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Combating Corruption in International Business: The Big Questions

DAVID HESS*

I. INTRODUCTION

The last several years have seen a significant rise in the efforts of governments to combat the supply side of corruption. The United States has led the way with criminal enforcement actions under the Foreign Corrupt Practices Act (hereinafter "FCPA"), and other nations are now showing signs that they will increase the enforcement of their anti-bribery laws as well.[1] Due to these increased efforts, now is an important time to ask some of the big questions in combating corruption.[2] By "big," I do not mean the most pressing or controversial questions. Instead, I mean those questions that cause us to take a step back from current FCPA debates and think about what the FCPA—and other similar anti-bribery laws—should be trying to accomplish in changing corporate behavior. In short, my big questions relate to understanding why corporations pay bribes, what corporations need to do to stop paying bribes (which is not as simple as some may assume),

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*Associate Professor of Business Law & Business Ethics, Ross School of Business, University of Michigan. This essay is based on remarks given at the 37th Annual Ohio Northern University Law Review Symposium , "Who's Afraid of the Foreign Corrupt Practices Act: Legal and Ethical Issues in Anticorruption Law."

1. TRACE INTERNATIONAL, GLOBAL ENFORCEMENT REPORT (GER) 2013 4, 7-8 (2014), *available at* http://www.traceinternational.org/wp-content/uploads/2014/09/TRACE-Global-Enforcement-Report-GER-2013.pdf.

2. The use of the phrase of "big questions" in this context is inspired by my colleague Steve Salbu's use of the term. *See* Steven R. Salbu, *Transnational Bribery: The Big Questions*, 21 NW. J. INT'L. L. & BUS. 435, 437 (2001). For my reply to some of the "big questions" raised by Salbu, see Thomas W. Dunfee & David Hess, *Getting from Salbu to the 'Tipping Point': The Role of Corporate Action Within a Portfolio of Anti-Corruption Strategies*, 21 NW. J. INT'L L. & BUS. 471 (2001).

and how to encourage corporations to actively fight corruption (that is, to combat corruption beyond their organizational boundaries).

There are, of course, many different perspectives one could take when answering these questions. In this essay, I consider these questions from the perspectives of business ethics and corporate social responsibility. Here, I am using the term "business ethics" to refer to both ethical decision making by individuals and the exercise of ethical leadership by management, which is managing the organizational context within which individuals engage in ethical decision making.[3] By corporate social responsibility, I am referring to the obligations corporations have to society beyond just following the law.[4]

The next section addresses the first question: why do corporations pay bribes? This leads to two additional questions: why do employees pay bribes, and when are compliance and ethics programs effective in preventing the payment of bribes? The next big question focuses on issues of corporate social responsibility: what should a corporation do to combat corruption? That is, is it sufficient for a corporation to simply ensure that its employees do not pay bribes, or should the corporation do something more?

II. WHY DO CORPORATIONS PAY BRIBES?

Generally stated, the literature on combating corruption (and corporate crime more generally) tends to take two views of bribe-paying corporations. First, there is the view that the corporation is the rational profit-maximizer.[5] This corporation makes the decision to pay bribes to win business because the benefits of the new (or continued) business outweigh the risks of getting caught paying a bribe and the expected penalty if the corporation does get caught.[6] The role of the government is to set penalties at the right level to

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3. A Government Accountability Office report defined business ethics as:

> Business actions addressing the CSR concern of business ethics involve values such as fairness, honesty, trust and compliance, internal rules, and legal requirements. Among the actions taken to address business ethics are incorporating ethics into corporate value and mission statements, developing ethics codes, conducting ethics training, and monitoring ethical performance.

U.S. GOVERNMENT ACCOUNTABILITY OFFICE, GLOBALIZATION: NUMEROUS FEDERAL ACTIVITIES COMPLEMENT U.S. BUSINESS'S GLOBAL CORPORATE SOCIAL RESPONSIBILITY EFFORTS 8 (2005), *available at* http://www.gao.gov/new.items/d05744.pdf.

4. *See id*. at 5-6. A Government Accountability Report defined CSR as: "in addition to addressing the interests of its shareholders, business should address the interests of its other stakeholders, including customers, employees, suppliers, and the local community." *Id*. at 5.

5. Timothy F. Malloy, *Regulation, Compliance and the Firm*, 76 TEMP. L. REV. 451, 453 (2003).

6. Peter May would refer to this type of motivation as a "negative" motivation. Peter J. May, *Compliance Motivations: Affirmative and Negative Bases*, 38 LAW & SOC'Y REV. 41, 41-42 (2004). A negative motivation to comply with the law is based on "fears of the consequences of being found in

encourage corporations to resist the temptation to pay a bribe.[7] Under this view, the corporation is generally viewed as a "black box." This view does not look at the motivations of individuals within the corporation, but views the corporation as responding to external incentives in a rational, calculated manner.[8] In short, corporations are viewed as following the law only if the consequences are sufficiently negative, as opposed to following the law due to a sense of obligation.[9]

At first glance, a company like Siemens appears to be an example of this view. Before it paid over $1.5 billion in fines in 2008 for paying bribes, the use of bribery at Siemens was wide spread.[10] The company paid bribes in multiple different nations, utilized secret bank accounts to reduce the risks of getting caught, and one manager even claimed to have overseen an annual bribery budget of $40 to $50 million for several years.[11] Although the German laws had changed to make it clear that bribing foreign government officials was illegal, the company continued to pay bribes because, as one manager stated, employees believed they had to pay them or else "we'd ruin the company."[12]

At the time of the Siemens' enforcement action, the company was not facing significant risk of prosecution because German officials had not taken any significant actions to create a fear of enforcement and the United States was just beginning its increased enforcement of the FCPA. However, contrary to the rational profit-maximizer view, it is doubtful that greater enforcement risk would have changed Siemens' behavior. Instead, Siemens likely was an example of what Blake Ashforth and Vikas Anand call a "suicidal corruption."[13] That is, a corporation that continues down a path that appears to only be leading it to catastrophic failure.[14] As discussed further below, this occurs because the payment of bribes can become such a part of the organization's normal routine that the organizational members will not question the appropriateness of the use of bribes or be responsive to greater external threats of punishment. Instead, the corporation continues

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violation of regulatory requirements." *Id*. at 42. An "affirmative" motivation, on the other hand is not based on coercion, but "good intentions and a sense of obligation to comply." *Id*.

7. *See* Malloy, *supra* note 5, at 453-54.

8. *See id*. at 498-99 n.208.

9. May, *supra* note 6, at 42.

10. The Department of Justice's sentencing memorandum provides a detailed description of Siemens' corrupt activities. Department's Sentencing Memorandum, U.S. v. Siemens et al. (D.D.C. 2008), *available at* www.justice.gov/opa/documents/siemens-sentencing-memo.pdf.

11. Siri Schubert & T. Christian Miller, *At Siemens, Bribery Was Just a Line Item*, N.Y. TIMES, Dec. 20, 2008, *available at* http://www.nytimes.com/2008/12/21/business/worldbusiness/21siemens.html?pagewanted=all&_r=0.

12. *Id*.

13. Blake E. Ashforth & Vikas Anand, *The Normalization of Corruption in Organizations*, 25 RES. ORG. BEHAV. 1, 23 (2003).

14. *See id*.

down a path that would cause any outsider to the organization to wonder, "how did they think they could get away with that?" In short, this shows how, in some cases, the culture of the organization—here, one that views the payment of bribes as a normal part of its business activity—can be a more powerful influence on behavior than an increased threat of an enforcement action.[15]

The second view of a bribe-paying corporation is one that believes that the corporation is taking all reasonable efforts to combat corruption (through the adoption of a compliance and ethics program), but one or more of its employees (so-called "rogue employees"[16]) still find ways to evade the system and pay a bribe.[17] In the United States, those corporations that are caught paying bribes but have taken reasonable efforts to prevent the bribe payments are eligible for a mitigated sentence under the Organizational Sentencing Guidelines.[18] In addition, under the Department of Justice's charging policy, those corporations may avoid being indicted and instead receive a settlement agreement.[19] Currently, many commentators are arguing that corporations that have implemented a compliance program should receive even greater protection. In fact, some argue that a corporation should have an affirmative defense providing that if one of its employees or agents paid a bribe, the corporation cannot be held liable if it can show that it took reasonable steps to prevent such payments.[20]

There are several reasons behind this increased interest in an affirmative defense to violations of the FCPA. First, the United Kingdom Bribery Act of 2010 provides that a corporation is strictly liable for a bribe payment by an employee, but it can use the affirmative defense of having adopted "adequate procedures" to prevent the bribe payment.[21] Second, some commentators have framed corporations as essentially victims of bribe

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15. *See* Schubert & Miller, *supra* note 11.

16. David Hess & Thomas W. Dunfee, *Fighting Corruption: A Principled Approach; The C^2 Principles (Combating Corruption)*, 33 CORNELL INT'L L.J. 593, 610 (2000); Mike Koehler, *Revisiting a Foreign Corrupt Practices Act Compliance Defense*, 2012 WIS. L. REV. 609, 659 (2012).

17. Hess & Dunfee, *supra* note 16, at 610.

18. U.S. SENTENCING COMMISSION, 2014 GUIDELINES MANUAL, CHAPTER EIGHT – SENTENCING OF ORGANIZATIONS, INTRODUCTORY COMMENTARY (2014), *available at* http://www.ussc.gov/guidelines-manual/2014/2014-chapter-8.

19. US DEPARTMENT OF JUSTICE, CRIMINAL DIVISION, A RESOURCE GUIDE TO THE FOREIGN CORRUPT PRACTICES ACT 56 (2012), *available at* http://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf.

20. *See* Koehler, *supra* note 16, at 651-53 (arguing in favor of a compliance defense and reviewing the statements of former Department of Justice officials in favor of a compliance defense); Jon Jordan, *The Adequate Procedures Defense Under the UK Bribery Act: A British Idea for the Foreign Corrupt Practices Act*, 17 STAN. J.L. BUS. & FIN. 25, 55-56 (2011) (arguing in favor a compliance defense).

21. Bruce W. Bean and Emma H. MacGuidwin, *Unscrewing the Inscrutable: The UK Bribery Act 2010*, 23 IND. INT'L & COMP. L. REV. 63, 63-64 (2013).

demands.[22] That is, in countries with high levels of corruption, the corporation's employees or agents are constantly faced with bribe requests. This creates a significant risk that, despite the corporation's best efforts, eventually an employee will break down and pay the bribe.[23] Thus, when deciding whether to pursue business opportunities in a country with high levels of corruption, the corporation is faced with the dilemma of either forgoing the opportunity in that country or accepting a significant risk that one of its employees may pay a bribe, which then makes the corporation liable under the FCPA.[24]

We can all agree that corporations should adopt comprehensive compliance programs to prevent employees from paying bribes, and as a policy matter, we should find ways to incentivize corporations to adopt and continually improve their programs. However, we only want to reward effective compliance programs, and there are significant challenges in determining how earnest a corporation was in implementing its compliance program. For example, many commentators have raised the concern that corporations intentionally only adopt so-called "paper" programs.[25] That is, a program that on paper creates the appearance of attempting to ensure employees follow the law, but the corporation is not actually enforcing the program or is finding other ways to encourage employees to pay bribes.[26] Faulty compliance programs are not necessarily due to intentional managerial decisions. Instead, management may unintentionally implement a faulty program, such as by focusing on the internal controls aspects of the compliance program but neglecting important aspects of the corporate culture, for example. To satisfy the expectations of outsiders, management may focus on aspects of the compliance program that can be easily audited, such as whether it has given its employees anti-bribery training, and whether or not the company has an anonymous whistle blower program.

These are two common views that underlie the basic question of why corporations pay bribes; either the corporation is intentionally paying bribes due to a cost-benefit analysis showing the risks of liability are sufficiently limited, or the corporation is trying to prevent bribes but a rogue employee

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22. *See* Koehler, *supra* note 16, at 620.

23. *See id*.

24. *See* Andrew Brady Spalding, *Four Unchartered Corners of Anti-Corruption Law: In Search of Remedies to the Sanctioning Effect*, 2012 WIS. L. REV. 661, 664-67 (2012) (citing evidence showing that corporations enforcement of the FCPA reduces U.S. corporations' investments in countries with high levels of corruption).

25. *See* Paul Fiorelli, *Will U.S. Sentencing Commission Amendments Encourage a New Ethical Culture Within Organizations?*, 39 WAKE FOREST L. REV. 565, 567-68 (2004); Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH. U. L.Q. 487, 491-92 (2003); William S. Laufer, *Corporate Liability, Risk Shifting, and the Paradox of Compliance*, 52 VAND. L. REV. 1343, 1407-08 (1999).

26. *See* Krawiec, *supra* note 25 at 491-92; Laufer, *supra* note 25 at 1407-08.

pays a bribe despite those best efforts. In both cases, I believe the issue of corporate culture is not appropriately considered. For the first type of corporation, we need to understand how initial wrongful acts can spiral out of control and lead to a situation approaching the suicidal corporation. Although management may (or may not) approve an initial bribe payment, the continued and increased use of bribes may grow out of control in the organization. To an organizational outsider, however, it appears that the corporation is making a rational choice to follow a corrupt payments strategy and therefore would be responsive to an increased threat of enforcement actions. For the second type of corporation, we need to understand that a corporation is not taking reasonable efforts to prevent bribe payments if it is not managing its corporate culture. And according to some recent research discussed below, by neglecting its corporate culture, the company's compliance program can actually encourage more wrongful behavior.

To help understand the role of culture, we will ask another "big" question: why do employees pay bribes? We are especially interested in understanding why otherwise ethical employees pay bribes. Answering this question requires that we look at the organizational context in which employees operate.

A. Why do Employees Pay Bribes?

The starting point for answering the question of why employees pay bribes is to recognize that most employees do not engage in wrongdoing because they are "bad" people attempting to get ahead by any means necessary. Instead, many employees are struggling to do their jobs and face significant pressures to get results, which causes them to break the rules. For example, consider a survey conducted by KPMG that asked managers to identify the "root causes of misconduct" in their organizations. The least likely cause that managers selected was employees breaking the rules to further their own personal interests.[27] The more common causes selected by managers included employees feeling pressure to meet their performance targets and believing that they would be evaluated and rewarded based on whether or not they met their targets, regardless of the means used to achieve those targets.[28] In addition, managers cited employee beliefs that the company does not take its code of conduct seriously.[29]

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27. *See* KPMG FORENSIC, INTEGRITY SURVEY 2013 12, *available at* http://www.kpmg.com/CN/en/IssuesAndInsights/ArticlesPublications/Documents/Integrity-Survey-2013-O-201307.pdf. This result is consistent with the prior KPMG Integrity Surveys. *Id*. at 17.

28. *Id.* at 12.

29. *Id.*

The combination of these pressures and employee beliefs can start a process that leads to entrenched wrongful behavior within the organization. This is behavior that cannot be corrected simply by requiring additional employee training or layering on new internal controls. Thus, a key lesson from surveys such as KPMG's is that when wrongdoing is observed, we should not view it as an isolated instance, but should consider how it relates to prior behavior and how it can impact future behavior if it is not appropriately controlled. The starting point for examining this process is understanding why otherwise good people give in to the workplace pressures identified above (which are not necessarily pressures to commit wrongful acts, but pressures to meet their performance goals) and engage in unethical behavior, such as paying a bribe or ignoring obvious red flags that an agent of the corporation is using bribes to obtain business.

Employees facing, or at least perceiving, these pressures to meet performance expectations without regard to the means used or what the company's code of conduct states often find ways to rationalize wrongful behavior. A rationalization allows an individual to commit an act that he or she knows is wrong, but still view him- or herself as a good person.[30] The employee views the action as an "exception" to a rule, rather than as a direct violation of a rule or social norm. The following phrases capture some of the most common rationalizations:

- "Everyone is doing it."
- "It's not technically illegal."
- "I'm not responsible. I had no choice. I was ordered to do it."
- "No one is really harmed if I do it."
- "I have an obligation to my group."[31]

Employees may utilize rationalizations before they act, or as a way to justify an action that they have already taken.[32] Either way, these rationalizations can put an employee on the slippery slope to additional, and perhaps more significant, wrongful conduct.[33] When a person is considering an act that she knows is wrong, a rationalization helps push her in the direction of committing the act; the rationalization makes it easier to

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30. *See* Ashforth and Anand, *supra* note 13, at 6.

31. *See generally* Vikas Anand et al., *Business as Usual: The Acceptance and Perpetuation of Corruption in Organizations*, 19 ACAD. MGMT. EXECUTIVE 9, 11-14 (2005). For a more complete discussion of how employees may rationalize the payment of bribes, see David Hess & Cristie L. Ford, *Corporate Corruption and Reform Undertakings: A New Approach to an Old Problem*, 41 CORNELL INT'L. L.J. 307, 319-22 (2008).

32. Anand et al., *Business as Usual, supra* note 31, at 11.

33. *Id*.

take the action.[34] In other cases, an employee may not carefully consider their options before acting and simply respond to a situation with a wrongful act. Later, when looking back on her action, the employee rationalizes that behavior.[35] Below is an explanation of how we get into these situations of needing to rationalize behavior after acting.

When an individual takes the opportunity to carefully consider his or her options before acting, social psychologists refer to that as System Two thinking.[36] System One thinking, on the other hand, is a more automatic decision based on emotions and heuristics.[37] For example, in one study, women were asked how they would respond if during an employment interview the interviewer asked inappropriate questions of a sexual nature.[38] Sixty-eight percent of the women surveyed stated that they would refuse to answer the question and twenty-eight percent stated that they would directly confront the interviewer or leave the interview.[39] A subsequent experiment that placed fifty women in that situation found that no one refused to answer the question, leave the interview, or confront the interviewer.[40]

Max Bazerman and Ann Tenbrunsel explain this difference between how interviewees predicted they would act and how they actually acted by using System One and System Two thinking.[41] When predicting our behavior (the women that were asked how they would respond if placed in such a situation), we use System Two thinking and consider abstract principles of appropriate behavior.[42] When actually in the situation, however, the women's actions were driven not by trying to do the right thing, but by a strong desire to get out of the uncomfortable situation.[43] The wide difference between predicted behavior and actual behavior shows that when predicting our behavior, we often do not consider the situation we will be in and the emotions we will be feeling at that time.[44] One implication from this is that compliance training for employees that only focuses on understanding the rules in the company code of conduct will not be as effective as compliance training that walks employees through case studies of how this situation will arise during their job and the pressures they will

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34. *Id*.
35. *Id*.
36. DANIEL KAHNEMAN, THINKING, FAST AND SLOW 19-30 (2011).
37. *Id.* at 20-21.
38. MAX H. BAZERMAN & ANN E. TENBRUNSEL, ETHICAL BLINDSPOTS: WHY WE FAIL TO DO WHAT'S RIGHT AND WHAT TO DO ABOUT IT 62-63 (2011) (discussing the study: J. A. Woodzicka & M. LaFrance, *Real Versus Imagined Gender Harassment*, 57 J. SOC. ISSUES 15 (2001)).
39. *Id*.
40. *Id.* at 63.
41. *See id*. at 66-70.
42. *See id.*
43. *See* BAZERMAN & TENBRUNSEL, *supra* note 38, at 66-70.
44. *See id.*

be facing. For our purposes, however, this also shows how we get into situations where we find that we did not live up to the expectations we hold for ourselves and we need to explain that inconsistency. Rationalizations provide that explanation.

What is especially problematic about rationalizations—whether they occur before or after wrongful behavior—is that they do not allow us to admit our mistakes and commit to doing better in the future. Instead, rationalizations can put us on the slippery slope to greater wrongdoing.[45] That is, once a person commits that initial wrongful act, he or she is at risk not only of continuing that behavior, but also engaging in incrementally worse and worse acts over time.[46] Now that we have an understanding of why employees may engage in wrongful acts and may start down on a slippery slope, we can examine how such actions may spread throughout the organization.

One way to understand how wrongful practices can spread throughout the organization (or certain departments) is through Ashforth and Anand's three-stage model.[47] Stage one involves management encouraging unethical behavior by employees.[48] This does not have to be done intentionally or explicitly, but can be unintentional.[49] For example, as discussed above, misconduct is often caused by employees feeling pressure to meet performance targets and being rewarded for meeting those targets regardless of the means used. Thus, imagine two employees, A and B. Employee A meets his targets through the use of corrupt payments (which he rationalizes either before or after acting), and is rewarded for achieving his goal. Employee B refuses to use corrupt payments, misses his targets, and is in someway punished for his failure (such as a low bonus, disfavored job assignments, or even termination of employment). Through this reward system, management has implicitly approved Employee A's behavior, and sends that message to all other employees who are aware of A's tactics.

In stage two of the model, the wrongful behavior becomes embedded in corporate practices.[50] As other employees see A's behavior and the rewards he receives, they assume that management approves or even actively encourages that behavior.[51] In stage three, after these practices have spread to a significant number of employees, it becomes routine behavior within

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45. Anand et al., *supra* note 31, at 11.

46. David T. Welsh et al., *The Slippery Slope: How Small Transgressions Pave the Way for Larger Future Transgressions*, 100 J. APPLIED PSYCH. 114 (2015).

47. Ashforth and Anand, *supra* note 13, at 4-15.

48. *Id*. at 5-6.

49. *Id*. at 6-8.

50. *Id*. at 8.

51. *Id*. at 9.

the organization (or department).[52] Employees no longer question the use of the behavior and eventually, through a process of desensitization due to regular exposure to the behavior, may not even recognize it as an ethical issue.[53] The end result may be an organization similar to Siemens, with widespread misconduct.

As the above shows, it is never sufficient for management to claim that they hire ethical employees and therefore do not need to worry about those employees engaging in wrongful behavior. Instead, to protect against wrongdoing by individuals and to keep any wrongful practices from spreading throughout the organization as described above, corporations need a comprehensive compliance and ethics program supported by an ethical corporate culture. In the next section, we discuss the circumstances in which those programs are likely to actually be effective.

B. When do Compliance and Ethics Programs Help Prevent the Payment of Bribes?

The goals of compliance and ethics programs are for employees to be aware of ethical issues, to make the correct choice when faced with an ethical issue, to seek advice when uncertain of how to act, and to feel free to report wrongdoing when it is observed. These goals make it easier for employees to resist rationalizing their behavior and to speak up when they see a problem. As discussed below, the empirical evidence to date shows that managing the ethical culture of an organization produces significantly better results than a compliance program focused only on detecting and punishing wrongdoing. In addition, having a "paper," or poorly implemented compliance program, can often lead to an increase in wrongdoing in the organization.

Social psychologists studying how organizational contexts influence ethical behavior distinguish between an ethical climate and an ethical culture.[54] In brief, an ethical climate refers to employees' perceptions of what is or is not appropriate behavior in that organization.[55] For example, one organization's ethical climate may be based on caring for the well being of customers above other interests, while another organization's ethical climate could emphasize that it is appropriate to focus primarily on how an

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52. Ashforth & Anand, *supra* note 13, at 11.

53. *Id*. at 11-12.

54. Muel Kaptein, *Understanding Unethical Behavior by Unraveling Ethical Culture*, 64 HUM. REL. 843, 846 (2011).

55. *Id.*

action impacts your own self interests.[56] An ethical culture, on the other hand, refers to "those aspects of the perceived organizational context that may impede unethical behavior and encourage ethical behavior," such as formal or informal reward systems.[57] Not surprisingly, most researchers have found that ethical climates and ethical cultures are highly correlated.[58] Practitioners often refer to ethical climate and ethical culture as simply the ethical culture, and, for simplicity, I will do that in this essay as well.

A recent meta-analytic review of empirical studies on ethical behavior in an organizational context confirmed the importance of the ethical culture in influencing ethical behavior.[59] For the purposes of this paper, what is important to understand is the relationship between culture and an organization's compliance and ethics program. Not surprisingly, the review of the studies showed that simply having a code of ethics does not influence employee behavior.[60] However, when employees had the perception that the company enforced its code of ethics, then unethical behavior was reduced.[61] With respect to the potential harms of an unenforced "paper" program, the authors state:

> The meta-analysis also found that when perceived code enforcement and other organizational variables (e.g., ethical culture and ethical climate) are taken into account simultaneously, code existence has a small positive effect on unethical behavior. This suggests that in the presence of these other factors, employees can view the mere existence of a code as a negative sign that the code represents window dressing only, thus producing a cynical response that leads to more unethical behavior.[62]

Likewise, one study found that when employees perceived that the company's compliance and ethics program was implemented in a manner only to protect the organization or top management from blame, then the program was associated with an increase in unethical and illegal activity as compared to a company that implemented the program in a manner to promote ethical values or even a company that used the program simply to

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56. Jennifer J. Kish-Gephart et al., *Bad Apples, Bad Cases, and Bad Barrels: Meta-Analytic Evidence About Sources of Unethical Decisions at Work*, 95 J. APPLIED PSYCH. 1, 6 (2010); Linda Klebe Treviño et al., *(Un)ethical Behavior in Organizations*, 65 ANNUAL REV. PSYCH. 635, 640 (2014).

57. Kaptein, *supra* note 54, at 846.

58. *Id.*; Kish-Gephart et al., *supra* note 56, at 21.

59. Kish-Gephart et al., *supra* note 56, at 21.

60. *Id.*

61. *Id.*; Treviño et al., *(Un)ethical Behavior*, *supra* note 56, at 639.

62. Treviño et al., *(Un)ethical Behavior*, *supra* note 56, at 639.

detect and punish wrongdoing.[63] More recent research shows that when a compliance program is adopted to meet external demands, but is not meaningfully implemented in the corporation, it causes the program to lose legitimacy with employees.[64] Due to the lost legitimacy, employees are unlikely to find the compliance program valuable or important for their work, and are therefore unlikely to follow it.[65] In the worst-case scenario, the values behind the program—in our case anti-bribery and corruption—may also lose legitimacy, which can result in the compliance program actually lowering employees' consideration of the relevant ethical issues.[66]

This decoupling of the adoption of a compliance program from its implementation in the organization may not be an intentional decision by management, which is a common assumption behind "paper" programs.[67] For example, management may decide to implement the compliance program in stages over time due to lack of resources. However, that incremental approach can create the perception among employees that the program is decoupled from actual practice, which can be just as harmful as an intentional decision by management to decouple.[68]

A recent study led by Linda Trevino looked more specifically at Ethics and Compliance Officers (hereinafter "ECOs") and identified several challenges that ECOs face when attempting to establish the legitimacy of the company's compliance program.[69] If these challenges are too great to overcome, then the program will be decoupled from practice, and the problems identified above may occur.[70] The challenges these researchers found included:

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63. *See* Linda Klebe Treviño et al., *Managing Ethics and Legal Compliance: What Works And What Hurts*, 41 CALIF. MGMT. REV. 131, 135-39 (1999).

64. Tammy L. MacLean & Michael Benham, *The Dangers of Decoupling: The Relationship Between Compliance Programs, Legitimacy Perceptions, and Institutionalized Misconduct*, 53 ACAD. OF MGMT. J. 1499, 1516-17 (2010); *see* Tammy MacLean et al., *When Organizations Don't Walk Their Talk: A Cross-Level Examination of How Decoupling Formal Ethics Programs Affects Organizational Members*, 128 J. BUS. ETHICS 351, 363 (2015).

65. MacLean & Benham, *Dangers of Decoupling*, *supra* note 64, at 1516-17.

66. *See id.*; *see also* MacLean et al., *When Organizations Don't Walk Their Talk*, *supra* note 64, at 363 ("Our findings that decoupling formal ethics programs leads to negative individual-level perceptions on the part of organizational members support the existing research that suggests that ethics/compliance programs perceived as largely symbolic can do more harm than good.").

67. *See* Patricia Bromley & Walter W. Powell, *From Smoke and Mirrors to Walking the Talk: Decoupling in the Contemporary World*, 6 ACAD. MGMT. ANNALS 483, 484 (2012) (noting that much of the decoupling of organizational practices (in general, not just compliance programs) that occurs is likely unintentional).

68. MacLean et al., *When Organizations Don't Walk Their Talk*, *supra* note 64, at 363.

69. Linda Klebe Treviño et al., *Legitimating the Legitimate: A Grounded Theory Study of Legitimacy Work Among Ethics and Compliance Officer*s, 123 ORG. BEHAV. & HUM. DECISION PROCESSES 186, 191-94 (2014).

70. Bromley & Powell, *supra* note 67, at 489-93.

- Ethics and Compliance Officers having difficulty demonstrating to others the effectiveness of the program and the value it adds to the organization.
- Management believing that they are already ethical and have hired ethical employees, and without any immediate crisis facing the company, pushing ethics to the "back burner."
- Employees at all levels of the company believing that the compliance program gets in the way of conducting business effectively.[71]

Overall, as these studies show, what matters is not just the presence of a compliance program, but how it is implemented and supported by an ethical corporate culture. If it is not implemented appropriately, then the program will have little or no effect on ethical behavior, and in some cases, may further the company's slide into becoming a "suicidal organization." Thus, when considering the role of compliance and ethics programs in combating corruption—whether as a manager implementing a program, a member of the board of directors reviewing the compliance program, a legislator considering the compliance defense discussed above, or an enforcement attorney—these issues of corporate culture must be front and center. For example, if we are considering adding a compliance defense to the FCPA, we need to ask whether that defense can be structured in a way that would encourage corporations to focus on these issues of corporate culture, or whether such a defense would cause corporations to over-emphasize those aspects of their compliance program that are most easily audited and, due to this lack of focus on implementation, cause the program to be at-risk of losing legitimacy with employees. We also need to consider whether the defense would cause corporations to actively seek to improve their programs over time through a culture that supports open discussion of ethical issues, or whether it would incentivize corporations to work towards creating the appearance that they have state-of-the-art programs and attempt to quiet any suggestions by ECOs that certain corporate practices may be encouraging unethical behavior or that the program could otherwise be improved.

71. Treviño et al., *Legitimating the Legitimate*, *supra* note 69 at 191, 94.

C. Summary.

Overall, the legal community needs to understand why corporations pay bribes. In some cases, top management seeks to use bribes to get ahead. Those corporations often have a compliance program that matches best practices. However, they do not have a culture that supports the implementation of that program (and it is important to note that a compliance program can also be part of the foundation for building a ethical corporate culture). In other cases, the corporation is trying to do the right thing, but they need assistance in managing the compliance program and culture. And, as stated above, it may not be so easy to categorize a corporation as "bad" or "good." The "bad" corporation at one time may have been a "good" corporation that unintentionally went down the three-stage process model described above. And what appears to be the "good" corporation today may head down a similar path if its corporate culture is not appropriately managed.

The above discussion also shows that when looking at why employees pay bribes, it is important to look at the organizational context. Employees face pressures to meet their targets, and a culture that does not appropriately support ethical behavior may push an employee to commit an act that the employee disapproves of, but finds a way to rationalize. This shows that bribery should not be viewed as an isolated issue, but the likelihood of paying bribes is dependent on the ethical culture of the organization. In other words, how managers discuss and deal with any type of ethical issue within the organization can have an impact on the culture of the organization, which will influence the use of wrongful payments.

III. WHAT SHOULD A CORPORATION DO TO COMBAT CORRUPTION?

The second big question moves beyond a corporation ensuring that its employees or agents are not paying bribes and asks what else corporations should be doing to combat corruption. How can we get corporations to think about anti-bribery not just as a legal compliance issue, but also as part of their social responsibilities to society? The first part of this essay discussed how corporations should not think about anti-bribery as just a legal compliance issue, but as an ethical issue that must be supported by a strong, values-based corporate culture. In this part, we are thinking about anti-bribery as a matter of corporate social responsibility (hereinafter "CSR"). However, as explained below, these two aspects of anti-corruption are connected because they should be mutually supporting of each other through a corporate culture that has anti-corruption as a strong value.

The first step toward answering our current big question is determining what it means for a corporation to be socially responsible. The term CSR

seems to mean something different to everyone. Even for those that would self-identify as working in the CSR field, there is no single, universally agreed upon definition of corporate social responsibility.[72] For our purposes, Business for Social Responsibility developed a definition that captures the general idea, stating, "[CSR] is achieving commercial success in ways that honour ethical values and respect people, communities and the natural environment."[73] The United Nations Global Compact provides some detail to that definition by establishing ten universal principles that all corporations should "embrace, support and enact, within their sphere of influence."[74] Initially, there were nine principles, which covered the areas of human rights, labor rights, and the natural environment. Later, a tenth principle was added, which stated, "[b]usinesses should work against corruption in all its forms, including extortion and bribery."[75] This principle was added after lobbying by those that believed that the other nine principles could not be implemented effectively without corporations also committing to the fight against corruption.[76] The following discussion on labor rights demonstrates this need.

A common issue in CSR is the treatment of labor throughout a corporation's supply chain. Not even twenty years ago, most corporations believed that the use of child labor, forced overtime, and unsafe work conditions by their suppliers were the concern of those suppliers and outside the corporation's responsibilities. Most famously, in response to sweatshop allegations at that time, Nike denied responsibility by stating, "we don't make shoes."[77] Now, however, it is generally recognized that corporations do have a responsibility to ensure that their suppliers respect the rights of their employees. To meet this responsibility to protect the rights of workers, corporations promulgate policies on worker safety and rights that they expect their suppliers to comply with, and then hire auditors to determine if those suppliers are in fact in compliance with those policies. Corporations then report the auditors' findings to their shareholders and other interested stakeholders in disclosures such as sustainability reports.

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72. *See* Alexander Dahlsrud, *How Corporate Social Responsibility is Defined: An Analysis of 37 Definitions*, 15 CORP. SOC. RESP. & ENVTL. MGMT. 1, 1 (2008).

73. *Id*. at 8.

74. *See* David Hess, *Enhancing the Effectiveness of the Foreign Corrupt Practices Act through Corporate Social Responsibility*, 73 OHIO ST. L.J. 1121, 1124 (2012); UNITED NATIONS GLOBAL COMPACT, THE TEN PRINCIPLES OF THE UN GLOBAL COMPACT, *available at* http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html.

75. UNITED NATIONS GLOBAL COMPACT, PRINCIPLE TEN: ANTI-CORRUPTION, *available at* https://www.unglobalcompact.org/what-is-gc/mission/principles/principle-10.

76. Hess, *Enhancing the Effectiveness*, *supra* note 74, at 1124-25.

77. Caroline Kaeb, *Emerging Issues of Human Rights Responsibility in the Extractive and Manufacturing Industries: Patterns and Liability Risks*, 6 NW. U. J. INT'L HUM. RTS. 327, 345 (2008).

However, as stated in a recent New York Times headline, these audits of suppliers' factories are often "fast and flawed."[78] The auditors typically just run through a checklist of items and are easily tricked by factories.[79] The factory owners may coach employees on how to answer auditors' questions, send a signal when auditors arrive to let child laborers know that they should run out the back door, or they bring in products (e.g., clothing and toys) from an unaudited factory and claim that the products were made in their factory.[80] Overall, some experts believe that even with greater public attention to the issue of "sweatshops" and the introduction of factory audits, very little has changed in the last twenty years.[81]

Underappreciated in this lack of progress is the role of corruption. In some cases, the factory making the apparel or other items can simply bribe the auditor to get a passing grade.[82] In other cases, the auditor may extort a bribe payment from the factory by threatening the factory with a failing grade.[83] It is also common for the factory to hire a consulting firm in advance of the audit to help the company pass the audit, which is accomplished by the consulting company bribing the auditors.[84]

In other situations, certain aspects of building safety are beyond the scope of an audit, and are the responsibility of local building inspectors, which may also be a corrupt system.[85] For example, one of the major CSR news items in 2013 was the collapse of a building in Bangladesh that housed factories supplying goods for many different multinationals.[86] The building collapse caused the deaths over one thousand workers.[87] Corruption at the local government level allowed the building to be built in direct violation of building codes (including additional stories), and allowed various other safety violations to go unchecked.[88] Likewise, commentators

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78. Stephanie Clifford & Steven Greenhouse, *Fast and Flawed Inspections of Factories Abroad*, N.Y. TIMES, Sept. 1, 2013, *available at* http://www.nytimes.com/2013/09/02/business/global/superficial-visits-and-trickery-undermine-foreign-factory-inspections.html.

79. *See id.*

80. *See id.*; *see also* Declan Walsh & Steven Greenhouse, *Certified Safe, a Factory in Karachi Still Quickly Burned*, N.Y. TIMES, Dec. 7, 2012, *available at* http://www.nytimes.com/2012/12/08/world/asia/pakistan-factory-fire-shows-flaws-in-monitoring.html.

81. Clifford & Greenhouse, *supra* note 78.

82. China Labor Watch, *Corrupt Audits Damage Workers Rights: A Case Analysis in Bureau Veritas Factory Audits*, 5-8 (2009), *available at* http://www.chinalaborwatch.org/upfile/2009_12_9/2009bvcorruption1209.pdf; *see also* Clifford & Greenhouse, *supra* note 78.

83. China Labor Watch, *supra* note 82, at 5.

84. *Id.* at 6.

85. Clifford & Greenhouse, *supra* note 78. For some of these items, such as fire escapes, commentators believe that auditors should cover those items. *Id*.

86. *Id.*

87. *Id.*

88. Norman Bishara & David Hess, *Human Rights and a Corporation's Duty to Combat Corruption*, *in* LAW, BUSINESS AND HUMAN RIGHTS: BRIDGING THE GAP 71, 77-78 (R. Bird et al. eds., 2014).

have noted that in Pakistan—which has seen several hundred workers die in factory fires recently—inspectors make significant, additional money by allowing factory managers to pay bribes to avoid health and safety regulations.[89]

In response to the tragedies at these factories, various initiatives have formed, such as the *Accord on Fire and Building Safety in Bangladesh*.[90] However, unless corruption is brought under control, corrupt payments will prevent these programs from reaching their potential, or worse, having any impact at all while still creating the impression that some progress is being made. Overall, whether it is bribes paid to auditors or to local government inspectors, corporations are linked to these corrupt activities through their suppliers, and this corruption is allowing significant human rights violations to occur. Although corporations may have short-term financial incentives to look the other way due to the lower costs of production corruption affords, these actions make them complicit in human rights abuses. In addition, these situations create significant risks to the corporation's reputation, which may offset any short-term cost savings.[91]

Thus, as to the big question of why corporations should take an active role in combating corruption, from the CSR perspective used in this essay, we can see that combating corruption is necessary for corporations to meet their other well-recognized social responsibilities. Because of this link between corruption and CSR, corporations should integrate combating corruption with its other social initiatives.[92] As stated above, in many cases, combating corruption becomes solely a legal compliance issue. Corporations focus only on ensuring that their employees or agents are not paying bribes. However, to "embrace, support, and enact" the first nine principles of the Global Compact, combating corruption must mean more than just ensuring that employees and agents do not pay bribes, but must ensure that corruption is not interfering with their responsibilities with respect to human rights, labor, and the environment.[93]

In Part II, I discussed an ethical corporate culture that supports a compliance and ethics program designed to prevent wrongful payments. Now, we need to consider the possibility of the corporation adopting a

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89. Declan Walsh, *Anger Rolls Across Pakistani City in Aftermath of Factory Fire*, N.Y. TIMES, Sept. 13, 2012, *available at* http://www.nytimes.com/2012/09/14/world/asia/anger-and-grief-across-karachi-after-factory-fire.html.

90. *See* THE ACCORD ON FIRE AND BUILDING SAFETY IN BANGLADESH, ADVISORY BOARD MEETING REPORT (April 3, 2014), *available at* http://bangladeshaccord.org/wp-content/uploads/Accord-3-Apr-2014-Advisory-Board-Meeting-Report.pdf.

91. *See* David Hess, *Catalyzing Corporate Commitment to Combating Corruption*, 88 J. BUS. ETHICS 781, 782 (2009).

92. Bishara & Hess, *supra* note 88, at 86.

93. *See* Hess, *Enhancing the Effectiveness*, *supra* note 74, at 1124-26.

broader anti-corruption culture that permeates all of its activities. This is a culture that supports both compliance and social initiatives to combat corruption. As stated above, corruption is an issue of CSR; standard mechanisms of CSR already include anti-corruption. For example, sustainability reports require corporations to provide disclosures on how they prevent employees from paying bribes. Stakeholders that make up the CSR community, such as NGOs and social investors, also place pressure on corporations to prevent wrongful payments.[94] Corporations must do more, however. We need to encourage corporations to understand how corruption impacts their ability to meet their other social responsibilities and work toward ending that impediment by proactively combating those corrupt activities. This is the next step in corporations truly developing an anti-corruption culture that supports both ensuring that employees do not pay bribes and that the corporation is seeking out ways that it can help end the corruption that prevents its other social initiatives from being effective.

IV. CONCLUSION

Corporations must combat corruption. By allowing their employees to pay bribes they are contributing to a system that prevents the realization of basic human rights in many countries. Ensuring that employees do not pay bribes is not accomplished by simply adopting a compliance and ethics program, however. This essay provided a brief overview of why otherwise good employees pay bribes in the wrong organizational environment, and what corporations must focus on to prevent those situations from arising. In short, preventing bribe payments must be treated as an ethical issue, not just a legal compliance issue, and the corporation must actively manage its corporate culture to ensure it supports the ethical behavior of employees.

This essay also argued that corporations must do more than just ensure that their employees do not pay bribes. Corporations should work to reduce the impact of corruption on their efforts to meet their social responsibilities in the areas of human rights, labor, and the environment. Overall, corporations must adopt a culture where the anti-corruption mindset permeates all of their activities. This includes both internal actions that support employees' anti-corruption efforts and external actions, including a willingness to work with other organizations on initiatives to combat corruption, whether those organizations are in the private, civil, or public sector.

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94. David Hess, *Combating Corruption Through Corporate Transparency: Using Enforcement Discretion to Improve Disclosure*, 21 MINN. J. INT'L L. 42, 70-73 (2012).