no obligation to engage in the public sphere in a selfish way. Moreover, inasmuch as those with inherited public power never chose their position, we do not soften the blow of corruption accusations by arguing that kings cannot be guilty of misusing powers they did not seek. They may always abdicate. However, for corporate officers and directors of enormous companies that can exercise governing power, this harshness *does* expose a fundamental problem with our current antimonopoly laws by creating two obligations that conflict with each other.

Using the functionalist approach, we should shift from an analysis of office-holding to an analysis of who holds “governing power.” Governing power exists when a company, person, or institution has the capacity to make choices that govern the lives of others. A juror has governing power over the defendant. A magnate has governing power over his town when he uses his ability to elect or defeat candidates who then exercise formal power. Governance is often defined by reference to a combination of decision-making and the implementation of those decisions. Political scientist Stephen Bell’s popular definition of governance argues that it is “the use of institutions, structures of authority and even collaboration to allocate resources and coordinate or control activity in society or the economy.”¹⁸ The lines are by no means clear; and there is not space here to explore in full the difficult questions of what is and is not governing power.

More important, the job of anticorruption activists is largely not to identify instances of normative failure, but to identify the syndrome, and then push for the rules that make the syndrome less likely.

We need not spend much time debating the particulars of who or what company is corrupt, so long as we agree that there is a broad set of powerful companies that pursue selfish interests while exercising public power.

By way of analogy, consider a national campaign against alcoholism. One way to deal with alcoholism is to try to identify everyone who is alcoholic – engaging in extensive studies to determine who might be dependent on alcohol and who is merely drinking a lot – in order to provide individualized resources to those who need them. In that approach, the question of who makes the judgment about particular individuals, and by what criteria they are judged, is critical. But another approach might be to use countrywide surveys to identify that there is problem of alcoholism, and then suggest countrywide solutions that would reduce the levels of addiction overall and the likelihood of future addiction. In the second approach, we spend little energy parsing the alcoholic from the nonalcoholic, and most of our energy is focused on prophylactic rules.¹⁹

Using this syndrome approach, undoubtedly there are several big multinationals engaged in public corruption. We need not have a consensus around individual actors’ corruption in order to agree that there is endemic corruption. Two analysts might disagree over whether Siemens or Amazon has more governing power, but they can certainly agree that some large multinational corporations engage in the selfish use of public power, and would likely include both Amazon and Siemens in that category.

For instance, I can argue that Google’s exercise of public power is corrupt because it does so in pursuit of its own selfish ends, regardless of the impact on the public good. As evidence to support my argument, I could point out that, as of 2017, Google is the largest lobbyist in the Unit-

ed States. Google has been implementing a successful political strategy to embed its software in public schools (both in order to get its tools adopted and in order to collect data).²⁰ Google is a major funder of think tanks and has exercised its funding power to shape policy, supporting scholars who support its own political ends. In short, an essential, nonaccidental part of Google's business strategy is to shape public policy in a way that serves its own narrow interests. As with the rich businessman controlling the small town described above, I argue that a functional analysis would treat Google as corrupt. However, one need not agree with my particular argument about Google in order to agree that the structure of power in our society makes it likely that powerful companies like Google – if not Google itself – will use public power for private ends.

The legality of the behavior is not decisive in determining either whether there is governing power or whether it is self-ish. Google's practices as described here are entirely legal under U.S. law. Lobbying is legal, funding think tanks is legal, building a political strategy to shape public education is legal, and supporting academics is legal. Moreover, these behaviors *should* be legal. However, the legality or illegality of a behavior is not a particularly useful distinction in determining whether something is corrupt. As political scientist Dennis Thompson has argued, "Connections that are proximate and explicit, elements required to show bribery, are not necessarily any more corrupt than connections that are indirect and implicit. The former may be more detectable, but are not necessarily the more deliberate or damaging form of corruption."²¹

Instead, there are many possible relationships between the legality of a behavior and its corruptness. First, it is possible that there is no relationship between illegality and

corruption. The second possibility is that illegality separates corrupt from noncorrupt behavior. The third possibility is that illegal activity defines the heart of corruption, that which is easiest to define and which we should most readily condemn, but some legal activity is also corrupt, if less intensely so. The fourth possibility is that there is often a relationship between illegality and corruption, but that such correlation does not help us decide in any particular instance whether an action is corrupt or not. Corruption encompasses a great deal of legal behavior; only a small subset of corrupt behavior has been criminalized. Moreover, noncorrupt behavior can be criminalized and called "corrupt" by the state.

The final option – a correlative relationship but not sufficiently strong to make presumptions – is the best way to understand the connection between corruption and legality. While the overlap between illegality and corruption exists, and may not be wholly arbitrary, it approaches arbitrariness because the reasons for not criminalizing behavior are so varied and historically and culturally dependent. Unless one is a positivist (believing law defines morality), there is no a priori reason to assume a strong relationship between that which has been criminalized and that which is corrupt. In fact, given that power tends to protect itself, in most polities we should often start with the assumption that the most corrupt acts are shielded from criminal liability by those in power. Those in power, be they judges or lawmakers, may have selfish reasons to protect corrupt behavior and criminalize noncorrupt behavior. World history is littered with regimes that do not criminalize corrupt behavior because those in power are engaged in it. But even in a perfectly functioning democracy, where an engaged public would have criminalized corrupt behavior, there are many reasons for using other tools than criminal law to deter corruption.

The reasons for criminalizing some behavior and not others is often unrelated to the morality of the action or the degree of public condemnation. A democratic society could decide that criminal law is not a particularly effective mechanism for deterring corruption. In the United States, bribery of members of Congress was not illegal at the federal level until 1853. Before then, everyone thought that paying a congressperson in exchange for changing a vote was corrupt; they simply did not use criminal law as the tool for deterring such corruption. Other considerations, like the desire to protect certain forms of expression, could lead to the legalization of corrupt behavior. For instance, under existing U.S. law, a senator who accepts a personal gift of \$15 with the understanding that it will influence his or her vote is committing federal bribery. No explicit exchange is needed. However, if the same senator accepts a campaign contribution of \$5,000, knowing it represents the purchase of the exercise of one hundred votes, that does not violate federal bribery law in the absence of an explicit contract or agreement indicating the senator's intent.²² There are reasons, both historical and protective of political expression, that make the former a crime and the latter not. But those reasons tell us nothing about the corruptness of the action. The fact that the latter is not a crime is not evidence that it is not corrupt, or that it is somehow less corrupt.

As of 2016, it is legal under federal law in the United States for someone to pay tens of thousands of dollars to a state governor in exchange for the governor, using the official title of the office, setting up meetings and making introductions to other officials and business executives. The Supreme Court struck down a law criminalizing this behavior because of free speech and due process concerns. Nothing in the decision suggested that the Court thought that the behavior was not corrupt.²³ In the same vein, lobbying, which was criminal

behavior for one-third of American history, has achieved protected legal status because laws against lobbying were struck down as violative of the First Amendment.²⁴ This is undoubtedly a good thing. But the fact that criminalizing a behavior would threaten free speech is hardly sufficient to mean that no instances of that behavior are exhibitions of corruption.

In sum, criminality and corruption may have a substantial overlap in certain developed democracies, but that overlap does not tell us much about the corruptness of any particular act, or whether most corrupt acts are crimes.

You might argue that I have created a straw man. It is the rare definition of corruption that openly relies on criminal law as a starting point for determining whether corruption exists. Definitions are far more likely to refer to "abuse of public power for private ends," or "norm violation in a self-serving way by those in public power." Even Joseph Nye, whose definition is often characterized as requiring illegality, recognizes norm violation, apart from illegality, within the category of corruption. However, among the scholars and commentators who *theoretically* acknowledge that much corrupt behavior is legal, many still exhibit an assumption that legality is a good marker of corruption. Empirical studies and economic models of corruption often start with criminality.²⁵ Transparency International starts with the assumption that most corruption is illegal.²⁶ Many comparative studies rely on criminality directly or indirectly.

For instance, in Susan Rose-Ackerman's landmark book *Corruption and Government: Causes, Consequences, and Reform*, she acknowledges that legal corruption is important, but states that because her work is comparative, she will only look at those instances in which laws were broken.²⁷ She further argues that it "may be rhetorically valuable" to call legal behavior corruption,

but that it does not “further the analytical” or “policy exercise of understanding the landscape and proposing reforms.”²⁸ This seems to get the analytical and policy project upside down: it privileges those with the power to make the law with the power to define corruption.²⁹ Rose-Ackerman’s recent work has been more likely to recognize legal behavior as a significant problem, but I use this example because it is typical of the simultaneous acceptance and rejection of legal corruption.³⁰

Once the anticorruption community accepts that neither office-holding nor legality is a definitive marker of the existence of public corruption, it becomes free to explore corruption as it actually exists in modern society.

In the last thirty years, the entire machinery of modern multinational corporations has developed, through law and culture, to embrace the pursuit of public power as an essential business function. The deep design of a large multinational corporation is to build power to gain control over local governments and international regimes in which it operates so that it can advance policies that create value for the corporation.³¹ Large multinational corporations routinely exercise public power, and do so guided by private interests above public ones. The intent/orientation of large corporations is easier to divine than the intent of most individuals or organizations. When there is a conflict between public and private interests, the enabling statutes of a corporation require an orientation toward a limited set of stakeholders.

One might point out that corporate entities need not seek short-term profits. As the U.S. Supreme Court recently reaffirmed: “Modern corporate law does not require for-profit corporations to pursue profit at the expense of everything else, and many do not.”³² The myth that corporations are required to maximize share-

holder value is just that: a myth, and one that is largely pushed by activist hedge fund managers seeking to pressure corporations to produce short-term profits.³³

However, corporations are not free to pursue the public good when doing so conflicts with the long-term sustainability of the corporation. Under state law, directors and officers of a corporation have a duty of care and of loyalty to the corporation. That duty does not flow merely to shareholders, but to all the stakeholders in a corporation. At a basic, ethical level, these laws create an obligation to maximize value – arguably long-term, sustainable value – for the corporation. It is rare that a lawsuit succeeds on the grounds that directors and officers violated these obligations, but that does not mean that the obligation does not exist. Instead, the laws, designed to ensure that directors and officers do not treat the corporation as their own vehicle, also ensure that the public good cannot justify decisions that directly hurt stakeholders.

In many instances, corporate stakeholder ends will either support the public interest or at least be consistent with the public interest. In these instances, there is no corruption problem. Under other circumstances, a CEO may have some discretion due to conflicting visions of long-term sustainability: this discretionary space is where corporate social responsibility (CSR; a form of corporate self-regulation) is likely to be most powerful. In the overwhelming majority of other instances, the corporation will not exercise public power. In these cases also, there is no corruption problem. For the millions of small or medium-sized corporations, their private obligations will not conflict with public obligations, because such corporations simply do not have the power to shape public policy on taxes, trade, antimonopoly, or contracting: they will face no moral dilemma. The local pizza shop has no raft of lobbyists, and if the owner makes a political donation, it will be \$30 or \$300, not

a \$300,000 independent expenditure. The vast majority of companies never engage a lobbying firm, let alone build all the tentacles of public-policy-bending machinery. Some company owners may be wonderful and deeply invested in their community, others greedy and self-centered, but as a structural matter, these companies do not pose a public corruption threat.

However, for large corporations that invest heavily in politics, there will be frequent episodes in which the obligations to long-term profitability and to the public interest directly conflict. Four of the most common conflicts involve tax laws, trade laws, antimonopoly laws, and contracts with the government. Big corporations will almost always have an interest in lowering their tax burden, improving their position in global trade, decreasing antimonopoly enforcement, and increasing opportunities to win government contracts. Occasionally these interests will align with those of the public, but frequently they will not. It is indefensible – to all the stakeholders in the corporation – not to be engaged in politics and not to build public power that can be used to benefit the corporation in terms of taxes, trade, antimonopoly, and government contracts. A CEO of Apple that did not have a public relations firm would be fired by its board of directors.

Imagine a CEO of a modern multinational corporation with \$100 million to invest. She can choose to invest the money in decreasing the cost of producing the product, or she can invest the money in changing the laws to decrease the corporate tax rate. The first involves changing the production line, switching some materials, and a slight product innovation; the second involves a combination of campaign contributions, direct lobbying, media strategy, and coauthored white papers. Most estimates suggest the first strategy provides a 5 percent return on investment, while the second strategy provides a 50 percent return on investment.

The first strategy does not hurt the public at large; the second strategy decreases essential tax revenue for schools. The first strategy involves no corruption. The second strategy is corrupt. We would expect the CEO to engage in the second strategy. The selfish exercise of public power – public corruption – is an essential part of the job.

How can we change that behavior? How can we fight the threat of rampant legal public corruption by large multinationals? Some analysts, like Ben Heinemann Jr., argue that the discretion afforded directors and officers is far greater than that which they exercise, and that corporate leaders can, consistent with law and culture, pursue the public good. Heinemann's efforts are important, but cannot address the problem posed by a corporation like Apple that wants to reduce its tax burden through lobbying and campaign contributions. Some might argue for a fundamental overhaul in corporate law, explicitly requiring officers and directors to serve the public good. And the rise of new corporations operating with clear public obligations might create positive impacts at the margins, but the side effects of fundamentally restructuring the corporate form would be far from benign. Moreover, this argument is antidemocratic, and essentially an argument for aristocratic/oligarchic rule: it accepts that multinationals play a governing role, and merely requests that they do so with a public orientation.

Instead, our anticorruption efforts should focus on the precise point at which public corruption comes into play: when corporations come to exercise public power. Corporate public corruption is most likely when the industry itself is very large and heavily concentrated; when there are cross-industry interests in bending public power; or when a single corporation has become essential to a polity, or “too big to fail.”

In other words, we should focus public policy on the problem of corporations ex-

exercising public power – which only happens at a certain scale and degree of power – and not the problems of corporations being selfish: let them be selfish, but do not let them govern.

In the United States, there is a long tradition of resisting the corrupting tendencies of concentrated power through anti-monopoly laws. These laws – at the center of which is the Sherman Antitrust Act of 1890 – were not designed to punish corrupt behavior, but to make corruption less likely. They were designed to prevent corporate directors and officers from facing the point at which their public and corporate obligations clashed. They were designed to ensure that private parties did not gain unaccountable public power. As Justice William O. Douglas explained in his dissent in the 1948 Supreme Court case *U.S. v. Columbia Steel Co.*, the traditional philosophy of American antitrust law is that

all power tends to develop into a government in itself. Power that controls the economy . . . should be scattered into many hands so that the fortunes of the people will not be dependent on the whim or caprice, the political prejudices, the emotional stability of a few self-appointed men.

Drawing on that tradition, we should embrace antimonopoly law as an essential tool for fighting local and global corruption.

The first target might be highly concentrated industries. Profits are higher in concentrated industries, creating more cash flow for investment in politics. (It is no accident that pharmaceuticals, an industry that explicitly relies on monopolies, has among the highest profits and the greatest political investments.) Moreover, it is simpler and cheaper to organize a group consensus when the potential members are few. Fewer actors can more easily make joint strategic decisions about what to demand from government and create a shared, consistent message when lobbying and in meet-

ings. With fewer actors, the costs of identifying shared needs, of coordinating timing, and of identifying and punishing free-riders are all reduced. In monopolistic or oligopolistic industries, it is easier to share fixed costs, like writing legislation, identifying targeted politicians, and producing effective messaging. The concentrated industry therefore can more economically lobby for shared goals, including decreasing taxes for the industry, increasing subsidies for the industry, decreasing regulations, and creating public insurance for the industry. An essential part of our anticorruption strategy, then, must be decreasing concentration. That means looking at industries that are dominated by few firms, such as online advertising or online retail.

Anticorruption reformers should also focus on corporations that have grown so large that they represent a significant fraction of the economy. When the size of a corporation relative to the GDP is significant – like 2 percent of GDP – democratic choices become constrained by the self-interest of the individual corporation. Even in the absence of resources devoted to purchasing political influence, the company with a large relative size will have public power. Its sheer size makes it incumbent upon legislators to design laws that will at minimum ensure the stability of the company. If Lockheed goes under and lays off all of its employees, that has an impact on the entire economy. Even without lobbying, therefore, Lockheed can make demands of government based on the threat of its own failure. Companies that are large relative to the size of a country's GDP can control politics by threatening to collapse or leave if their demands are not met.

In concrete terms, global anticorruption should support free and open markets, with decentralized economic actors. We should support antitrust efforts that put barriers in the way of companies' monopolistic behavior, such as the European

Union's efforts against Google; support antitrust regimes that lead to breaking up heavily concentrated industries and stopping mergers; and support campaign finance regimes that make corporate influence on elections more difficult. The goal is to encourage an approach toward power that recalls Justice Louis Brandeis: concentrated private power is corrupt and corrupts, and therefore should not be allowed.

The most useful antimonopoly, anticorruption strategies will differ in particular contexts; but as the exercise of power by multinationals continues to grow, there are a handful of urgent approaches:

- Applying neutrality principles to platforms like Google and Facebook, and not allowing vertical integration: search services and advertising must be broken up. Amazon and Apple must be limited in their ability to discriminate in price or search, and to use pay-to-play models in their search. The massive public power and control wielded by these platforms depend on their ability to leverage their power in one area to make profits in another. This approach includes condemning countries that refuse to limit platform dominance and power.
- Supporting legal regimes that separate distribution from content in cable and wireless companies, requiring the breakup of Comcast, for instance. Condemning countries that refuse to separate the two.
- Urging countries to break up big banks, both in terms of size and function.
- Supporting the breakup of the monopolies of companies like Monsanto, allowing for competition from farmers; opposing the Monsanto-Bayer merger; supporting countries that ban the ownership of seeds and chemicals.
- Encouraging global trade agreements to disfavor monopolistic practices.
- Condemning countries that allow corporate spending in elections.

None of these principles is simple to implement. There will necessarily be a high degree of over- and under-inclusiveness in any rule. There is no magic number representing company size within a country, or across countries, and no magic structural relationship that will avoid these harms. This, of course, is true for most laws: even for something seemingly more straightforward like traffic law, there is no magic number at which the speed limit best accommodates the principle of reducing unnecessary deaths. But when it comes to governance and rules of governance, there is always special difficulty in defining the rules of the game, because the rules of engagement create the outcome, including the outcome of what the rules of engagement should be. However, the difficulty in designing rules should not be a deterrence to trying. The underlying argument here is similar to that of the mid-twentieth-century Chicago school of economics. Our visions of human nature differ: I believe people are complicated and can be public-orientated, that we are not solely or even primarily *homo economicus*. And we use different language. But these economists from Chicago saw the threat of corruption of large corporations wielding public power. They were worried about a future of "rent-seeking," as they called it, shifting public policy as a strategy for increasing profits. In "The Theory of Economic Regulation," George Stigler famously wrote that "regulation is acquired by the industry and is designed and operated primarily for its benefit."³⁴

Stigler, Gary Becker, Richard Posner, and others argued that the size of government should shrink to prevent corruption, because a smaller government with weaker central governing powers would create less incentive for private actors to seek public power. They argued that rent-seeking would be more likely in highly regulated industries because the existence of regu-

lation and differentiation is what inspired corporate political involvement.

However, they did not push for an aggressive antimonopoly strategy. Instead, they pushed to dismantle antimonopoly laws. Why? They made two basic theoretical mistakes in their description of politics. First, they imagined a limited set of policies that might affect a company and, second, they presumed an upper limit of the value that companies could extract from governments. Judge Posner argued that once a company becomes a monopolist, it has “less incentive to expend resources on obtaining the aid of government in fending off competitors” than one in a highly competitive industry.³⁵ Posner imagines that the would-be monopolist faces a single rent (monopoly) that, once secured, sates his interest, and operates as a ceiling of all possible rents. This is clearly false: experience shows that big companies, having invested in securing a foothold in power, will have already paid much of the fixed cost of building the machinery to exercise public power, and will be more imaginative (and efficient) in using it to secure more benefits of different kinds. This logical flaw also shows up in the work of Gary Becker. In his classic 1983 paper modeling rent-seeking, Becker describes an upper limit on what a company will seek from the government: “The total amount raised from taxes, including hidden taxes like inflation, equals the total amount available for subsidies, including hidden subsidies like restrictions on entry into an industry.”³⁶ However, the creative rent-seeker, like the entrepreneur in any area, will not look at present flows to determine potential flows, but will look at possible flows given political limitations. There is no theoretical constraint on the potential size of the subsidy. The potential value of the subsidy is not defined by existing taxes. More taxes can be levied: the existing population of the country does not define it, because levies (direct and indirect)

can be brought to bear on other countries’ populations. As a theoretical matter, then, the upper limit of a subsidy from a government is the maximum revenue the government can generate through its power. (As a practical matter, the probabilities approach zero as the subsidy approaches the maximum revenue.) This is not a small point. There are plenty of real-world examples in which companies exercise public power to secure benefits despite the absence of existing revenue. The bailout of the financial institutions is one example; the insurance mandate sought by insurance companies is another. And at a smaller scale, laws that require schools to teach technology classes are, from the perspectives of certain technology companies, rent-seeking laws: they are not grounded in existing revenue but rely on school boards to create it. Deficit spending is not limited by current tax revenues. And one can seek rents through the manipulation of monetary policy in a way that is not limited by existing revenues. In other words, the total potential benefits are bounded by the total potential (not actual) governmental revenue, including debts. The fixed upper limit model was essential to the argument that that concentration in industries posed no corruption threat.

Anticorruption crusaders have for decades asked companies to join them in fighting corruption on a global level. Some of these efforts have doubtlessly produced public good. However, corporate social responsibility is bound to be insufficient to address the threat of corruption that flows from those companies themselves. Even the most aggressive corporate social responsibility standards do not exhort companies unilaterally to become less politically powerful. Even if they did, it is unlikely that such an exhortation would work: it is hard to imagine Microsoft choosing not to merge with LinkedIn because of internal CSR policies.

Corporate public corruption flows from a tragic tension: between directors' or officers' obligation to the corporation's health, and their ability to increase profitability by increasing corporate power. There is ample evidence that massive corporations, even those perceived as leaders in CSR, invest heavily in public relations to reduce their tax burden. They do not bribe, but they extract wealth from the public through tax cuts; on a net level, they add more corruption than they reduce.

One approach locates the institutional flaw in corporate law and corporate obligations, arguing that officers and directors should be ethically free to pursue the public good even when it directly conflicts with corporate goals. In the Aristotelian framework, one might call this the aristocratic approach: the goal is to free corporate CEOs to be aristocrats instead of oligarchs. While I laud these efforts, I am troubled by the vision they present: unaccountable corporate

actors independently choosing that which is best for the country, and quite possibly the world. Moreover, systems of aristocracy are notoriously weak, and tend toward corruption themselves. Freedom plus exhortation does not always mean virtue. The occasional multinational will resist the temptation to reduce its own taxes or deregulate its industry, but that is hardly a prospect to rely on. As Madison famously wrote in *Federalist Paper* No. 51: "If angels were to govern men, neither external nor internal controls on government would be necessary."

The problem is not with the existence of the corporation, or with corporate law. More free and open markets would lead to less corruption. The problem is with concentrated power: a handful of actors who are *sui generis*; so large and powerful they can bend public power. The modern anti-corruption movement chooses not to address these large actors, using formalism or legalism as an excuse, at all of our peril.

ENDNOTES

¹ As when Siemens spent millions of dollars paying executives to win contracts at a state-owned utility in Israel. "Siemens to Pay to Settle Bribery Case," Reuters, May 26, 2016, <http://www.reuters.com/article/israel-siemens/siemens-to-pay-israel-43-mln-to-settle-bribery-case-israel-idUSL5N17Z2N6>.

² For example, see Michael Johnston, *Syndromes of Corruption: Wealth, Power, and Democracy* (Cambridge: Cambridge University Press, 2005), 60–88.

³ For example, see Amitai Etzioni, *Capital Corruption: The New Attack on American Democracy* (New Brunswick, N.J.: Transaction Books, 1988).

⁴ Aristotle *Nicomachean Ethics* 8.1.

⁵ For some discussion of the debate, see Michael Johnston, "Public Officials, Private Interests, and Sustainable Democracy: When Politics and Corruption Meet," in *Corruption and the Global Economy*, ed. K. A. Elliot (Washington, D.C.: Institute for International Economics, 1997), 61–82; Dennis F. Thompson, *Ethics in Congress: From Individual to Institutional Corruption* (Washington, D.C.: Brookings Institution Press, 1995), 7 [corruption ordinarily involves the "improper use of public office for private purposes"]; Michael Johnston, "The Political Consequences of Corruption: A Reassessment," *Comparative Politics* 18 (4) (1986): 459, 460 [corruption is "the abuse of public roles and resources for private benefit"]; and Joseph J. Senturia, "Corruption, Political," in *Encyclopaedia of the Social Sciences*, ed. Erwin R. A. Seligman and Alvin Johnson (New York: Macmillan, 1931), 448 [defining corruption as "the misuse of public power for one's own personal profit"]. For an argument that morality is essential to understanding corruption, see Laura S. Underkuffler, *Captured by Evil: The Idea of Corruption in Law* (New Haven, Conn.: Yale University Press, 2013).

- ⁶ Richard Mulgan, “Aristotle on Legality and Corruption,” in *Corruption: Expanding the Focus*, ed. Manuhua Barcham, Barry Hindess, and Peter Larmour (Canberra, Australia: ANU Press, 2012), 26.
- ⁷ The idea that private actors might be part of a corrupt system has received attention. Michael Johnston, for instance, has argued that in societies with close ties between political elites and companies, the lines between public and private are blurred, which implicates corruption because corruption depends upon the idea of clearer lines between the spheres. I see this essay as supporting Johnston’s arguments about influence markets and elite cartels.
- ⁸ Sung Hui Kim, “Insider Trading as Private Corruption,” *UCLA Law Review* 61 (2014): 928 – 952.
- ⁹ To be clear, the problem of private actors corrupting public actors via legal means is central to much of the literature, but I make a slightly different point.
- ¹⁰ See, for example, Melvin Urofsky’s description of Louis Brandeis’s battle with Boston Elevated. Melvin I. Urofsky, *Louis D. Brandeis: A Life* (New York: Schocken, 2012), 135 – 139.
- ¹¹ *Trist v. Child*, 88 U.S. 21 Wall. 441 441 (1874). Emphasis added.
- ¹² Much of the discussion about private entities – including big multinational companies like Monsanto, Google, or Siemens – concerns whether they are engaged in what is sometimes called private corruption, and whether we should even recognize the category of private corruption. For instance, on a smaller scale, if a bank manager accepts a personal payment from a customer in exchange for giving that customer special banking treatment, is that corruption? This essay does not address that question, but rather argues that there are many situations in which private actors do exercise governing power, and should be recognized for such. There is also a split between analysts who believe that there is a separate category of private-to-private corruption, and those who believe there is not. For purposes of this essay, I do not engage that argument: I am not addressing those situations in which Siemens might accept bribes from Bayer, but rather when Bayer uses its power to influence the German government.
- ¹³ For a recent volley in this debate, see Kim, “Insider Trading as Private Corruption.”
- ¹⁴ Joseph Nye, “Corruption and Political Development: A Cost-Benefit Analysis,” *The American Political Science Review* 61 (2) (1967): 417.
- ¹⁵ Arnold Heidenheimer and Michael Johnston argue that corruption has been defined in three ways: “public office centered,” “market centered,” and “public interest centered.” See Arnold J. Heidenheimer and Michael Johnston, eds., *Political Corruption: Concepts and Contexts* (Abingdon, United Kingdom: Routledge, 2000), 3 – 6. A closer examination, however, shows that the market-centered approach also depends upon formal office office-holding, since it describes corruption as those instances in which entities seek rents from “the bureaucracy” or public officials. For a discussion of the market-centered definitions of Jacob van Klaveren and Nathaniel Leff, see *ibid.*, 8. Moreover, some of the public interest-centered definitions also employ public office office-holding and formal roles. For instance, Carl Friedrich attaches corruption to power-holders tasked with certain duties. Friedrich argues corruption exists when a “powerholder” “is by monetary or other rewards not legally provided for, induced to take actions which favour whoever provides the rewards and thereby does damage to the public and its interests.” Carl J. Friedrich, “Political Pathology,” *The Political Quarterly* 37 (1) (1966): 70, 74. For a more general discussion of these different approaches, see Heidenheimer and Johnston, eds., *Political Corruption: Concepts and Contexts*, 6.
- ¹⁶ The functional approach could consider this business owner not corrupt if he were using his wealth to shape public power to pursue public ends, even if we disagreed with those ends.
- ¹⁷ The United States’ federal criminal law of bribery has, in some very limited circumstances, taken a functionalist approach to determining who is a “public official.” In *Dixon vs. United States* (1984), an administrator at a private nonprofit corporation, administering federal grants, took money from a contractor in exchange for steering federal funds the contractor’s way. The administrator argued that he should not be convicted under federal bribery law because he was not a public official. The Supreme Court rejected that argument, and instead used something like a functional analysis, suggesting that someone is a public official depending on a fact-specific

- analysis of the degree to which he exercised public power. However, *Dixson* involved statutory interpretation, not interpretation of public terms of approbation, and the statute at issue defined a public official as one “acting for or on behalf of the United States.” *Dixson v. United States*, 465 U.S. 482 (1984).
- ¹⁸ Stephen Bell, *Economic Governance and Institutional Dynamics* (Oxford: Oxford University Press, 2002).
- ¹⁹ The approach that would make the least sense is one that identifies alcoholism by looking at who is breaking laws related to alcohol, using formal means to determine a very difficult and perhaps impossible diagnostic question.
- ²⁰ Natasha Singer, “How Google Took Over the Classroom,” *The New York Times*, May 17, 2017, <https://www.nytimes.com/2017/05/13/technology/google-education-chromebooks-schools.html?mcubz=0>.
- ²¹ See Dennis F. Thompson, “Two Concepts of Corruption: Making Campaigns Safe for Democracy,” *George Washington Law Review* 73 (5–6) (2005): 1046.
- ²² *McCormick v. United States*, 500 U.S. 257 (1991). I have oversimplified a complicated area in my description above, but the basic point remains: the requirements for one are different than for the other.
- ²³ *McDonnell v. United States*, 579 U.S. ____ (2016).
- ²⁴ Zephyr Teachout, “The Forgotten Law of Lobbying,” *Election Law Journal* 13 (1) (2014): 4.
- ²⁵ For example, see Timothy Besley and John McLaren, “Taxes and Bribery: The Role of Wage Incentives,” *The Economic Journal* 103 (416) (1993): 119.
- ²⁶ See, for example, the Transparency International website: “Corruption generally comprises illegal activities, which are deliberately hidden and only come to light through scandals, investigations or prosecutions.” Transparency International, “Corruption Perceptions Index 2014: In Detail,” https://www.transparency.org/cpi2014/in_detail#myAnchor1.
- ²⁷ See Susan Rose-Ackerman, *Corruption and Government: Causes, Consequences, and Reform* (Cambridge: Cambridge University Press, 1999).
- ²⁸ *Ibid.*, 343.
- ²⁹ It is a variation of the Hobbesian idea that the sovereign controls law and therefore meaning: “The judgement of what is reasonable, and what is to be abolished, belongeth to him that maketh the law, which is the sovereign assembly or monarch.”
- ³⁰ See, for instance, Susan Rose-Ackerman, “International Actors and the Promises and Pitfalls of Anti-Corruption Reform,” *University of Pennsylvania Journal of International Law* 34 (3) (2013): 484. Rose-Ackerman writes, “Although outright corruption in the form of bribes and kickbacks will remain a problem facing all polities for the foreseeable future, those interested in promoting economic growth, poverty alleviation, governance reform, and market efficiency also need to consider how the legal exercise of financial power undermines these values.”
- ³¹ They also have a separate, personal desire to use public power for private ends, since corporate pay is regularly tied to shareholder value; this creates separate issues that I do not address here, but note: it creates conditions of excessive temptation, more than most people can bear.
- ³² *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. ____ (2014).
- ³³ For example, see Lynn Stout, “Corporations Don’t Have to Maximize Profits,” *The New York Times*, April 15, 2015.
- ³⁴ George Stigler, “The Theory of Economic Regulation,” *The Bell Journal of Economics and Management Science* 2 (1) (1971): 3.
- ³⁵ Richard Posner, *Antitrust Law*, 2nd ed. (Chicago: The University of Chicago Press, 2001), 23.
- ³⁶ Gary S. Becker, “A Theory of Competition Among Pressure Groups for Political Influence,” *The Quarterly Journal of Economics* 98 (3) (1983): 372.

Preventing Systemic Corruption in Brazil

Sérgio Fernando Moro

Abstract: This essay describes the Brazilian anticorruption operation known as Operação Lava Jato (“Operation Car Wash”), its findings, and its results based on cases tried up to March 2018. Told from the perspective of the federal judge of the Thirteenth Federal Criminal Court of Curitiba, in whose court most of the Lava Jato cases have been prosecuted, this massive criminal case offers lessons that may be useful to other anticorruption efforts. Preventing systemic corruption is a challenge, but it is a necessary step for the improvement of democracy.

What began as an investigation of an isolated instance of corruption within a Brazilian oil company expanded into an immense anticorruption operation known as *Operação Lava Jato* (“Operation Car Wash”). This investigative operation has penetrated deep within Brazil’s government and corporate elite to root out systemic state-sanctioned corruption. Its criminal cases also appear to be instating new legal norms for how corruption cases are handled in Brazil, giving citizens hope that Lava Jato’s impact will be felt far into the future. How Brazilian prosecutors and courts dealt with this immense anticorruption effort may provide important lessons for the battle against systemic corruption both in Brazil and elsewhere. This essay provides a comprehensive account of Lava Jato and its significance for Brazil going forward.

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It is important to note from the beginning that Lava Jato is not a single criminal case but several, in which federal prosecutors have decided to pursue separate charges against many defendants. So far, more than sixty criminal cases have been brought against about 289 defendants in Brazilian federal courts.¹ About thirty-three of those cases have already been tried, resulting in convictions of bribery and money laundering for about 157 people. The reflections I offer in

this essay are based on the cases that have been tried at the time of writing. I do not analyze or comment upon cases that have yet to be tried or that are awaiting sentences.

At the core of the Lava Jato cases are crimes connected to contracts with *Petroleo Brasileiro S/A* (Petrobras). Petrobras is a semipublic, majority state-owned Brazilian company engaged primarily in oil and gas exploration, refining, and transportation. It is Brazil's largest company and one of the world's major oil and gas companies. It was founded in 1953 to explore Brazilian oil and gas fields with the goal of transforming Brazil into a self-sufficient producer of petroleum products.

As the cases already tried reveal, multiple bribes were paid in contracts between Petrobras and its suppliers; these bribes were used for the criminal enrichment of Petrobras executives and politicians, as well as to finance electoral campaigns. Before describing what prompted the investigation and how it unfolded, however, it is important to provide some context, including some details concerning Brazilian criminal justice.²

White-collar crimes like bribery and money laundering represent a challenge for law-enforcement agencies all over the world. They are often difficult to discover, to prove, and to punish. Such crimes are usually committed in secret, by powerful people, and with some degree of sophistication. And police, prosecutors, and the judiciary are often not well prepared for the investigation, prosecution, and judgment of these highly sophisticated crimes. Sometimes powerful defendants also exploit the gaps in the criminal law and of the judicial system to prevent effective accountability.

Some countries are more successful than others in enforcing the law against these kinds of crimes. Brazil, at least prior to Lava Jato, did not have a strong tradition of enforcing the law against crimes committed

by powerful politicians or businessmen. There are likely two main reasons for this.

The first is the slow pace at which the judicial process progresses in Brazil. Until recently, the enforcement of a criminal conviction was possible only after the case reached a final decision that could no longer be appealed. Enforcement of a criminal sentence depended on the judgment of the last appeal. Only then would the case be seen as *transitado em julgado*, or tried with no possibility of appeal. Years might pass between an initial judgment and the final sentence.

This rule emerged from a 2008 Supreme Court decision regarding a controversial interpretation of the presumption of innocence in Brazil's Constitution.³ Theoretically, enforcing this rule would not be a problem, but because of a generous system of appeals and the heavy caseload of Brazilian Superior Courts, powerful defendants used it to manipulate the judicial process, initiating endless appeal proceedings to prevent their cases from ever reaching a conclusion and effectively avoiding accountability.⁴

Until recently, it was very common for no final decision to ever be reached in complex criminal cases involving powerful individuals. Even cases with strong evidence of criminal behavior or cases involving very serious crimes never reach conclusions in Brazil. As a rule, wealthy and well-connected defendants in these cases never go to prison, despite compelling evidence of their guilt. However, this rule changed recently, as I will explain below.

The second main reason for criminal impunity among the powerful is the fact that the Supreme Court of Brazil has original jurisdiction over criminal charges against high federal official authorities, including the president, vice president, cabinet ministers, and members of the federal Congress. This is ensured by a controversial provision in Brazilian law stating that high politicians and authorities in criminal cases must have *foro privilegiado* ("privileged

forum”). So if, for example, a criminal investigation in a lower court produces evidence of criminal conduct by a federal congressman, the judge must immediately send the case to the Supreme Court. However, as mentioned, the Brazilian Supreme Court’s heavy caseload (its docket contained over fifty-five thousand cases in the last year alone) makes it very difficult to adjudicate criminal charges in a timely fashion. Consequently, cases involving crimes committed by powerful defendants sometimes literally never end. In practice, the special jurisdiction of the Supreme Court over criminal charges involving high-ranking official authorities worked as a shield against accountability.

These are two primary structural reasons (though there are others) why law enforcement is so weak on crimes committed by powerful defendants in Brazil. The weak enforcement of the law against white-collar crimes is one of the likely reasons for the development of systemic corruption in Brazil. However, legal procedures have recently changed the system for the better, at least in part. Lava Jato is not alone, but rather is part of this broader effort.

Criminal Case 470, decided by the Brazilian Supreme Court in 2012, began to change the norm of weak enforcement of the law against white-collar crimes in Brazil.

In this case, also known as *Mensalão* (“monthly,” because the case involved monthly bribes to some congressmen), the Supreme Court convicted several highly placed politicians, including a powerful former minister of the federal government and several congressmen, political leaders, political party operatives, and bank directors, of bribery and money laundering.⁵ In this case, it was proven that the chief minister of the Brazilian federal government between 2002 and 2005 organized a bribery scheme to obtain political support from congressmen for federal legislative initiatives.

The charges were presented before the Supreme Court in 2006, though it took until 2012 for the case to go to trial. There was a great deal of skepticism about the Supreme Court’s judgment, especially about whether it would try the case in a reasonable time and convict the defendants. But in the end, the Supreme Court issued a guilty verdict for most of the defendants, including several powerful politicians. Of course, Brazilian courts had produced some convictions for white-collar criminals in the past. But these were the exception, not the rule, and none of them was as important or relevant as the decision in Criminal Case 470. These verdicts marked a clear break with the norm of weak enforcement of the law against white-collar or financial crimes. A Supreme Court decision has great influence across the whole judicial system. Beyond the importance of the criminal cases’ direct consequences, they worked as an example for all Brazilian law enforcement agencies and judges, showing that the shield against effective accountability for powerful defendants could be broken.

Two years after the judgment in Criminal Case 470, Operação Lava Jato began. As usually happens with criminal investigations, Lava Jato started small. The federal police opened an investigation targeting four individuals involved in what seemed at the time to be a money-laundering scheme involving black-market money exchanges. One of these individuals, professional money launderer Alberto Youssef, was connected to a former director of Petrobras, Paulo Roberto Costa. The investigation revealed that Youssef had bought a luxury car for Costa, concealing the origin of the resources used.

This evidence led the federal police, working with judicial search-and-seizure warrants, to raid the offices and houses of Youssef and Costa in March 2014. During this process, Costa tried to destroy and hide

paper evidence and consequently was placed into pretrial detention. Youssef was also arrested on a pretrial detention order due to his status as a recidivist career criminal.

Looking at the banking records of Youssef's front companies, police and prosecutors discovered that his accounts had received millions of reais in credits from some of the biggest Brazilian construction companies, which also happened to be some of Petrobras's major suppliers. In another line of the investigation, it was discovered with the assistance of Swiss authorities that Costa had hidden millions of dollars in offshore accounts. Facing long prison terms, Alberto Youssef and Paulo Costa agreed in the second half of 2014 to conclude plea agreements with the prosecutors.

Youssef and Costa revealed that, as a rule, every contract Petrobras signed with the major Brazilian construction companies included kickbacks of 1 or 2 percent of the total value of the contract to the Petrobras officials who approved it. Youssef's role was to organize the money laundering scheme. Costa received a share of the bribes to work for the interests of the construction companies. Another share of the money went to politicians, including federal legislators of the Progressive Party (*Partido Progressista*), which was part of the ruling coalition and was in practice responsible for the nomination of Costa for his position at Petrobras.

Youssef and Costa testified that other Petrobras officials had received bribes and had worked with intermediaries and politicians from other parties in the governing coalition, such as the Workers' Party (*Partido dos Trabalhadores*) and the Party of the Brazilian Democratic Movement (*Partido do Movimento Democrático Brasileiro*). They also revealed that the Brazilian construction companies who paid the bribes were fixing Petrobras's bidding-process outcomes. Petrobras's major suppliers decided in advance which among them would

win each bidding process, and the chosen company could then offer a price proposition without real competition. They called themselves "The Club."

The investigations continued to produce new evidence based in part on plea agreements with other cooperating criminals. Of course, everything a cooperating criminal says has to be supported by additional evidence. For this reason, many investigations are still ongoing. But it has been possible in some cases thus far to obtain evidence that corroborates information revealed by cooperating criminals. There have been about twenty-eight criminal convictions and sentences specifically related to bribery in Petrobras contracts as a result of the Lava Jato cases tried up to March 2018. Convictions reached top executives of the biggest Brazilian construction companies acting as corruptors; top executives of Petrobras acting as facilitators and beneficiaries of bribes or kickbacks; and intermediaries between these two groups.

So far, four former directors of Petrobras have been convicted and sentenced to prison terms. Two of them decided, after serving part of their prison sentences, to cooperate with authorities. The police and prosecutors discovered that all four had millions of dollars or euros in bribes hidden in offshore accounts in countries such as Switzerland, Monaco, and Luxembourg. A Petrobras CEO was also convicted for taking bribes and money laundering.

At least six trials ended in convictions for former federal legislators who had received bribes in the Petrobras scandal. In four other cases, the Court found that money from bribes had been directed to finance illicitly a political party. Two of the former lawmakers convicted in the Lava Jato cases had also been involved in Criminal Case 470 (*Mensalão*). Amazingly, they continued to accept illegal payments from Petrobras even as the *Mensalão* trial was under way in the Brazilian Supreme Court.

These behaviors, which may appear absurd, are indicative of the impunity many corrupt officials enjoyed. In another example, in 2014, Congress created a special investigation commission for the Petrobras scandal. A senator was nominated as vice president of the commission. Instead of doing the investigation, he took the opportunity to request bribes from top executives of the biggest construction firms then under investigation so that they might avoid scrutiny. For this, the senator was eventually convicted of taking bribes himself.

Even a former Speaker of the House of Representatives was implicated in the scandal and was convicted. Again with the assistance of Swiss authorities, it was discovered that he had received about \$1.5 million in bribes, which were deposited in offshore accounts in a Swiss Bank. A former governor of the state of Rio de Janeiro, a former secretary of finance of the federal government, and even a former president of Brazil were also convicted for receiving a share of bribes in Petrobras's contracts.⁶ So far, dozens of executives from eleven of Brazil's largest construction companies have been convicted as bribe givers.

To illustrate the magnitude of these corrupt practices, a manager at Petrobras, after reaching a plea agreement with the authorities, agreed to return nearly \$97 million in bribes that he had received from Petrobras contracts and kept in secret bank accounts abroad. In the beginning of the investigation, Petrobras assumed a posture of general denial, refusing to admit any problem of governance publicly. As the investigation developed, however, the company gradually began to admit that crimes were committed, culminating in an official recognition in Petrobras's 2015 annual report to shareholders of losses from corruption of nearly 6 billion reais (about \$1.9 billion).

It took time, but some of the construction companies involved in the scheme also began to admit responsibility. Three

of the largest companies – Camargo Correa, Andrade Gutierrez, and Odebrecht – reached leniency deals with the prosecutors. In exchange for lighter punishments, they agreed to reveal illicit acts, abandon criminal practices, implement efficient systems of compliance, and compensate public coffers by returning billions of reais. One of them also revealed that it paid bribes for public employees abroad, in countries like Peru, Argentina, and Mexico, among others.

The cases already tried reveal that the payment of bribes on Petrobras's contracts was not an exception but, rather, the rule. Some of the cooperating criminals used that very word, describing the crimes they committed as simply “a rule of the game in contracts of the public sector.” Some alleged that this illicit practice went beyond Petrobras and was used by other state-owned companies and in other branches of the federal government.

Investigations are ongoing not only in the Federal Criminal Court of Curitiba, where the investigation started, but in other Brazilian federal courts that were assigned responsibility for trying certain Lava Jato cases. Because of *foro privilegiado*, dozens of highly placed politicians, especially congressmen, are being investigated by the chief federal prosecutor before the Supreme Court. In spite of the Court's heavy caseload, some of these high-profile defendants have been charged already.

The cases already sentenced suggest that an environment of systemic corruption was uncovered by the investigation. The payment of bribes was taken for granted in Petrobras's contracts; participants knew even before signing contracts that bribes would be paid, just like the construction companies knew in advance whose “turn” it was to win the contract, irrespective of the formal bidding process. They also knew that the bribes would be shared between

Petrobras executives and the federal politicians who gave them political support. There were even fixed rules to calculate the amount of the bribes: generally 1 or 2 percent of the total value of the contract.

Corruption, as an isolated crime, exists all around the world. But systemic corruption – the payment of bribes as a rule of the game – is not as common, and represents a severe degeneration in the functioning of the public and private spheres, especially in democratic nations.⁷ The costs of systemic corruption are enormous. First, the cost of the bribes is usually added by the offending company to their contracts with state-owned companies or with the government, affecting public budgets. If the payment of such bribes is not an isolated practice but a general rule, the management of public resources is severely affected. Moreover, the need to generate funds for bribes in systemic corruption schemes can affect investment decisions by public and private entities.

Some of Petrobras's bad investments may not be simply explained as a result of a bad judgment or unlucky bet, but instead as a deliberate choice by the corrupt directors of Brazil's largest enterprise to generate bribes rather than to make the best decision from an economic point of view. One example is the construction of the new Abreu e Lima refinery.⁸ Initially, Petrobras estimated the cost of the project at \$2.4 billion. However, by 2015, Petrobras had already wasted \$18.5 billion on the construction of the refinery, and it was only partially complete. Even if the refinery operated with full efficiency for the rest of its planned life, it would incur a loss of \$3.2 billion. Lava Jato cases have shown that bribes were paid in some construction contracts for the refinery. But the difference between \$2.4 billion and \$18.5 billion cannot be explained only by the additional costs of the bribes. Bad investment decisions were made because Petrobras executives were more concerned

with receiving kickbacks than doing their job in the company's best interests.

Another detrimental effect of systemic corruption is that it chases away local and foreign investors. If the market is not clean and transparent and if bribes and cheating are the rule, responsible investors will not have the confidence to put their money into that market. But above all, systemic corruption is damaging because it undermines confidence in the rule of law and in democracy. If the law does not apply to everyone and if crime and cheating are the norm, trust in democracy will progressively erode.

Faced with the revelation of systemic corruption, what should be done? First, the judicial system must work. Crimes that are uncovered and proven through due legal process must be punished. Justice works when the innocent defendant goes home and the guilty defendant goes to prison, irrespective of their economic or political status. There is still much to be done to advance this concept in Brazil, yet Criminal Case 470 and Lava Jato, like other recent cases in Brazil, reveal that much can be done even within the current legal system, as long as allegations are dealt with seriously.⁹ Justice must be more than actors playing their parts in cases that never end with perpetrators who are never punished.

The adequate functioning of the criminal justice system is a necessary, though insufficient condition for the elimination of systemic corruption. It is imperative that other public institutions, like the executive and legislative branches of government, adopt public policies aimed at preventing and combating corruption as well. Systemic corruption is not and cannot be a problem only for the judicial branch.

The government is the principal actor responsible for creating a political and economic environment free of systemic corruption. Through its visibility and power, the government can lead by example. Better

laws can improve the efficiency of the criminal justice system and increase the transparency and predictability of relations between the public and private sectors, reducing incentives and opportunities for corrupt practices.

Another important step would be the significant reduction of party patronage in the civil service. The influence of party politicians in the recruitment of executives in state-owned companies, and other high positions in the state bureaucracy, is what made the criminal scheme at Petrobras possible. Based on cases tried and sentenced thus far, it seems that Petrobras executives were appointed with a mission: to obtain financial resources from suppliers for the illicit enrichment of politicians or the illegal financing of electoral campaigns. Reducing political influence in state-owned companies would help to prevent this evil.

Freedom of the press and access to information are also essential. For citizens to have meaningful checks on those who govern, they must be well informed about the management of public life.

Everything to do with the Lava Jato cases, from the prosecution, evidence, and hearing of witnesses to the judgment and sentencing, has been conducted openly and in the light of day. The Brazilian Constitution requires that the judicial process be open to public scrutiny. There is no possibility of having cases prosecuted and tried in secret. This rule of transparency was very important for the Lava Jato cases. Making every piece of evidence public was crucial for gaining the popular support necessary for the enforcement of the law, and helped preempt attempts by powerful defendants to obstruct justice.

In fighting systemic corruption, the private sector also plays a part. Corruption involves those who make illicit payments and those who receive them. Both parties are guilty. Companies must therefore do their homework, denouncing requests

or demands for bribes, as well as implementing mechanisms of internal control and accountability that make it difficult or impossible to pay or receive them. It is also important for private-sector actors to work collectively so that companies involved in corrupt practices are identified and isolated from the market and not allowed to assume a preeminent position. An outstanding example of this kind of private-sector responsibility can be found in Sicily, where businesses have joined together in associations like *Addiopizzo*, or “goodbye *pizzo*,” to collectively refuse to pay mafia money (*pizzo*).¹⁰ Acting together, they have more power to refuse to pay extortion money and to avoid retaliation from organized crime. Their slogan is “a whole people who pays *pizzo* is a people without dignity.” Collective mobilization on the part of private companies could be used to good effect in Brazil, with some situation-specific modifications.

It is also important to keep in mind that systemic corruption is a product of institutional and cultural weaknesses. Systemic corruption is not a natural phenomenon, and no country is destined to live with it. Even if discovering and exposing corruption generates new challenges and painful resistance in the short run, these effects are part of the cure. Once systemic corruption is discovered, necessary public policies should be adopted and implemented to overcome it. The problem cannot be resolved by sweeping it under the rug.

Because of the dimension of the crimes that have been uncovered, Lava Jato perhaps more than any other case provides Brazil with a golden opportunity to take the necessary steps to overcome this shameful practice. It is difficult to predict at this stage whether that will happen, whether corruption will be contained and reduced to more reasonable proportions, or whether Brazil will return to the pre-Lava Jato lev-

els of corruption. Some backlash and criticism against Lava Jato has arisen (especially from politicians and corporations involved), much of it driven by misconceptions about the nature of the enterprise.

Some critics have complained that the Lava Jato operation is not impartial and has been used to “play politics.” But this is not so. Of course, crimes involving bribes paid to politicians will inevitably have political consequences. But they arise outside the court and beyond the judges’ control.

Others have said that Lava Jato represents the “criminalization of politics.” The blame should not, however, be aimed at the judicial process, but rather at the politicians who committed the crimes. The judicial process is just a reaction against corruption, as the justice system cannot turn a blind eye to crime.

Some critics say that the judiciary has not respected due process in these cases. However, every aspect of the judicial process has been conducted in open court with respect for the rights of the defendants, and has been based on extensive evidence obtained, processed, and publicized in accordance with the law and the Brazilian constitution. Lava Jato is not a witch hunt. Investigators simply followed the leads from case to case, uncovering a widespread problem that mandated numerous convictions and detentions. Therefore, nobody is being charged or convicted based on political opinion. When there is evidence of illegal conduct, the accused are being charged and convicted because of the bribery and money laundering crimes they committed, not because of their political allegiances.

Finally, there has been concern about the use of pretrial detention in the Lava Jato cases. Pretrial detentions should, of course, be the exception and not the rule in any judicial system. However, a judge in Brazil can order a pretrial detention if the defendant presents a danger to other individuals or to society, or if there is a risk that the defen-

dant will flee or obstruct justice. There are similar laws in the United States: the U.S. Criminal Code allows a judge to deny bail if the defendant is potentially dangerous or a flight risk.¹¹ The U.S. Supreme Court case *U.S. v. Salerno* affirmed that this statute was constitutional.¹²

In the Lava Jato cases, pretrial detentions were ordered only when evidence against the defendant was particularly strong; when there was a risk that the defendant would flee or obstruct justice; or to prevent the defendant from committing new crimes while awaiting trial. It is important to understand that the crimes of the Petrobras cases were committed in a professional and serial manner in a context of systemic corruption. For example, one of the companies involved in this criminal network devoted a specific department solely to paying bribes, which was in operation for several years, even during the investigation. Operations ceased only when the company’s top executives were served with pretrial detention orders. Given the presumption of innocence, pretrial detentions should be exceptional; but the extraordinary nature of systemic corruption demands strong and urgent measures by criminal justice to break the vicious circle.¹³

Other critics have complained about the extensive use of plea agreements in the Lava Jato investigation, arguing that prosecutors and judges are still not being tough enough on white-collar criminals. However, crimes like corruption are committed in secret and usually only the criminals themselves are witness to their wrongdoing. Therefore, it is sometimes necessary to make a deal with a criminal to get evidence to build a case on more central players. As U.S. Federal Appellate Judge Stephen Trott has stated, sometimes such bargains are necessary, because without them “the big fish go free and all you get are the minnows.”¹⁴ It makes sense to offer a plea agreement, for example, to a

criminal responsible for a money laundering scheme in order to get evidence against bribe takers or bribe givers who are responsible for the national environment of systemic corruption.

Until now, the police, prosecutors, and the judiciary have been the main protagonists in Brazil's fight against systemic corruption. It is important also to acknowledge the Brazilian Supreme Court, which has handed down new precedents that strengthen some anticorruption rules. In a possible collateral effect of the investigation of the Petrobras scandal, Brazil's Supreme Court overruled the harmful provision I discussed above, which allowed wealthy defendants to postpone indefinitely, through endless appeals, the execution of a prison sentence.¹⁵ In 2016, the Supreme Court ruled that the enforcement of a criminal conviction is permitted immediately after a sentence is affirmed by a court of appeal; it is no longer necessary to wait several years for a final decision at the highest level of appeal.

This precedent represents a kind of judicial revolution in the enforcement of criminal law in complex cases in Brazil. Its impact is already visible in several other cases involving corruption. With this new ruling, Brazil's Supreme Court has clearly demonstrated that it fully understands the connection between systemic corruption and impunity.¹⁶

In another important case, Brazil's Supreme Court ruled against the legality of electoral contributions from companies.¹⁷ Brazilian electoral law previously lacked proper limits on large corporate contributions to elections. In light of endemic corruption, the Supreme Court understood that without safeguards, there would be a great danger of improper relations between companies and politicians via quid pro quo donations. So it ruled such contributions void until proper regulations could be approved.

Unfortunately, it seems that as of this writing, the executive and legislative branches of government have made no such significant contribution to Brazil's efforts against corruption. For example, they could do so by proposing and approving better anticorruption laws. One necessary step would be to change Brazilian electoral law along the lines of the Supreme Court decision I describe above. Congress should discuss proper and strict regulations for electoral contributions from companies. For example, it could forbid any electoral contributions from companies with government contracts and establish low limits for other corporate donations.

Unfortunately, there are some signs of reaction against Lava Jato from Congress itself. In 2016, federal prosecutors presented a bill to improve anticorruption laws. Despite major popular support for the measures, the House rejected most of the reforms, and it is still uncertain whether the bill will be approved. More disturbing was an attempt in the House to approve an amnesty bill for illegal electoral donations, up to and including bribes. In another controversial act, the Senate drafted a new bill about abuses of power committed by judges, prosecutors, and police officers. Of course, official authorities who abuse their powers should be held accountable; this, also, is central to a working system of justice. But the text of the bill was written such that it could have a cooling effect on the independence of the judiciary and the autonomy of the prosecutors and the police to pursue criminal corruption as they see fit. As of this writing, the future of this bill is also uncertain.

It is possible to garner some lessons from Brazil's situation. Decades of weak law enforcement against crimes committed by high politicians and powerful businessmen have generated a breeding ground for bribery, kickbacks, and corruption. Weak

law enforcement may not be the first cause of this virulent corruption, but it certainly does not help to constrain it. However, new realities have presented Brazil with an opportunity to face systemic corruption, to confront past failures and set a new course for the future. The systemic corruption uncovered in Brazil is shameful. But there is another way to look at this picture. The efforts of many individual Brazilians to fight the problem of corruption have brought these crimes to light. The police, the prosecutors, and the judiciary are now dealing seriously with them.

There is no shame in the enforcement of the law.¹⁸ Lava Jato provides a measurement of the extent of Brazil's corruption, but also a measurement of Brazilians' dedication to anticorruption efforts. The Lava Jato operation is still ongoing, but it is already without precedent. Corruption scandals are not new to Brazil's history, but never before were top executives of the country's biggest construction companies arrested, tried, and convicted. Never before Lava Jato had a single director of Petrobras been charged with a crime. Today, four of them and a CEO are serving prison terms. Eight powerful politicians have been convicted and some arrested, including the former speaker of the House. Several congressmen are being investigated and prosecuted before the Supreme Court for bribery and money laundering (and not because of their political opinions).

Several measures have been essential to the success of Operação Lava Jato, including:

- The creation of task forces by the police and federal prosecutors to concentrate effort and resources on the investigation and to prosecute serious bribery and money laundering crimes.
- The use of pretrial detentions only in cases in which there was strong evidence of the crimes or in which deten-

tions would prevent new crimes from being committed.

- The use of plea agreements to disrupt complicity and secrecy between criminals and to advance investigations.
- Extensive international cooperation and support from Switzerland and other countries.
- Trying cases under public scrutiny, from evidence and arguments to judgments.
- Speedy criminal procedures and trials.
- Strong public backing to prevent attempts by powerful defendants to obstruct justice.

All of these factors have contributed to progress in enforcing the rule of law in Brazil.

Much more must be done in the fight against corruption, and it is too soon to say whether Brazil will exchange its current system for one fully committed to effective accountability for crimes committed by powerful politicians and businesspeople.

Even so, it is important to highlight that since 2015, millions of Brazilians have protested against corruption. For example, in March 2016, more than three million people occupied the streets in several state capitals and major cities in peaceful demonstrations. It is true that these demonstrations were also motivated by other causes, such as dissatisfaction with the state of the economy and with the former government. But the Lava Jato operation was a common cause that united demonstrators. The fight against corruption has definitively entered Brazil's public policy agenda and will influence political debates for years to come.

Hopefully, it will be possible to look back some years from now and say that Lava Jato made the national economy, the rule of law, and democracy stronger in Brazil. Maybe it will be possible to say systemic corrup-

tion was overcome and that it became a sad memory from Brazil's past. We cannot take this result for granted, but there is some hope. At the very least, the Lava Jato cases,

like Criminal Case 470, represent a clear break with a past of impunity and with tolerance for systemic corruption.

Sérgio
Fernando
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ENDNOTES

¹ Basic information about *Operação Lava Jato* is available at Ministerio Publico Federal, "Caso Lava Jato," <http://www.mpf.mp.br/para-o-cidadao/caso-lava-jato> (accessed March 10, 2018).

² I am a federal trial judge in Brazil working in a role analogous to that of a district federal judge in the United States. Criminal cases are normally tried and sentenced in Brazil by a trial judge sitting alone, while jury trials are only used in murder cases. Federal judges in Brazil also have other responsibilities, such as ordering pretrial detentions and authorizing investigative measures such as wiretaps or searches and seizures. My court in Curitiba is responsible for trying most of the Lava Jato cases.

³ HC 84.078, Supremo Tribunal Federal, February 5, 2009. All Brazilian Supreme Court decisions are available at Supremo Tribunal Federal, <http://www.stf.jus.br>.

⁴ The Brazilian Supreme Court received 56,257 new cases in 2017. These statistics are available at Supremo Tribunal Federal, "Movimento Processual," <http://portal.stf.jus.br/textos/verTexto.asp?servico=estatistica&pagina=movimentoProcessual>.

⁵ Ação Penal 470, Supremo Tribunal Federal, December 17, 2012. The opinion for the Court was delivered by Justice Joaquim Barbosa.

⁶ It is important to note that there are pending appeals against several of these convictions that could overrule them.

⁷ The *Mani Pulite* operation also revealed systemic corruption in contracts of the public sector in Italy. For a description, see Alberto Vannucci, "The Controversial Legacy of Mani Pulite: A Critical Analysis of Italian Corruption and Anti-Corruption Policies," *Bulletin of Italian Politics* 1 (2) (2009): 246.

⁸ Regarding the cost of the Abreu e Lima Refinery, see Raquel Landim, "Refinaria Abreu e Lima dará prejuízo de US\$ 3,2 bi," *Folha de S. Paulo*, December 18, 2015, <http://www1.folha.uol.com.br/poder/2015/01/1576627-refinaria-de-abreu-e-lima-dara-prejuizo-de-us-32-bi.shtml>.

⁹ For example, the "Calcutta Operation" (*Operação Calicute*) was inspired by Lava Jato and resulted in several criminal convictions against corrupt officials of the State of Rio de Janeiro. Some information about the Calcutta Operation is available at https://pt.wikipedia.org/wiki/Operação_Calicute (in Portuguese, accessed March 20, 2018).

¹⁰ See Addiopizzo, <http://www.addiopizzo.org>.

¹¹ Title 18, Section § 3142.

¹² *United States v. Salerno*, U.S. 739, 107 (1987).

¹³ About ninety-seven pretrial detentions were ordered in *Operação Lava Jato*; however, most of them were later followed by criminal convictions. At the time of this writing, there were only six defendants in pretrial detention who had still not been tried.

¹⁴ Stephen S. Trott, "The Use of a Criminal as a Witness: A Special Problem," *Hastings Law Journal* 47 (5/6) (1996).

¹⁵ HC 126.292, Supremo Tribunal Federal, February 17, 2016; and ADCs 43 and 44, Supremo Tribunal Federal, tried on October 5, 2016. These judgments overruled HC 84.078, Supremo Tribunal Federal, tried on February 5, 2009.

¹⁶ Unfortunately, in August 2017, information emerged that some justices were again considering changing their votes about the rule.

¹⁷ ADI 4.650, Supremo Tribunal Federal, September 17, 2015.

¹⁸ President Theodore Roosevelt, in a speech before the U.S. Congress in 1903: “The exposure and punishment of public corruption is an honor to a nation, not a disgrace. The shame lies in toleration, not in correction. No city or state, still less the nation, can be injured by the enforcement of law.” Theodore Roosevelt, “Third Annual Message, December 7, 1903,” The American Presidency Project, <http://www.presidency.ucsb.edu/ws/?pid=29544>.