

## Gifts, Bribes, and Exchange: Relationships in Non-Market Economies and Lessons for Pax E-Commercica

Timothy L. Fort

James J. Noone

Follow this and additional works at: <http://scholarship.law.cornell.edu/cilj>

 Part of the [Law Commons](#)

---

### Recommended Citation

Fort, Timothy L. and Noone, James J. (2000) "Gifts, Bribes, and Exchange: Relationships in Non-Market Economies and Lessons for Pax E-Commercica," *Cornell International Law Journal*: Vol. 33: Iss. 3, Article 4.  
Available at: <http://scholarship.law.cornell.edu/cilj/vol33/iss3/4>

This Article is brought to you for free and open access by Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell International Law Journal by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact [jmp8@cornell.edu](mailto:jmp8@cornell.edu).

# Gifts, Bribes, and Exchange: Relationships in Non-Market Economies and Lessons for Pax E-Commercia

Timothy L. Fort\* & James J. Noone\*\*

Introduction .....	516
I. What is So Bad About Bribery? .....	518
A. Moral Arguments Against Bribery .....	519
B. A Cybernetic Argument .....	523
1. <i>The Corporate Analogy</i> .....	524
2. <i>A Detour Through Hawaii</i> .....	528
II. Lessons from Anthropology .....	531
A. Fundamentally, Nothing is a Gift: The Role of Self- Interest .....	531
B. The Spiritual Nature of Giving .....	534
1. <i>Public Nature of the Gift as a Protection</i> .....	536
2. <i>Public Nature of the Gift</i> .....	536
3. <i>Alienability</i> .....	537
4. <i>Peace, Corruption, and Cybernetic Structures</i> .....	538
5. <i>The C<sup>2</sup> Principles: A Commentary</i> .....	541
6. <i>Mediating Institutions</i> .....	542
Conclusion .....	545

*Oro*, the High Priest thought,] was a powerful god. He had accomplished what no other god before him had attained: the consolidation of all the islands . . . a master god like Oro merited supreme sacrifices like sharks and men. . . . King Tamatoa's thoughts were different . . . he felt . . . considerable uneasiness over the fact that the total of sacrifices for any given convocation had now been established as nine [men], plus more perhaps according to the chances of the day. The king wondered: "Is this sudden conversion to Oro a device by the wise men of Haviki whereby they can depopulate my island and thus accomplish by guile what they have always been unable to do by battle?" . . . Then, for the first time he expressed in words his real perplexity: "It is very difficult to be king when the gods are changing."<sup>1</sup>

---

\* Assistant Professor, University of Michigan Business School. Ph.D., J.D., Northwestern University; M.A., B.A., University of Notre Dame.

\*\* Ph.D., A.B.D. (Archeology), University Of Michigan; B.A., Bates College.

1. JAMES A. MICHENER, HAWAII 34-35 (1959) (describing the "takeover" of a South Pacific island named Haviki, which led to the emigration from it and the travel to and settling of Hawaii).

## Introduction

What is there that is new to say about bribery? Bribery is universally condemned, albeit not universally prohibited. Philip Nichols points out that all the major world religions condemn the practice of bribery<sup>2</sup> and that every nation of the world outlaws it.<sup>3</sup> Transnational organizations from the Organization of American States (OAS)<sup>4</sup> to the Organization for Economic Development (OECD),<sup>5</sup> to name just two, condemn the practice and attempt to prohibit it. Non-governmental organizations, such as Transparency International,<sup>6</sup> publicize the countries where corruption is the worst, a worthwhile task that focuses even more attention on the problem. Scholars direct significant attention to the merits of various organizational and legal regimes to eliminate the practice.<sup>7</sup>

If we assume that bribery constitutes corruption and if various organizations condemn the practice, what then is left to say? In this article, we advance three ideas. First, it is important to understand exactly what is wrong with bribery. Part I argues that the various contentions against bribery from deontological, consequential, and even contractarian normative premises present necessary but insufficient descriptions of the moral problems of bribery. Instead, we wish to consider seriously the strengths and weaknesses of what it means to live in a "global village."<sup>8</sup> Living in such a community, as in any community, requires us to see bribery not as an isolated transgression, but rather as indicative of a fragmented social structure.

This is important because efficiency-based arguments against bribery unfortunately carry with them a new way of (dis)orienting the world. These changes are amplified, and are likely to be continually amplified, in a world characterized by increasing e-commerce. E-commerce, a primarily American and Western European business development, brings with it

2. See Philip M. Nichols, *Regulating Transnational Bribery in Times of Globalization and Fragmentation*, 24 *YALE J. INT'L L.* 257, 278 (1999).

3. See *id.* at 258.

4. See Inter-American Convention Against Corruption, Mar. 29, 1996, 35 *I.L.M.* 724.

5. See Steven R. Salbu, *Extraterritorial Restriction of Bribery: A Premature Evocation of the Normative Global Village*, 24 *YALE J. INT'L L.* 223, 225 (1999).

6. See David A. Gantz, *Globalizing Sanctions Against Foreign Bribery: The Emergence of a New International Legal Consensus*, 18 *Nw. J. INT'L L. & BUS.* 457, 476 (1998).

7. See, e.g., Beverly Earle, *Foreign Corrupt Practices Act Amendments: The Omnibus Trade and Competitiveness Act's Focus on Improving Investment Opportunities*, 37 *CLEV. ST. L. REV.* 549 (1989); Beverly Earle, *The United States' Foreign Corrupt Practices Act and the OECD Anti-Bribery Recommendation: When Moral Suasion Won't Work, Try the Money Argument*, 14 *DICK. J. INT'L L.* 207 (1996); David A. Gantz, *The Foreign Corrupt Practices Act: Professional and Ethical Challenges for Lawyers*, 14 *ARIZ. J. INT'L & COMP. L.* 97 (1997); Philip M. Nichols, *Corruption in the World Trade Organization: Discerning the Limits of the World Trade Organization's Authority*, 38 *N.Y.U. L. REV.* 711 (1996); Philip M. Nichols, *Outlawing Transnational Bribery Through the World Trade Organization*, 28 *LAW & POL. INT'L BUS.* 305 (1997); Steven R. Salbu, *Bribery in the Global Market: A Critical Analysis of the Foreign Corrupt Practices Act*, 54 *WASH. & LEE L. REV.* 229 (1997).

8. While this term causes us discomfort, it seems to be the best available metaphor to describe an interconnected political economy.

notions of autonomy that, in some ways, make bribery harder to control. As the opening vignette suggests, in such a changing environment, the rules (or the gods in ancient Hawaii) change and leave one wondering about what laws control. Quite obviously, the e-commerce age has brought with it a global effort to view bribery as a significant impediment to commercial development. Ultimately, we must ask how in this environment do we battle bribery in various parts of the world without roiling sovereign waters.

Second, we consider three anthropological cases of gift-giving. The purpose of these cases is not to argue that cultures have different understandings of what constitutes a gift as opposed to a corrupting bribe. That they do have different understandings has been well-established.<sup>9</sup> Rather, these cases illustrate those social institutions that can protect a gift from becoming corrupting. These anthropological reports show that the public, ritualistic, and relational aspects of the gift protect society from unscrupulous bribers and bribe-takers. Certainly one cannot immediately transplant the *Kula* found by Bronislaw Malinowski in the Trobriand Islands<sup>10</sup> to contemporary business, however, one can learn from the institutional functions served by Trobriand practices and apply them to our contemporary situations. Part II addresses these issues.

The third and final aspect is perhaps the most important, but requires far more development than we can provide here. We simply want to provoke some thought on the relationship of corruption to the maintenance of peace. An important reason given for the prohibition of bribery is that it detracts from free trade, and free trade in turn fosters peace. While we ultimately endorse this position, it is not as neat a connection as one might think. Historically, trade also has provoked violence, particularly when a gift is rejected or is deemed inappropriate.<sup>11</sup> Nonetheless, the connection between the elimination of corruption and international peace is important and, precisely because of this importance, one needs to understand the structures that might allow for a more acceptable and effective transnational prohibition of bribery.

In short, understanding the communal human nature is a step toward effective elimination of corruption, although it is not necessarily considered in a market economic analysis. For our present purposes, we focus on the notion of corruption from the perspective of the pre-market mind, as analysis of economic questions in the contemporary age too easily assumes a market orientation that misses important elements of a corrupting transaction. By recapturing a sense of a communal human nature, we take advantage of opportunities for a richer understanding of how to combat bribery in a way that also fosters harmony.

---

9. See Salbu, *supra* note 5, at 235.

10. See generally BRONISLAW MALINOWSKI, ARGONAUTS OF THE WESTERN PACIFIC: AN ACCOUNT OF NATIVE ENTERPRISE AND ADVENTURE IN THE ARCHIPELAGOES OF MELANESIAN NEW GUINEA 326 (1922).

11. See discussion *infra* Part II.B.4.

## I. What is So Bad About Bribery?

We consider two types of bribery. The first relates to bribery of a governmental official. The second relates to the bribery of a person in a business who, for various reasons, may have a moral duty to act on behalf of another person or an organization. In most respects, the moral analysis of bribery remains the same for both. As David Gantz summarizes, the Federal Corrupt Practices Act (FCPA) provides four elements in its attempt to characterize governmental bribery and eliminate it. They are to:

- (1) pay or offer to pay money or anything of value "corruptly," directly or indirectly, to
- (2) a foreign government official, political party, party official, political candidate or intermediary for such person,
- (3) while knowing or having reason to know—including a "high probability of knowledge"—that the purpose of the payment was to influence an official act or official decision,
- (4) designed to assist in obtaining or retaining business.<sup>12</sup>

The two affirmative defenses to the Act are the legality of the payment under the law of the host country and payment for travel and lodging arising out of promotional activities aimed at obtaining or retaining new business.<sup>13</sup> Failure of a host country to enforce local law is not a defense.<sup>14</sup> Philip Nichols emphasizes this focus on governmental corruption by defining bribery as a "transaction in which an official misuses his or her office 'as a result of considerations of personal gain, which need not be monetary.'"<sup>15</sup>

In an e-commerce age, of course, we must also consider other institutions, such as commercial organizations.<sup>16</sup> Commonly, scholars maintain that the nation-state system dates back to 1648 and the Treaty of Westphalia.<sup>17</sup> However, the rise of transnational organizations makes such a realist approach "inadequate."<sup>18</sup> In other words, one cannot simply focus on nation-states when considering bribery. One cannot ignore "private" brib-

---

12. Gantz, *supra* note 6, at 460.

13. See *id.* at 460-61.

14. See *id.*

15. Nichols, *supra* note 2, at 258 (citing David H. Bagley, *The Effects of Corruption in a Developing Nation*, 19 *WORLD POL. Q.* 719, 720 (1966)).

16. Professors Salbu and Nichols, in their excellent (and entertaining) dialogues on bribery both acknowledge that non-governmental organizations are important new actors on the economic scene, although both stress the merits of various anti-bribery regimes in terms of nation-states. Salbu, for instance, says that "[t]oday's world remains one of separate sovereignties. Although states may one day prove obsolete, they are today's primary global unites of analysis." Salbu, *supra* note 5, at 231.

17. See, e.g., HENRY KISSINGER, *DIPLOMACY* 21 (1994).

18. Nichols helpfully describes these two schools. Realism posits that states are the only meaningful actors in international relations, that states are rational actors seeking power, and that the basic organizing principle of the relations between states is anarchy. In a time when entrepreneurs are forging deep commercial alliances with little regard for national borders, realism stops at the border. In a time of sustained global cooperation, classical realism insists on a "world of states obsessed with their power vis-à-vis other states." Nichols, *supra* note 2, at 456 (footnotes omitted); see also Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 *YALE J.*

ery because contemporary economics requires free flow of goods and services on the basis of price and quality absent other considerations, such as those of obtaining a bribe-payment.<sup>19</sup> In a free market, governmental regulation ideally is minimal<sup>20</sup> so that the relative importance of other institutions becomes more pronounced. Those institutions, such as corporations, thus might also be subject to bribery concerns with similar effects on the efficient distribution of goods and services.

Two corollaries flow from this multi-institutional view of the world. First, corporations themselves might act to eradicate bribery. To that end, we endorse "The C<sup>2</sup> Principles" proposed by David Hess and Thomas Dunfee.<sup>21</sup> An important reason for corporate initiatives is that corporations, if properly structured, can bring the governed a sense of participation in the creation of the norms prohibiting bribery.<sup>22</sup> We will elaborate on this idea in Part II.B.5 in proposing an amendment to Hess and Dunfee's important contribution.

The second corollary to the multi-institutional view of the world is that one also must consider non-governmental types of bribery. Accordingly, one can follow a wider notion of bribery as presented by Dunfee, Smith and Ross.<sup>23</sup> For them "[b]ribery occurs when one person (the briber) provides an inducement to another person (the bribee) that is intended to be in exchange for the bribee doing, or not doing, something that would favor the briber and be contrary to the bribee's positional duty."<sup>24</sup> This definition, of course, includes not only governmental bribe-taking, but also a great deal of activity within the private sector. An employee, for instance, has the positional duty to benefit his principal—his boss or perhaps the corporation—rather than himself. Thus, Dunfee, Smith and Ross apply bribery to a larger set of institutional actors.

#### A. Moral Arguments Against Bribery

Using this broader definition, Dunfee, Smith and Ross consider three moral arguments against bribery. The first is a deontological one: bribery is wrong because it is an "intentional violation of a binding moral duty."<sup>25</sup> An agent of a corporation represents the interests of the corporation rather than her own self-interest and therefore violates this duty if she makes a decision on behalf of the corporation for reasons that benefit herself (by

---

INT'L L. 335, 337-38 (1989). For a good overview of various perspectives on peace, see *APPROACHES TO PEACE: A READER IN PEACE STUDIES* (David P. Barash ed., 2000).

19. See Gantz, *supra* note 6, at 464; Nichols, *supra* note 2, at 275.

20. See F.A. HAYEK, *THE FATAL CONCEIT* 32 (1988).

21. See David Hess & Thomas W. Dunfee, *Fighting Corruption: A Principled Approach The C<sup>2</sup> Principles (Combating Corruption)*, 33 CORNELL J. INT'L L. 593 (2000).

22. See generally Timothy L. Fort & Cindy A. Schipani, *Corporate Governance in a Global Environment: The Search for the Best of All Worlds*, 33 VAND. J. TRANSNAT'L L. 829 (2000).

23. See Thomas W. Dunfee et al., *Social Contracts and Marketing Ethics*, 63 J. MARKETING 14 (1999).

24. *Id.* at 22.

25. *Id.*

taking a bribe).<sup>26</sup>

The second argument is consequentialistic. Here, the prohibition derives from the fact that bribery can harm the organization on whose behalf the bribee acts by leading to a sub-optimal purchase, hiding the act from shareholders, being inefficient, as well as creating larger social harms in terms of corrosive effects on the social structure, diminished happiness of citizens, reduced credibility of government, increased lawlessness, and even possible revolution.<sup>27</sup> Thus, under consequentialism, one condemns bribery not necessarily because of the violation of a prescribed duty, but because of the harms resulting from bribery.

Although deontological and consequentialist arguments are common in contemporary moral parlance, Dunfee, Smith and Ross note significant problems with these prohibitions on bribery. For instance, under deontological analysis, other duties may force one to engage in bribery. These could include feeding one's family, employing workers, or pursuing a worthwhile goal, such as inducing a South African business to oppose apartheid during the 1980s. Moreover, the deontological approach comes largely from an application of Immanuel Kant's theory of ethics to the modern business world.<sup>28</sup> Ignoring philosophical attacks against Kant in business ethics, anthropologist Bronislaw Malinowski writes that:

The great moral philosopher was wrong when he formulated his *categorical imperative*, which was to serve human beings as a fundamental guiding principle of behavior. In advising us to act so that our behaviour might be taken as a norm of universal law, he reversed the natural state of things. The real rule guiding human behavior is this: "what everyone else does, what appears as norm of general conduct, this is right, moral and proper."<sup>29</sup>

Malinowski bases his assessment not on normative philosophy, but on how people actually formulate their moral views. What others do in the community is also likely to be what an individual in that community does. A Kantian assessment, therefore, may be of limited assistance.<sup>30</sup> Regarding consequentialism, the task of actually being able to foresee and calculate possible deleterious effects of a given action is problematic for human capabilities. A person given the opportunity to receive a bribe is not likely, even if she is willing to undertake the effort, to be able to compute the various effects of her decision on the variety of stakeholders who may be affected by it. This is particularly true if she must consider the numerous stakeholders in a large corporation or a nation-state.

Regardless of the particular theory, Dunfee, Smith and Ross note that

---

26. See *id.* at 23.

27. See *id.* at 23 (citing Nichols).

28. See, e.g., ROBERT SOLOMON, *ETHICS AND EXCELLENCE* 113-14 (1992) (arguing that Kantianism acts as a sort of disease in modern ethical theory); WILLIAM C. FREDERICK, *VALUES, NATURE AND CULTURE IN THE AMERICAN CORPORATION* 252 (1995) (arguing that Kantian business ethics are anachronistic).

29. See MALINOWSKI, *supra* note 10, at 326.

30. See SOLOMON, *supra* note 28, at 114; FREDERICK, *supra* note 28, at 252-54.

those bribe-givers who provide "such largess" occupy a difficult position.<sup>31</sup> They must either claim that the gifts make no difference, avoiding characterization as a bribe or as illegitimately spending shareholders' money; or that they do make a difference, accepting the characterization of the expenditure as a bribe but justifying it in terms of profitability.<sup>32</sup>

To provide guidance on bribery which is sensitive to varying community norms and yet subjects these norms to certain moral transcultural minimums, Tom Donaldson and Tom Dunfee develop a series of hypernorms against bribery.<sup>33</sup> "Necessary social efficiency" is one such hypernorm.<sup>34</sup> It is an action or policy that "contributes toward the provision of necessary social goods sufficient to sustain the least well-off members of society at a level of reasonable possibility concerning liberty, health, food, housing, education, and just treatment."<sup>35</sup> Donaldson and Dunfee establish this hypernorm by arguing that two necessary goods are fairness and aggregate welfare.<sup>36</sup> In order to actualize these goods, one must have institutions such as private property.<sup>37</sup> Following Aristotle's argument against Plato, they argue that one is more likely to utilize private property efficiently and productively, for the benefit of all members of the society, than would be the case in absence of private ownership.<sup>38</sup> Therefore, the organization of the economic structure of a society must reflect efficient utilization of resources in which society has a stake and individuals should discharge their role duties stemming from the economizing parameters of efficiency strategies in which one participates.<sup>39</sup> In other words, the least well-off have the best chance of obtaining basic goods if resources are used efficiently. Consequently, society should be structured to allocate resources efficiently and individuals should fulfill their roles in this structure.<sup>40</sup>

For Donaldson and Dunfee, bribery violates the hypernorm of necessary social efficiency in two ways. First, it harms political participation.<sup>41</sup>

---

31. See Dunfee et al., *supra* note 23, at 26.

32. See *id.*

33. See THOMAS DONALDSON & THOMAS W. DUNFEE, *TIES THAT BIND: A SOCIAL CONTRACTS APPROACH TO BUSINESS ETHICS* (1999). For Donaldson and Dunfee, moral analysis in business occurs on two levels. The first level is that of the local community. A norm is "authentic" if members of the community have an opportunity to consent to the norm of the community, consent they can evidence through actual assent, the ability to participate in the development of the communal norm, or an opportunity to leave the community if in disagreement with the norm. See *id.* at 38. However, since a community may enact a norm that may strike many as deeply problematic, they also propose a second-tier assessment based on formal moral theory. See *id.* at 49-81. In this tier, Donaldson and Dunfee propose the notion of "hypernorms," which are transcultural moral minimums that any local norm must accord with in order for the local norm to be "legitimate" and binding. See *id.*

34. See *id.* at 117.

35. *Id.* at 119.

36. See *id.* at 121.

37. See *id.* at 129.

38. See *id.* at 129.

39. See *id.* at 129-30.

40. *Id.*

41. See *id.* at 226-30.



When a government official makes a decision on the basis of a bribe, he allocates public resources in a manner not subject to the political control of the public because the decision is not open to accountability mechanisms.<sup>42</sup> As a hidden transaction, the bribe diverts money from the political process.<sup>43</sup> Accordingly, there is a violation of the societal norm designed to provide the least well-off the possibility of pursuing basic goods.<sup>44</sup>

Bribery also violates the hypernorm of necessary social efficiency in that it skews the efficient distribution of resources.<sup>45</sup> Under Donaldson and Dunfee's analysis, the skewing of resources resulting from bribery may very well hurt the least well-off.<sup>46</sup> Although a particular bribe may be relatively small relative to a country's gross domestic product, the diversion of funds that occurs possibly could produce a profoundly negative cumulative effect on the economy.<sup>47</sup> Moreover, some bribes are not so small. Large bribes obviously have a greater impact on the efficient allocation of resources. Therefore, this argument, which is both economic and moral in nature, is helpful in the analysis of bribery. Furthermore, we advocate considering the sufficiency of efficiency as a moral criterion in an e-commerce age.<sup>48</sup>

As Judge John Noonan notes, "bribery as a phenomenon is as old as bureaucratic systems."<sup>49</sup> Indeed, in both governmental and private bribery, agency is a central problem. It surfaces whenever an agent, who is under an obligation to utilize another person's funds for that person's benefit, instead directs the funds for his, the agent's, own benefit. The larger the structure and the greater the agent's separation from the ownership of the assets, the greater the risk of bribery. The difficulty with the predominant theories of moral behavior—Kantian, Utilitarian, or Economic—is that they do not indicate why an individual would find her self-interest directly enhanced by foregoing bribery as long as she eluded capture.

There is another corporate analogue to this in terms of corporate governance. For most of the twentieth century, American corporate governance scholarship focused on how to control managers who were no longer the primary shareholders.<sup>50</sup> Simply put, in large corporate institutions, the degree of separation of one's duty from the ownership of assets one controls fuels the temptation to influence the flow of these assets toward one's personal preferences to the detriment of the principal. Brib-

---

42. See *id.* at 226-27.

43. See *id.*

44. See *id.*

45. See *id.* at 228.

46. See *id.* at 225.

47. See *id.* at 228-29.

48. See *infra* note 193 and accompanying text.

49. Nichols, *supra* note 2, at 272.

50. See, e.g., A. A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049 (1931); A. A. Berle, Jr., *For Whom Corporate Managers Are Trustees*, 45 HARV. L. REV. 1365, 1366-67 (1932); E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees*, 45 HARV. L. REV. 1145 (1932).

ery provides one example of this phenomenon; managers who direct corporate funds toward their preferred charitable objectives provides another. Perhaps Milton Friedman presents the rhetorical culmination criticizing this problem when he insists that the clear duty of a manager is to enhance profitability.<sup>51</sup> Regardless of how one assesses Friedman's argument of corporate social responsibility, he makes a valid assessment that managers who direct funds to programs that have no relation to the profitability of their corporation, under current governance regimes, are stealing from their company regardless of their noble intentions.<sup>52</sup> This appraisal is true insofar as current corporate governance insists that the purpose of a corporation is to maximize profits for shareholders through the efficient use of resources.

It is important to see the agency dimensions of this issue because efficiency serves as a helpful criterion for the evaluation of agents' actions. Nonetheless, we are leery of relying too heavily on efficiency as a criterion by which one can adequately assess issues such as bribery and corporate governance. Focusing solely on efficiency may obscure other relevant factors that are not so easily monetized and which, if monetized, grossly distort the value itself.<sup>53</sup> Thus, we explore two aspects of efficiency in formulating anti-bribery policies in an e-commerce age. We offer a critique of efficiency, not in opposition to Donaldson and Dunfee's hypernorm of necessary social efficiency,<sup>54</sup> but as a supplement to it and clarification of the difficulties that attend its use.

First, what happens when one looks at bribery not as a moral problem to be rectified by transnational legal agreements encouraging governments and corporations to crack down on bribery, but instead as a symptom of a community whose gods, as the opening vignette suggests, have changed and, therefore, whose moral feedback mechanisms have short-circuited? Second, although efficiency may be a sound principle for twentieth century business practices, is it as important for the twenty-first century?

## B. A Cybernetic Argument

Because our approach differs significantly from the dominant traditional Enlightenment ethics theories,<sup>55</sup> we describe the basis of our recommendations in some detail. We believe that an agent's interest in paying or taking a bribe is greater when notions of autonomy dominate, threatening to marginalize the communal notion of self. This occurs when an individual, shorn of communal obligations, sees his self-interest as abstracted

---

51. See Milton Friedman, *The Social Responsibility of Business is to Increase Its Profits*, N.Y. TIMES, Sept. 13, 1970, § 6 (Magazine), at 32, 126.

52. See *id.* at 24.

53. See ROY A. RAPPAPORT, *ECOLOGY, MEANING, & RELIGION* 131 (1979).

54. See *supra* note 33.

55. See, e.g., PATRARA WERHANE, *PERSONS, RIGHTS AND CORPORATIONS* (1985) (relying on Kantian premises); WILLIAM M. EVANT & R. EDWARD FREEMAN, *A Stakeholder Theory of the Modern Corporation*, in *ETHICAL THEORY AND BUSINESS* 97, 101-05 (Tom L. Beauchamp & Norman E. Bourne eds., 3d ed. 1988) (same); DONALDSON & DUNFEE, *supra* note 33 (relying on contractarian notions).

from nonmaterial goods. Bribery then becomes rational unless one is caught. Alternatively, the observance of ethical business practices likely nourishes an individual's attachment to the community and enhances the common good, which then benefits the agent's self. This cycle is harmed by corruption.

### 1. *The Corporate Analogy*

Robert Jackall has written extensively on the phenomenon of how bureaucracy separates individuals from the consequences of their actions.<sup>56</sup> This is particularly true, he argues, in large modern corporations.<sup>57</sup> Others, such as Peter Berger and Richard John Neuhaus,<sup>58</sup> as well as Robert Nisbet,<sup>59</sup> have argued that because moral character forms in small "mediating institutions," large bureaucratic regimes can leave an individual disconnected from the consequences of his actions.<sup>60</sup> Mediating institutions provide an internal feedback mechanism to regulate behavior; one that large bureaucratic systems have difficulties replicating. This mechanism is a cybernetic structure, defined by anthropologist Roy Rappaport as one denoting:

a structure or form of a particular sort, that of the closed causal loop. *Intrinsic to, or entailed by,* the operation of a *simple* cybernetic structure is "negative feedback," such that deviations of the states of components of the loop from reference values initiate processes tending to return those states to their reference values.<sup>61</sup>

In other words, we can approach the bribery question by asking what types of structures we can create to connect an agent with her work sufficiently well so that organizational mechanisms provide the requisite forces to discipline wrongdoing and return the organization to one that is not corrupt.

In rephrasing the question, we do not reject the work of transnational organizations, such as Transparency International, in their attempts to eradicate bribery and corruption. Further, we do not object to Donaldson and Dunfee's analysis. In fact, we endorse transnational organizations' efforts to punish bribe-taking for the moral reasons presented by Donaldson and Dunfee. What we offer is a refinement: a recommendation that to combat bribery effectively, one must create self-regulating structures. Doing so requires considerations beyond efficiency. These considerations relate to basic human nature. We must reflect on how individuals' moral behavior inculcates and relates to the good of a community whose members are harmed by corruption. Moreover, anthropological evidence sug-

---

56. See ROBERT JACKALL, *MORAL MAZES: THE WORLD OF CORPORATE MANAGERS* (1988).

57. See *id.* at 11-12.

58. See PETER BERGER & RICHARD JOHN NEUHAUS, *TO EMPOWER PEOPLE: THE ROLE OF MEDIATING STRUCTURES IN PUBLIC POLICY* (1977).

59. See ROBERT A. NISBET, *THE QUEST FOR COMMUNITY: A STUDY IN THE ETHICS OF ORDER AND FREEDOM* (1953).

60. See generally TIMOTHY FORT, *ETHICS AND GOVERNANCE: BUSINESS AS MEDIATING INSTITUTION* (forthcoming 2001, Oxford University Press).

61. RAPPAPORT, *supra* note 53, at 76.

gests that these structures, rather than the free market itself, nourish peaceful relations among countries and thus supports our argument.

As an example of our position, consider the recent debate regarding bribery between Steven Salbu and Philip Nichols. The problem of combating bribery while not antagonizing countries with non-western values is at the heart of the debate between Salbu and Nichols.<sup>62</sup> Salbu repeatedly cautions against imposing values from afar and attempting to make distinctions regarding the nature of appropriate gift-giving in various cultures.<sup>63</sup> His argument can be seen as one stemming from the difficulty associated with the creation of a community—often referred to as a “global village”—which is simply too large to offer the kind of virtue-inculcating lessons that inspire a person not to accept or offer bribes. A premature attempt to do so risks moral imperialism.<sup>64</sup>

Nichols, on the other hand, notes that all cultures condemn the practice legally and religiously so that the risks of imperialism are virtually nonexistent.<sup>65</sup> With such cross-cultural agreement and provided that local communities can determine whether a particular transaction is corrupting, extra-territorial and transnational prohibition of the practice of bribery is a logical and even helpful step in eradication of bribery, particularly in poverty-stricken countries which are most harmed by bribery.<sup>66</sup>

Both Salbu's and Nichols' arguments are correct since a law prohibiting bribery may be most meaningful only if the lawmaking institutions are viewed as legitimate in the eyes of the governed. Obtaining that level of legitimacy is not simply a matter of articulating a finely-wrought principle or well-honed law, admirable and essential as those accomplishments may be. Legal historian Larry Kramer, for instance, argues that the Anti-Federalist argument at the time of the writing of the U.S. Constitution emphasized the need for small communities.<sup>67</sup> This was important, not to promote homogenous groupings of individuals as some scholars argue,<sup>68</sup> but to obtain the “confidence of the people.” The governed demand the ability to interact with the governors: to see them, hear them, and talk to them.<sup>69</sup> With the ability to conduct a personal evaluation of those who prescribe rules, one's confidence in the rules, whatever they may be, increases. If there is indeed a relationship between the confidence of the governed and the small sizes of institutions promulgating laws, then we could view the activities of transnational organizations as imperialistic *even if the laws themselves are just, and even if a person might otherwise agree with the content of the law.*

---

62. See Salbu, *supra* note 5; Nichols, *supra* note 2.

63. See Salbu, *supra* note 5, at 225-26.

64. See *id.*

65. See Nichols, *supra* note 2.

66. See *id.*

67. See Larry Kramer, *The Confidence of the People: Size, Representation, and the Constitutional Role of Political Parties*, Presentation at the Legal Theory Workshop of the University of Michigan Law School (Nov. 5, 1999) (manuscript on file with author).

68. See *id.* at 4-30 (noting criticisms of Montesquieu).

69. See *id.* at 62.

In terms of bribery, Salbu is right insofar as the imposition of laws by an abstract organization can alienate even if the law itself is unobjectionable.<sup>70</sup> Nichols is correct in that people *do agree* that bribery is wrong.<sup>71</sup> The way to encourage individuals to see their self-interest connected to eschewing bribery is not by a well-wrought edict from the World Trade Organization or the United Nations Commission on International Trade Law. These transnational organizations should take an intervening step and *also* attend to the encouragement and development of cybernetic structures within countries, which would better enable those countries to flush out the corrupting practices occurring within their borders. In fact, arguing in another forum and on a different topic, Salbu offers a model for this very kind of self-regulating community:

The functional family provides a useful analogy here. Like the family members who genuinely wish one another success, transactional allies will naturally constrain self-interest through concessions made for the ultimate good of others and of the alliance. Those who interact functionally and familiarly have little use for formalization of obligation, and indeed such formalization would be wasteful and ineffective. Like the organically moderated relationships that comprise the cohesive family, close business network allies have a reduced need for compulsory rules and obligations, both the establishment and the implementation of which are costly and superfluous in function. Innovations in relationship management forms may better serve emerging, nonadversarial forms of cooperative linkages.<sup>72</sup>

Salbu paints a picture of a need for legal doctrine to develop notions of contracts that take into account the ethical and relational commitment to a common good in a particular historical context. Rather than adversarial attempts to control and predict the elaboration of a transactional exchange, there is instead a need to provide models that accord with the realities of global business practices.

In a popular vein, Tom's of Maine CEO Tom Chappell describes this extension to corporate life when he compares the corporation to a family:

In the family we learn love, patience, respect, nurturing, affirmation, and health. The family also teaches us about competition, domination, selfishness, and deceit. The family is thus a relatively efficient learning system for the development of mind, spirit, and body. It involves the whole self. Certainly it has its own hierarchy and power centers, but it also can be egalitarian. Members of a happy, thriving family will do anything for each other; they devote themselves to maintaining that happiness and increasing it.

Substitute the word *company* for *family* . . . and you get an idea of what I envision a company community to include. In my experience, employees will run through walls for a company that understands them, gives them some freedom, encourages their creativity, appreciates their work, and rewards it fairly. Treat an employee like a cog in a machine, and you'll get a cog's work. Treat that same person as a member of your family, and you'll

---

70. See Salbu, *supra* note 5.

71. See Nichols, *supra* note 2.

72. Steven R. Salbu, *The Decline of Contract as a Relationship Management Form*, 47 RUTGERS L. REV. 1271, 1303-04 (1995) (citation omitted).

get loyalty.<sup>73</sup>

In a scholarly vein, Robbin Derry uses a similar model when she applies feminist scholar Virginia Held's "mother-child" paradigm to business ethics.<sup>74</sup> Derry's argument has two central points. First, Derry argues that it is a mistake to compartmentalize personal and professional life; the experiences of the one pour over into the experiences of the other.<sup>75</sup> She argues that personal experiences and models of parenting relationships may have something important to say about how to blend economizing and "ecologizing" values in business.<sup>76</sup> Second, she notes that rather than individuals finding themselves in the position of autonomous or rational actors, a parent finds him- or herself in an obligatory bond of responsibility, a characteristic of enmeshment that we rarely acknowledge in business.<sup>77</sup> We suggest, however, that this enmeshment is ever-present in a mediating institution.

Functional families exhibit a relationship between the well-being of the family unit that is the common good and the individuals comprising it.<sup>78</sup> The bonds within this unit extend beyond mere economic sustenance to entail moral, emotional, and spiritual values. Similarly, we suggest that even if we design businesses to focus on economic efficiency, the relationships within the company will be human ones and the bonds that sustain these relationships will also entail moral, emotional, and spiritual values. We may encourage such values by employing particular types of structures, but we cannot reduce them to philosophical principles or legal rules.

It may be helpful to note briefly an argument made by legal scholar and business ethicist Jeffrey Nesteruk. Nesteruk claims that business ethics suffer because they offer an impoverished view of the law as a set of rules, obligations, and constraints.<sup>79</sup> Beyond specific rules, Nesteruk emphasizes the rhetorical power of the images created by the law.<sup>80</sup> The use of law as a language provides us a mechanism to constitute and develop character, culture, and community.<sup>81</sup> In other words, phrases such as "fiduciary duty" or even "economic efficiency" become much more than rules; in fact, they form the ways in which we form our lives and communities. Relating this to bribery suggests that between relativism and globalism lies a role for transnational legal institutions to propose laws that turn organizations into cybernetic structures, where moral behavior is valued because one sees the connection between self-interest and the common

---

73. TOM CHAPPELL, *THE SOUL OF A BUSINESS: MANAGING FOR PROFIT AND THE COMMON GOOD* 61-62 (1993).

74. See generally Robbin Derry, *The Mother-Child Paradigm and Its Relevance to the Workplace*, 38 *BUS. & SOC.* 217 (1999).

75. See *id.* at 218.

76. See *id.* at 222 (commenting of William Frederick's allusion to Virginia Held. Derry elaborates on the Held position in integrating with Frederick's work).

77. See *id.* at 223.

78. See Salbu, *supra* note 72.

79. See Jeffrey Nesteruk, *Reimagining the Law*, 9 *BUS. ETHICS Q.* 603, 606-07 (1999).

80. See *id.* at 604.

81. See *id.* at 611-15.

good of the community to which one belongs. As we note later, this step in what is essentially an issue of corporate governance is the final, and critical, amendment to the C<sup>2</sup> Principles. The heart of this connection is the creation of structures which link community interest to individual self-interest.

The disjunction between an individual's self-interest and the common good of the community to which that individual belongs is at the heart of Alasdair MacIntyre's analysis.<sup>82</sup> MacIntyre critiques the bureaucratic managerial system's concealment of moral values in favor of autonomous, independent choices shorn of historical and cultural context.<sup>83</sup> Without such a connection, a prohibition can appear arbitrary, imposed, and meaningless.<sup>84</sup> MacIntyre, in two separate books, draws upon Hawaiian history to demonstrate his point.

## 2. A Detour Through Hawaii

While a discussion of ancient Hawaiian history may seem out of place in the context of a discussion on bribery, we wish to emphasize the utility of this history: if a rule is enacted with no more understanding of its rationale than that an authority has decreed it, the law will be less efficacious than if those subject to the law have a sense and at least an understanding, if not ownership, of it. In order to demonstrate this point, we shall look at the notion of *taboo* in Hawaiian history and focus on the intelligibility of any *taboo*, including one prohibiting bribery.

MacIntyre reports that when Captain James Cook made his third voyage to the Polynesian islands in 1778, his crew was surprised that while sexual mores were very lax, there were strict prohibitions on women eating with men.<sup>85</sup> When asked why, the Polynesian Islanders simply told the sailors that the practice was *taboo*.<sup>86</sup> No one, though, could really understand what *taboo* meant. In fact, anthropologists concluded that a few decades later, the natives themselves did not really understand what *taboo* meant.<sup>87</sup> According to MacIntyre, this is why Kamehameha II easily overthrew the *taboo* system in 1819.<sup>88</sup> While MacIntyre overdraws his assessment of Kamehameha II,<sup>89</sup> MacIntyre correctly observes that if a cultural

---

82. See generally ALASDAIR MACINTYRE, *AFTER VIRTUE* (1981).

83. See *id.* at 18.

84. See *id.*

85. See *id.* at 105.

86. See *id.* at 105.

87. See MARSHALL SAHLINS, *ISLANDS OF HISTORY* 142 (1985).

88. See MACINTYRE, *supra* note 82, at 105.

89. For a history, see LILIKALA KAME'ELEIHIWA, *NATIVE LAND AND FOREIGN DESIRES* (1992). Pre-westernized Hawaii featured a highly stratified, hierarchical social system with gods and kings somewhat interchangeable, and with regular ritual sacrifices of human beings as well as infanticide. It was also a society that knew few western restrictions of sexual practices: having multiple partners, married or not, was the norm, and they even viewed incest not only as permissible among the *Ali'i Nui* (the nobles) but necessary to produce a *Moi'i* (the king). Internally, however, a series of checks and powers highly regulated this social system in addition to a sense of impartiality, property rights, communication, and subsidiarity, which maintained *pono*, a sense of bal-

rule of behavior is predicated simply on a prohibition without any other understanding of its rationale, then that rule is hardly persuasive.<sup>90</sup>

In actuality, the notion of a *taboo* prohibiting women and men from eating together was based on the creation myth of Hawaiians called the *Kumulipo*, a myth taken with great seriousness in prewesternized Hawaii.<sup>91</sup> So too, for that matter, was a freewheeling attitude toward sex with multiple partners and spouses throughout life a logical participation in the highly sexually charged creation myth of *Kumulipo*.<sup>92</sup> The *taboos* were checks that kept powerful forces of the universe in balance. Without this creation myth, the religious system collapsed and so did the *taboos*. Abstracted from that myth, witnessed by the lack of harsh consequences for breaking the *taboo* in conjunction with Cook's arrival, applied in a way that systematically and by definition "discriminated" against commoners, and further undermined when the ruling class, the *Ali'i Nui* (the nobles) and the *Moi'i* (the king) used *taboo* for commercial profitability with the west (i.e. a form of bribery). As such, the practice of *taboo* became an ineffective moral fragment that was only barely understood by the native Hawaiians.<sup>93</sup> What once was a behavioral system connecting individuals with cosmic identity was undermined when the rules of behavior no longer made any sense to the governed.

Thus, we can say that the *Ali'i Nui's* fondness for western luxury prompted them to misuse *taboo* for commercial advantage. They accepted bribes, thereby further disconnecting their own good from the common good of the *maka'aina* and making *taboo* itself unintelligible by precluding the communication of its rationale in a way that would gain cultural assent. Between 1795 and 1819, Kamehameha also used *taboo* rules to regulate trade with European countries thus changing *taboo* rules from rit-

---

ance or equilibrium. These checks came in the form of religion, competition, and the *aloha 'aina*, the love of and care for the land. Changes in all three resulted in the loss of traditional Hawaiian culture. After Kamehameha's death in 1819, his son Kamehameha II (or Liholiho) became king. But Liholiho did not have his father's strength or aura. With no *mahele* remaining to establish his authority, he turned to a religious test of strength, which he failed. At that point, his power was very weak. Two of Kamehameha's wives, the royal wife Keopuakini (Liholiho's mother) and Kamehameha's favorite wife Ka'ahumanu (who acted as a regent) encouraged Liholiho to break *kapu* and permit women to eat with men. Liholiho accomplished this by first allowing gender intermixing among the *Ali'i Nui* and then later through his own participation. This effectively ended any pretense of Hawaiian religion. Rather than accepting MacIntyre's interpretation that Liholiho undertook a Nietzschean overthrow of Hawaiian religious system, viewing the breaking of a *kapu* as a quest to reverse the disastrous loss of Hawaiian population by embracing a new religious tradition that seemed to offer a new *pono* and life would be more accurate. See *id.*

90. See MACINTYRE, *supra* note 82, at 106.

91. See VALERIO VALERI, *KINGSHIP AND SACRIFICE: RITUAL AND SOCIETY IN ANCIENT HAWAII* 4-7 (Paula Wissing trans., University of Chicago Press 1985); see also J.D. BISIGNANI, *KAUAI HANDBOOK* 19-39 (3d ed. 1997) (providing a surprisingly accurate and concise summary of Hawaiian history).

92. See SAHLINS, *supra* note 87, at 9-26.

93. See ALASDAIR MACINTYRE, *THREE RIVAL VERSIONS OF MORAL ENQUIRY: ENCYCLOPAEDIA, GENEALOGY, AND TRADITION* 184 (1990).



ual practice to practical economization.<sup>94</sup> As Sahlins indicates, the *taboo's* meaning changed from something ensuring the common good to a private benefit through a process of "a logical extension [which reached] the point of a functional transformation."<sup>95</sup> In short, it became a proprietary right equivalent to, and used today as, "no trespassing."<sup>96</sup> This meant that "for the common people, the sacred restrictions which promised divine benefits (when respected) were now directly counterpoised to the general welfare."<sup>97</sup> This further discredited *kapu* so that no intelligible rationale for it existed other than to know that it was prohibited.

MacIntyre argues that we are in the same moral position today that the Hawaiians were in then.<sup>98</sup> In fact, he argues that one would see the Enlightenment project—perhaps best exemplified in Kantian universal duty and utilitarianism—as degenerative in the pre-Cook Hawaiian mind because of how the "detachment of European moral rules from their place within an overall theological moral scheme, embodying and representing a highly specific conception of human nature, corresponds to the similar detachment of *taboo* rules."<sup>99</sup> With moral rules serving as abstract principles derived from an earlier history that we no longer know, moral rules and duties are disembodied fragments with no real authority except that which a powerful person can will and impose on others.<sup>100</sup>

This applies to bribery insofar as capitalist notions of efficiency and self-interest replace the pre-market understanding of selfhood and the relationship of that self to the community. More specifically, efficiency is a helpful criterion for action when situated within a context where its execution leads to communal goals. In ancient Hawaii or a modern mediating institution alike, efficiency is the mechanism that most adaptively distributes social goods however we define those goods. That definition may exclude money and wealth. Abstracted from a communal understanding of what is beneficial, efficiency can easily mean maximization of individual self-interest. Such a view of efficiency makes bribery perfectly logical. Only if one sufficiently raises the costs of bribery, such as through tougher anti-bribery schemes, would an individual choose not to maximize self-interest by bribing or accepting a bribe, whether in a governmental or corporate capacity. It is important to see, however, that this is only one of many possible schemes. There are other communal schemes in which the "individual" self is a complex set of relationships. Such schemes provide a different sense of gift-giving and perhaps might be revitalized in a "global village." It is critical to recapture that communal self and to provide structures that nourish it because otherwise bribery is simply the logical outcome of a fragmented society encountering the wealth and freedom of

---

94. See SAHLINS, *supra* note 87, at 142.

95. *Id.*

96. *Id.*

97. *Id.*

98. See MACINTYRE, *supra* note 93, at 182-83 (1990).

99. MACINTYRE, *supra* note 82, at 185.

100. See MACINTYRE, *supra* note 82, at 106.

capitalism and, as such, any attempts to outlaw bribery through transnational organizations would be seen as empty *taboo* rules; empty because they make no meaningful connection between the people and the prohibition.

## II. Lessons from Anthropology

Because we rely on anthropological evidence to argue for the communal aspect of human nature, we would like to consider gift-giving from the perspective of anthropological accounts of societies which have this pre-market conception of human nature. In doing so, three lessons are enlightening for a contemporary assessment of bribery. Our argument is not that transnational organizations are a mistake or that they should not attempt to reach a global understanding of norms promoting the global common good. To the contrary, we believe that these efforts are important and vital, but that their efficacy will depend upon the integration of global norms into the sphere of personal meaningfulness more than upon the logic of the law itself.

It is one thing to note that different cultures have differing practices regarding what constitutes a gift vis-à-vis a bribe. It is another to attempt to enter the minds of the members of a culture to understand why the analytical categories western capitalism applies to various types of exchanges distort the very communities to which anti-bribery legislation may apply. Three thoroughly inter-related aspects of gift-giving are worth noting. They are the difference in the understanding of self-interest, the inherently spiritual nature often accompanying an exchange, and the resulting conclusion that an exchange to obtain economic advantage is not necessarily a corrupting bribe.

### A. Fundamentally, Nothing is a Gift: The Role of Self-Interest

Contemporary business and legal analysis adopts the perspective of the rational person who seeks to maximize her self-interest. Some influential economists, such as Oliver Williamson, characterize human behavior as opportunistic—"self-interest seeking with guile."<sup>101</sup> So ingrained is the connection of self-interest and law, that some have argued that it is impossible for corporate theorists even to consider a description of legal behavior that is not connected with self-interested behavior.<sup>102</sup>

Thought of in terms of economic self-interest, one runs into an agency question as to how to constrain the self-interest of an individual who is able to benefit the "self" at the expense of the company. Indeed, this is what Dunfee, Smith and Ross consider when they caution that an individual as an agent could have a fiduciary duty to a principal, such as the company, which would transform the taking of a bribe into a violation of

---

101. OLIVER E. WILLIAMSON, *MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS* 9 (1975).

102. See *ETHICS AND AGENCY THEORY: AN INTRODUCTION* (Norman E. Bowie & R. Edward Freeman eds., Oxford Univ. Press 1992).

that duty and therefore an immoral act.<sup>103</sup> The economists' commitment to self-interest begs an enormous question, however, of what constitutes the "self." By monetizing the self so that it comprises that in which a rational individual finds the most utility, one confines the notion of the self to a particular view. From this vantage point, gifts must either be personal and outside economic calculations or part-and-parcel of business activity itself.

There are other ways of conceiving of the concept of "self." For instance, in speaking of self-interest, Marcel Mauss, who wrote the classic anthropological text on gift-giving, argues that:

If some equivalent reason animates the Trobriand or American Indian chiefs, the Andaman clans, etc., or once motivated generous Hindus, and Germanic or Celtic nobles, as regards their gifts and expenditure, it is not the cold reasoning of the merchant, the banker, and the capitalist. In those civilizations they are concerned with their own interest, but in a different way from our own age. They hoard, but in order to spend, to place under an obligation, to have their own 'liege men'. On the other hand, they carry on exchange, but it is above all in luxury articles, ornaments or clothes, or things that are consumed immediately, as at feasts. They repay with interest, but this is in order to humiliate the person initially making the gift or exchange, and not only to recompense him for loss caused to him by 'deferred consumption'. There is self-interest, but this self-interest is only analogous to what allegedly sways us.<sup>104</sup>

According to one of his most important interpreters, Mary Douglas, the notion of self that Mauss observed is one in which "individuals" were identified through their relationships with the social and spiritual world.<sup>105</sup> In this social world, for instance, gifts were constantly exchanged for all forms of goods and services.<sup>106</sup> While individuals in this world were certainly self-interested, they were interested in a range of things and relationships which was far more complex than can be captured by any one criterion, such as in the case of the rational economic actor. A rational economic actor may look at interest payments as the heart of a transaction enabling a borrower to rent an asset to satisfy that borrower's preferences and for a lender to put her assets to productive use generating returns to satisfy her preferences. Does this assessment, however, contemplate the humiliation of receiving a loan? Does it account for how individu-

---

103. See, e.g., Dunfee, et al., *supra* note 23.

104. MARCEL MAUSS, *THE GIFT: THE FORM AND REASON FOR EXCHANGE IN ARCHAIC SOCIETIES* 75 (W.D. Halls trans., 1990). We combine some things that, in the original, were not so obviously related. Although we think this presentation of potlatch and *mana* does not distort Mauss's central point, we must note that these are terms with different origins. They have become more general terms, however. *Mana* is a spiritual term for fitness, ability to lead, and strength. It plays prominently in the accounts of Pacific Island and Big Man societies. *Potlatch* is a term which originated with the coastal groups of the Northwestern United States, and was a type of feast in which these Native Americans ritually burned huge quantities of trade and other goods to "reset the clock," or clear the slate, and perhaps to prevent the accumulation of wealth through the trade process.

105. See *id.* at viii (Douglas's introduction).

106. See *id.*

als internally “feel” about a stratification of social hierarchy comprising luxury and “lendable” money versus the lack of those things?

Peter Richerson and Robert Boyd note that everything in human history suggests that we are not well-adapted to tolerate anything beyond the slightest deviation from social equality.<sup>107</sup> Nonetheless, the bureaucratic system of principal-agent relationship combined with the wealth disparities produced by capitalism,<sup>108</sup> trades on a dynamic that opposes this egalitarian predisposition. Thus, an agent (or a borrower), may experience aspects of psychological humiliation, such as in discharging the duties that accompany one’s role, that tempt one to resist arguments about efficiency and instead think in terms of taking advantage of one’s position to enhance one’s status. This assessment is probably more telling with respect to low-level agent misconduct than conduct by a government leader leading to extortion. It is meant more as a provocation than a comprehensive analysis. The provocation is whether a principal-agent or borrower-lender transactional analysis takes into account the dimensions of human nature and personal feeling so that it adequately captures the reality of the situation. Mauss’ assessment is that capitalist notions of self-interest do not capture this reality.<sup>109</sup> This does not mean that a capitalist notion of self-interest is wrong, merely that it only partially describes the dimensions of some situations.<sup>110</sup> We need more to understand what comprises self-interest.

In a pre-market world, one could not be part of a society without also being part of a gift-exchange process. This process could certainly be one that was neither purely personal nor commercial. It was, in fact, both. In studying the Trobriand people, for instance, Bronisław Malinowski described the *Kula* gift cycle and concluded that the *Kula* is half-commercial, half-ceremonial.<sup>111</sup> The people established no fixed line between trade or barter and gift-giving.<sup>112</sup> Since it could be both, even today we face ambiguities as to what constitutes a corrupting bribe. Seats in a skybox? Dinner? Christmas gifts?

Beyond the social nature of exchange, there is a connection between a person and the object that person created. Echoing a Lockean notion of property, Mauss argues that the entire capitalist structure is at odds with morality insofar as the system prevents a person from following the travels of his handiwork and, with a Marxian overtone, sharing in the profits of its sale.<sup>113</sup> In construing the meaning of a gift, one has to pay attention to the

---

107. See Peter J. Richerson & Robert Boyd, *Complex Societies: The Evolution of a Crude Superorganism*, 10 *HUMAN NATURE* 253, 269 (1999).

108. This is not to claim that capitalism does not advance the wealth of most people. There is evidence that it does raise all boats. See, e.g., F.A. HAYEK, *THE FATAL CONCEIT* (1988). But even optimistic accounts of capitalism note that there are inequalities in wealth in the system. See, e.g., LEE A. TAURS, *Developmental Responsibility*, in *MULTINATIONAL MANAGERS AND POVERTY IN THE THIRD WORLD* 127-39 (Lee A. Taurus ed., 1982) (implicitly recognizing corporate responsibilities in the midst of economic inequity).

109. See MAUSS, *supra* note 104, at 75-77.

110. See *id.*

111. See MALINOWSKI, *supra* note 10, at 510.

112. See *id.* at 176-94.

113. See MAUSS, *supra* note 104, at 96.

meaning of the self. If one considers multiple dimensions of the self, one can see its communal sense. Not only could it contemplate a relationship between the giver and the recipient, but also between the maker and the object. Distinctions between personal and commercial are much more ambiguous than what one generally encounters in traditional economic analysis. Because of that ambiguity, an analysis founded on a self-interested distinction between personal and commercial must fail if human beings are indeed social beings. This failure, however, is not necessarily a bad thing. Although a market assessment based on economic self-interest may not provide adequate distinction between what is and what is not a corrupting exchange, seeing its limitations can redirect attention from a market description to a more complete assessment.

### B. The Spiritual Nature of Giving

In addition to the social context in which one makes a gift and in which nothing is ever simply a personal gift, there is also a sense in which there is a spiritual connection bound in the exchange. Mauss discusses “potlatch” with regard to two elements. One is social and the other is spiritual. The social notion of the potlatch is the honor or prestige conferred by the wealth, but besides this socially constructed value, there is also the “*mana* conferred by wealth; and the absolute obligation to reciprocate these gifts under pain of losing that *mana*, that authority—the talisman and source of wealth that is authority itself.”<sup>114</sup>

The central legal obligation imposed through a gift derives from the spiritual nature of the exchange. That is, the “thing received is not inactive.”<sup>115</sup> Indeed, Mauss argues that “it is clear that in Maori law, the legal tie, a tie occurring through things, is one between souls, because the thing itself possesses a soul, is of the soul.”<sup>116</sup> To contemporary ears, this is a strange concept. One has “ensouled” an object so that when one delivers it as a gift, one simply does not deliver a useful object (in fact, the object may not be used at all, as we shall later note), but that the recipient now has part of the giver’s spirit within the object received. This is a dangerous situation that compels an individual to reciprocate, lest the soul of the giver be mistreated.<sup>117</sup>

As one can readily see, gift-giving in this context is a far more sophisticated phenomenon than a monetary transaction. It is one which involves things of value and which therefore compels reciprocal gift-giving. If done in a context of a social world inhabited by communal selves as sketched above, one again finds a series of serious obligations that a private/commercial distinction cannot capture. Nevertheless, it would also be a mistake to characterize the actors in such a world as altruistic saints.

In describing the *Kula*, for instance, Malinowski is careful to note that

---

114. *Id.* at 8 (footnotes omitted).

115. *Id.* at 11-12.

116. *Id.* at 12.

117. See generally *id.*

the people he studied also were acquisitive.<sup>118</sup> These were not Rousseau romantic savages who sacrificially loved all with whom they associated and gave gifts to others without regard for their own reward. They had natural instincts to get the gift and either (1) not return a gift or (2) return a gift of significantly less value. So why not return a lesser amount, as an agency theorist might predict? We see this temptation as even more pronounced because while reciprocation is necessary, the equivalence of the counter-gift is the giver's decision without any enforcement or coercion by the receiver.<sup>119</sup> However, according to Malinowski, the desire to conform to social rules overrides natural acquisitiveness.<sup>120</sup> The initial recipient of the gift is not miserly when he returns the gift.<sup>121</sup>

Trobian social thinking provides another reason as to why a person would want to give. It contemplates that a person who owns something is expected to share it with others, and the higher the rank of that person, the greater the obligation to do so; the main virtue of the wealthy is not hoarding, but generosity.<sup>122</sup> In fact, it is a demonstration of one's social status to be generous.<sup>123</sup> Thus, not to give would equate to calling into question one's right to a high rank.<sup>124</sup>

While Mary Douglas aptly characterizes Mauss as arguing that "[a] gift that does nothing to enhance solidarity is a contradiction,"<sup>125</sup> and while Malinowski is clear that the gifts occurring within the *Kula* comprise an economic institution fostering trade,<sup>126</sup> they do so from a framework of self-interest that is decidedly a communal one rather than an individualistic one. The important point is that an assessment of whether bribery transactions are personal or commercial within a particular community may provide a different understanding of human nature than is actually the case. As Mauss writes:

All these institutions express one fact alone, one social system one precise state of mind: everything—food, women, children, property, talismans, land, labour services, priestly functions, and ranks—is there for passing on, and for balancing accounts. Everything passes to and fro as if there were a constant exchange of spiritual matter, including things and men, between clans and individuals, distributed between social ranks, the sexes, and the generations.<sup>127</sup>

In a social structure in which one's identity is intimately tied to that of others, reciprocity is not so much "doing for others" as it is "doing for oneself." Moreover, even the terms associated with transactions may have an entirely different meanings depending on community. For instance,

118. See MALINOWSKI, *supra* note 10, at 96.

119. See *id.*

120. See *id.*

121. See *id.* at 95-97.

122. See *id.* at 97.

123. See *id.*

124. See *id.*

125. Mary Douglas, *Foreward*, in MAUSS, *supra* note 104, at vii.

126. See MALINOWSKI, *supra* note 10, at 84.

127. MAUSS, *supra* note 104, at 14.

some, but not other, tribes have “one single term to designate buying and selling, lending and borrowing.”<sup>128</sup>

This analysis results in two implications for anti-bribery statutes. First, in crafting such laws, the ontological self-description of a society may make a dramatic difference to both the comprehensibility and the efficacy of the statute. As such, enforcement of anti-bribery measures may require significant explanations to be understandable. While it is true that all societies hate corruption and condemn bribery, what constitutes corruption may be much more complex than simply trading on a distinction between what is personal and what is commercial. Second, rather than conclude the futility of an international statute which transcends cultural barriers, a broader understanding of this complexity is essential to create a workable transnational mechanism.

### 1. Public Nature of the Gift as a Protection

One of the distinguishing features of corrupting bribery is that it is hidden.<sup>129</sup> That is, one does not proclaim one’s prowess in accepting bribes.<sup>130</sup> One takes and provides bribes in secret and outside of the public’s view. A complication arises when people exchange gifts behind closed doors, not just because individuals are unable to evaluate them, but because the shame itself indicates a violation of a norm. The secretive nature of a gift is further reinforced when the thing given, usually money or a gift readily convertible into money, is easily transferable and inanimate. One may be able to suggest two approaches to regulating bribery depending on the extent to which bribes are public and gifts are freely alienable.

### 2. Public Nature of the Gift

If generosity is a sign of one’s status and power, then one should not be surprised that gift-giving is not a private affair at all. In fact, Malinowski found that in traditional societies it was a very public affair with very precisely-described public rituals. In describing the *Kula*, Malinowski writes that:

Along this route, article’s [sic] of two kinds, and these two kinds only, are constantly travelling in opposite directions. In the directions of the hands of a clock, moves constantly one of these kinds —long necklaces of red shell, called *soulava*. In the opposite direction moves the other kind —bracelets of white shell called *mwali*. Each of these articles, as it travels in its own direction on the closed circuit meets on its ways articles of the other class, and is constantly being exchanged for them. Every movement of the *Kula* articles, every detail of the transactions is fixed and regulated by a set of traditional rules and conventions, and some acts of the *Kula* are accompanied by an elaborate magical ritual and public ceremonies.<sup>131</sup>

128. *Id.* at 32 (citing Oliver Wendell Holmes, Jr.).

129. See JOHN T. NOONAN, *BIBES* 697 (1984).

130. See generally *id.*

131. MALINOWSKI, *supra* note 10, at 81.

A gift in this context depends on public recognition of its value. To be part of and to have a partner in the *Kula* was not something one wanted to hide, but rather it was a measure of one's status.<sup>132</sup> Public rituals accompanied canoe-building, voyages, exchanges, and feasting.<sup>133</sup> One contemporary step in this direction builds upon the work of Transparency International: to publicize gifts.<sup>134</sup>

The more gift exchanges are brought into the open, the more they can be evaluated. While a strictly economic market may not unearth this information, a market attuned to such activities may do so more readily. In this sense, Dunfee's notion of a marketplace of morality<sup>135</sup> has its greatest significance. For Dunfee, embedded within markets are moral preferences to which managers should be attentive.<sup>136</sup> The question is how these moral views come to bear on the kind of market in which managers do pay attention. The answer, we think, is a market that has information about the nature of the transactions that are taking place. In Trobriand society, the participants in the *kula* were sufficiently few to obtain this information.<sup>137</sup> In a global village, other institutions, such as Transparency International, must assist in that effort. The pre-market approach of publicizing gifts is a corrective measure that keeps corruption in check and from which a market economy can learn and on which it can build.

### 3. *Alienability*

A second characteristic of these gifts is that often they are neither really used nor subsequently traded, except within the context of the gift-exchange system.

In the economic and legal systems that have preceded our own, one hardly ever finds a simple exchange of goods, wealth, and products in transactions concluded by individuals. [W]hat they exchange is not solely property and wealth, movable and immovable goods, and things economically useful. In particular, such exchanges are acts of politeness: banquets, rituals, military services, women, children, dances, festivals, and fairs, in which economic transaction is only one element, and in which the passing on of wealth is only one feature of a much more general and enduring contract. Finally, these total services and counter-services are committed to in a somewhat voluntary form by presents and gifts, although in the final analysis they are strictly compulsory, on pain of private or public warfare. We propose to call all this the *system of total services*.<sup>138</sup>

Moreover, the recipient of the gift does not keep possession of the object for

---

132. See *id.* at 81.

133. See *id.* at 99-104.

134. See *supra* note 6.

135. See Thomas W. Dunfee, *Corporate Governance in a Market with Morality*, 62 L. & CONTEMP. PROBS. 129 (1999).

136. See *id.* at 145-49.

137. See MALINOWSKI, *supra* note 10 at 81. Although we do not report specific population figures, Malinowski indicates that a limited number of individuals participate in the *kula*.

138. MAUSS, *supra* note 104, at 3-4 (omitting notes).



any length of time.<sup>139</sup> Following the custom of generosity, when in possession of the gifts, one is likely to use them not for one's own benefit, but for that of family and friends. Malinowski notes that a chief with shell strings would not wear them to a dance, but would instead loan them to relatives and friends if they wanted them.<sup>140</sup>

It would be difficult to legislate notions of inalienability and generosity so as to combat bribery. Instead, we suggest that this is a spiritual issue related to the promotion of generosity. That it may be a matter of the spirit, however, is not to say that laws cannot do harm to spiritual concerns if legislators are not careful. Although beyond the scope of this article, we suggest that as commerce becomes increasingly globalized through technology, legal regimes ought to avoid encroaching upon spiritual affairs, particularly those that relate to the ethic of generosity.

#### 4. *Peace, Corruption, and Cybernetic Structures*

The globalization of commercial activity constitutes one of the driving forces behind the transnational prohibition of bribery.<sup>141</sup> The movement to combat bribery,<sup>142</sup> accompanied by the technological forces that allow it, lead to the characterization of the world as a global village. As Salbu argues, there is an ethical desirability in this notion because "the normative framework for the global village is one in which the peoples of the world recognize the descriptive reality of the term and work together to develop a unified culture."<sup>143</sup> At the same time, Salbu also warns that "the normative conception of the global village remains an ideal rather than a reality, because cultural heterogeneity confounds efforts to address world problems as a single community."<sup>144</sup>

One of the things a global village, a nuclear world, or an efficient free market needs most is international peace. The destructiveness of nuclear, biological, and chemical weapons is sufficient to warn of the dangers of contemporary warfare. Free market economist, F. A. Hayek, an author we have criticized severely in other places,<sup>145</sup> avers that the best way to build international peace is to encourage trade because it fosters virtues such as honesty, promise-keeping, and truth-telling; these are more efficient lubricants than coercive threats.<sup>146</sup> Hence, there are linkages among trade, ethics, and peace.

In terms of gift-giving and bribery, can one argue that the global action geared toward the elimination of bribery might foster international peace? This is not necessarily an easy question. Marcell Mauss, for

---

139. See MALINOWSKI, *supra* note 10, at 81.

140. See *id.* at 87-88.

141. See Nichols, *supra* note 2.

142. See *supra* note 7.

143. Salbu, *supra* note 5, at 229.

144. *Id.* at 229.

145. See Timothy L. Fort & James J. Noone, *Banded Contracts, Mediating Institutions, and Corporate Governance: A Naturalist Analysis of Contractual Theories of the Firm*, 62 L. & CONTEMP. PROBS. 169-74 (1999).

146. See HAYEK, *supra* note 108.

instance, encourages gift-giving and warns of the lack of reciprocity in gift-giving. Gifts should not be discouraged, he said, but encouraged because there is an obligation to engage in the giving and receiving, not simply a reflexive requirement to reciprocate.<sup>147</sup> "To refuse to give, to fail to invite, just as to refuse to accept, is tantamount to declaring war; it is to reject the bond of alliance and commonality."<sup>148</sup>

Does trade promote peace? Citing Robert McGee, Phil Nichols writes that "[c]ountries that trade with each other are less likely to go to war than are countries that erect trade barriers to prevent foreign goods from crossing their borders."<sup>149</sup> Nonetheless, anthropologist Lawrence Keeley warns of a darker side of the relationship between trade and warfare and notes that the grievances that provoke violence are often economic.<sup>150</sup> Contrary to the assumption that exchanges of goods and, in this example, marriage partners keep peace, Keeley argues that

in a brief time frame, this statement is generally true: the exchange of goods or voluntary intermarriage cannot very well take place while active hostilities are in progress. But in the longer term, assuming that intertribal exchanges of goods or intermarriage preclude warfare is a mistake. Historical research has found that disputes between trading partners escalate to war more frequently than disputes between nations that do not trade much with each other.<sup>151</sup>

As an example, Keeley points out that Japan traded heavily with the United States throughout the twentieth century and that Nazi Germany traded with the Soviet Union up until its 1939 invasion.<sup>152</sup> Kelly argues that the reason why trading partners and enemies are often the same people is "simply propinquity."<sup>153</sup> Moreover, the specific cause of warfare in tribal economies could rest in the failure to receive an expected gift or to refuse a gift or in one social group's monopoly over a particular commodity.<sup>154</sup>

Thus, the confidence we have in fostering trade as a war-prevention mechanism is not as straightforward as it might appear. In fact, Keeley argues that several things are necessary in order to prevent trade from erupting into warfare. They center on increasing the costs of war and the benefits of peace<sup>155</sup> so that countries:

treat trading partners with special care since they are our most likely enemies, allow for other countries' to have monopolies on goods we could produce ourselves and don't attack the monopoly, concentrate on peaceful rather than military technology and create largest social, economic, and political units possible ideally encompassing the whole world, rather than allowing those we do have to fragment into mutually hostile ethnic or tribal

---

147. See MAUSS, *supra* note 104, at 41-42.

148. *Id.* at 13.

149. Nichols, *supra* note 2, at 263.

150. See LAWRENCE KEELEY, *WAR BEFORE CIVILIZATION* 117 (1996).

151. *Id.* at 121 (citations omitted).

152. See *id.* at 122.

153. *Id.*

154. See *id.* at 123.

155. See *id.* at 16-61.

enclaves.<sup>156</sup>

Two of these goals, however, require an ethical sensitivity to the legal structures and cultural sentiments attending to issues such as bribery. For instance, Salbu seems most concerned with the issue of treating other countries with the utmost care.<sup>157</sup> It is because of the linguistic and cultural misunderstandings that can occur between two countries that extraterritorial laws are problematic.<sup>158</sup> This is why Salbu writes that as "every country adjudicates right and wrong in the complex social landscapes of its neighbors, we may wistfully reminisce about the days when peace was measured by how well each nation minded its own business."<sup>159</sup> However, if Nichols is correct that there is no evidence that criminalization of bribery antagonizes host countries,<sup>160</sup> then we can overcome this significant hurdle. The dilemma is that, as we have suggested, *the process of globally prohibiting bribery is as important as the substance of the prohibition.*

Moreover, complex interdependence makes the cost of going to war more expensive. If bribery undermines the relationships that create complex interdependence, as Nichols argues,<sup>161</sup> then the extent to which cultural misunderstandings occur may be outweighed by avoided violence. We doubt whether one could ever empirically prove this proposition.<sup>162</sup> If, however, bribery makes warfare more expensive and, in fact, does not antagonize local populations, then extraterritorial and transnational criminalization of bribery may be prudent.

The second method recommended by Keeley is to create the largest possible organizations in order to defeat tribalism that leads to warfare.<sup>163</sup> There may be significant truth to this, but increasing institutional size also gives rise to problems of human nature. Although Nichols uses the term "fragmentation" in a different way than MacIntyre does, Nichols notes that "it can be argued that globalization has caused the amount of transnational bribery to increase and that fragmentation has limited the viability of host country regulation."<sup>164</sup> The anomaly of fragmentation results from the fact that economic globalization often carries with it a desire to claim an identity within the global community.<sup>165</sup>

Clearly, what is called for is a notion of federalism. Such a notion would accord global authority to certain basic rules and principles while

---

156. *Id.* at 181.

157. See Salbu, *supra* note 5.

158. See Salbu, *supra* note 5.

159. Steven R. Salbu, *The Foreign Corrupt Practices Act as a Threat to Global Harmony*, 20 MICH. J. INT'L L. 419, 445 (1999).

160. See Philip M. Nichols, *Are Extraterritorial Restrictions on Bribery a Viable and Desirable International Policy Goal Under The Global Conditions of the Late Twentieth Century? Increasing Global Security by Controlling Transnational Bribery*, 20 MICH. J. INT'L L. 451, 474 (1999).

161. See *id.* at 463-71.

162. See, e.g., NILS BHINDA ET AL., *THE TRUE COST OF CONFLICT: SEVEN RECENT WARS AND THEIR EFFECTS ON SOCIETY* (Michael Cranna ed., 1994).

163. See KEELEY, *supra* note 150, at 122.

164. Nichols, *supra* note 2, at 270.

165. See Nichols, *supra* note 2, at 265.

leaving individual countries free to enjoy their own particular culture. The proposal we offer—to encourage the development of people-sized institutions, to require that any gifts be publicly recognized rather than hidden, to encourage a spirit of generosity, and to hold possessors of esoteric knowledge to fiduciary duties—would comprise rules that permit such global span and cultural respect. In particular, this federalism should not be limited to governmental layering or even focused solely on connections among government and NGOs. It should also take into account the governance of corporations and propose a means whereby these economic institutions can act as self-regulating, cybernetic systems. Dunfee and Hess proceed along these lines in proposing the C<sup>2</sup> Principles.

### 5. *The C<sup>2</sup> Principles: A Commentary*

In their contribution to this symposium, Dunfee and Hess propose a corporate commitment to combat bribery in the mode of the Sullivan Principles adopted by companies confronting apartheid in South Africa.<sup>166</sup> They call their proposals the C<sup>2</sup> Principles. To combat bribery, they advocate that corporations publicly acknowledge their commitment to the Principles. Under such Principles, corporations would (a) establish a clear policy against employees paying bribes and kickbacks, (b) train and discipline employees, (c) accurately record and report transactions that are independently audited, (d) require agents and suppliers to affirm that they have not engaged in improper payments, (e) establish a monitoring system, (f) report solicitation for payments to a group such as Transparency International, and (g) protect employees who similarly make such reports.<sup>167</sup>

We endorse the C<sup>2</sup> Principles. We also note that they will require a large-scale engagement by many corporations and by many individuals within each corporation in order for any single endorsing corporation to effectively discourage bribery. Although it is beneficial for firms to have active monitoring and disciplining processes; to be effective, the corporation must also engage its employees in a quest for the good of clean business rather than threatening trouble for misbehavior. Thus, to be effective, corporations must themselves form a community where individuals within that community see their self-interest connected with that of the corporations' commitment to merit-based business. Accordingly, it is important to point out that the discussion regarding the pre-market community sense of public transactions applies to efforts within the corporation itself. In that light, we would like to offer a corporate metaphor that has been elaborated elsewhere,<sup>168</sup> to characterize the nature of corporations that efficaciously combat bribery.

---

166. See Hess & Dunfee, *supra* note 21.

167. See Hess & Dunfee, *supra* note 21, at 29-30.

168. See Timothy L. Fort, *Business as Mediating Institution*, 6 *BUS. ETHICS Q.* 149 (1996); Timothy L. Fort, *The Corporation as a Mediating Institution: An Efficacious Synthesis of Stakeholder Theory and Corporate Constituency Statutes*, 73 *NOTRE DAME L. REV.* 173 (1997); Timothy L. Fort, *Goldilocks and Business Ethics: A Paradigm That Fits "Just Right,"* 23 *J. CORP. L.* 245 (1998) [hereinafter Fort, *Goldilocks and Business Ethics*]; Fort & Noone, *supra* note 145.

## 6. *Mediating Institutions*

In natural law terms, subsidiarity requires that problems ought to be solved at the smallest appropriate level. Thus, if a problem is a family or community issue, the family rather than the state should solve it.<sup>169</sup> Its corollary, however, is that it requires a level of participation by individuals within the community. Thus, John Finnis describes it: "one who is never more than a cog in big wheels turned by others is denied participation in one important aspect of human well-being."<sup>170</sup> A large bureaucratic organization, governmental or corporate "disguises and conceals and it depends for its power on its success at disguise and concealment."<sup>171</sup> What does it conceal? In a bureaucratic system, the system which Noonan notes correlates with the advent of bribery,<sup>172</sup> one assumes that one cannot ultimately adjudicate among various moral traditions, so one does not ask ultimate questions. One brackets them, and instead relies upon a process that will generate choices so individuals can determine autonomously what particular thing maximizes their individual self-interest. Free-market economics is based on precisely this conception.<sup>173</sup> It is based not on determining the "good" of a product, but on how to efficiently produce a product that meets market demand. Consumer choice, legal regulation, and competition then make assessments of what products are acceptable. The manager does not ask ultimate questions as asking them is beyond the scope of his job as an agent. For MacIntyre, the power of managerial efficiency depends on the ability to conceal the fact that deep values are at stake in corporate affairs.<sup>174</sup> Moreover, as Robert Jackall demonstrates, large bureaucracies conceal the consequences of one individual's actions.<sup>175</sup> "Who will notice or care if I take a bribe? No one will find out and if they do, it's not worth the time to go after me." The larger the organization, the more likely this becomes a plausible argument to a rational economic actor.

There is a biological reason for why human beings "short-circuit" when it comes to moral responsibilities in large organizations. Anthropologists have found consistent group sizes among aboriginal populations. These tend to cluster between twenty-five and thirty-five (the band) and four hundred to six hundred (the macro-band), which is the largest community that interacts regularly.<sup>176</sup> One of the difficulties in larger groupings is that scalar stress, that is increasing numbers of disputes within the group, increases exponentially rather than arithmetically for additions to

---

169. See RICHARD JOHN NEUHAUS, *DOING WELL AND DOING GOOD: THE CHALLENGE TO THE CHRISTIAN CAPITALIST* 243-45 (1992).

170. See JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 147 (1980).

171. MACINTYRE, *supra* note 85, at 103.

172. See generally NOONAN, *supra* note 129.

173. See generally FRIEDMAN, *supra* note 51.

174. See *supra* note 81 and accompanying text.

175. See JACKALL, *supra* note 56, at 11-12.

176. See Joseph Birdsell, *On Population Structure in Generalized Hunting and Collecting Population*, 12 *EVOLUTION* 189, 196-99 (1958).

the group beyond these “magic numbers.”<sup>177</sup> All of these relatively small numbers suggest a simple numerical empowerment of individuals. In such groups, morality may be communal, but the individual’s influence on her relevant community is arithmetically more powerful.<sup>178</sup>

This emphasis on small groups has contemporary validation. In his study on the development of human language, psychologist Robin Dunbar accounted for the genesis of its development.<sup>179</sup> He noted that a typical explanation for the difference between humans and other animals is the large size of the human brain.<sup>180</sup> Since whales and elephants have larger brains than humans, he examined the ratio of the neocortex—that part of the brain responsible for cognition as opposed to the controller of bodily functions and movement—to body mass.<sup>181</sup> In doing so, he found general groupings of neocortex ratios; that is, reptiles were in a certain range, fish in another, primates in yet another. Human brains had, by far, the highest ratio.<sup>182</sup> Dunbar also noticed that primates tend to limit the size of the group. Beyond a certain number, the group fissions.<sup>183</sup> He then plotted a graph of primate neocortex ratios against group size.<sup>184</sup> Extrapolating from the results, he predicted that the maximum size of a human group to be 150.<sup>185</sup> This is in the range of the hunter-gatherer numbers we just saw, but does it have any contemporary ratification? In fact, in looking at other studies, Dunbar consistently found these numbers in diverse communities such as the Christian Hutterites in Europe; the Dakotas and southern Canada; the Mormons led by Brigham Young in the journey to Utah; the sizes of optimal congregations in a study by the Church of England; and the size of the military company unit.<sup>186</sup> Dunbar relates this to sociological studies, which indicate:

that social groupings larger than 150-200 become increasingly hierarchical in structure. Small social groups tend to lack structure of any kind, relying instead on personal contacts to oil the wheels of social intercourse. But with more people to coordinate, hierarchical structures are required. There must be chiefs to direct, and a police force to ensure that social rules are adhered to. And this turns out to be an unwritten rule in modern business organizations too. Businesses with fewer than 150-200 people can be organized on entirely informal lines, relying on personal contacts between employees to ensure the proper exchange of information.<sup>187</sup>

---

177. Gregory Johnson, *Organizational Structure and Scalar Stress*, in *THEORY AND EXPLANATION IN ARCHAEOLOGY* 389, 396-404 (C. Renfrew et al. eds., 1982).

178. See Fort, *Goldilocks and Business Ethics*, supra note 168, at 263-64.

179. See generally ROBIN DUNBAR, *GROOMING, GOSSIP, AND THE EVOLUTION OF LANGUAGE* (1996).

180. See *id.* at 56.

181. See *id.* at 56-57.

182. See *id.* at 57-63.

183. See *id.*

184. See *id.* at 63.

185. See *id.*

186. See *id.* at 74-76.

187. *Id.* at 71-73.

These anthropological realities suggest that certain capacities are universal within human beings. The findings themselves do not suggest universal norms, but do indicate basic human capacities that may have an impact on how human beings relate to each other.

Such small institutions have been called "mediating institutions."<sup>188</sup> They stand between the individual and society.<sup>189</sup> They socialize and empower the individual and thereby, ideally, make such individuals into citizens who enter society with the tools to negotiate knowing that they are social creatures dependent upon a community.<sup>190</sup> That is the rosy view. The thorny stem is that these groups can be insular, violent, and reclusive.<sup>191</sup> The difference between the rose petals and the thorns is the difference between a mediating institution and a quarantining institution. A mediating institution provides a community for its members, but it does mediate, so that it is open to the outside world. It therefore is always negotiating and adapting. On the other hand, a quarantining institution sets off the community from society. It sets off members of the community to keep them pure from the diseases of the outside world. Interactions between a quarantining institution and society tend to be hostile rather than adaptive. While a mediating institution must have a unique identity, it also contains within its feedback mechanisms, its cybernetics,<sup>192</sup> openness to environmental changes.

We have applied this notion of mediating institutions to organizational ethical issues.<sup>193</sup> The principle remains the same in global organizational life. The term "global village" is helpful insofar as it demonstrates the complex interdependency of our lives with every other living creature on the planet. This becomes an increasingly intelligible reality in the e-commerce age. Recognizing such interdependency is a helpful first step in posing what duties we have to those other creatures. At the same time, the term is dangerously misleading because a "village" implies a smallness that one can cognize and it is difficult to cognize relationships with six billion human beings, not to mention other living animals, plants, and the earth generally. Because of this, thinking in terms of us all living in a "village" poses real risks of underestimating the importance and the structures of intermediary institutions that, in fact, regularly instill in us the notion of interconnectedness.

Although mediating institutions may sound nostalgic, the e-commerce age will rely on them to foster ethical behavior. If we are anywhere close to being right about the need for communities to foster ethical behavior, then building the communal structures in the e-commerce age is a necessary step for business ethics. If individuals are to take ethical responsibilities seriously then business ethicists, particularly those with either organiza-

---

188. See BERGER & NEUHAUS, *supra* note 58.

189. See *id.*

190. See, e.g., Cass Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988).

191. See *id.*

192. See RAPPAPORT, *supra* note 53.

193. See Fort & Noone, *supra* note 145.

tional or legal skills, need to attend to how the character of those individuals are formed.

It would seem that global business will provide the means for communication and economic integration of the world, a step that may help mitigate some tribal rivalry. Nevertheless, it is not the tribe that causes warfare, but rather a certain kind of tribalism. In his study of nonviolent societies, anthropologist David Fabbro notes that the following attributes are present in peaceful societies: small and open communities with face-to-face interpersonal interactions; an egalitarian social structure; generalized reciprocity; social control and decision making through group consensus; and nonviolent values and enculturation.<sup>194</sup>

His list is interesting in that the characteristics it encompasses are virtually identical to our description of mediating institutions, at least those with a normative character.<sup>195</sup> A central task for business ethicists is to figure out how to create these structures in an age dominated by a technology and an economic model that shrinks the world. It is in this combination of mediating institutions in a global village where business ethics will find the significance of its work in linking justice and business to sustainable peace.

In an e-commerce age, information has value. In terms of bribery, we emphasize that necessary social efficiency may be most efficaciously provided by truthful information about bribe-taking practices so that members of a community, particularly within corporations that adopt the C<sup>2</sup> Principles and where bribery exists can assess the propriety of the action. This disclosure position may be even more important than the distribution of assets which relies on the importance of individuals to make their own autonomous choices of what to do with those assets. In some respects, this is a minor quibble. Both efficient distribution of resources and truthfulness about bribe-taking are important. We believe this public disclosure is a central insight demonstrated anthropologically with consequences for legal affairs.

## Conclusion

We began by asking what is left to be said about bribery. In response, we offer three arguments that relate more to the institutions and processes that regulate bribery. First, if we are to encourage individuals to refrain from bribing and bribe-taking, they must learn to see that their self-interest, which would otherwise be enhanced by the bribing activity as long as they are not caught, is connected to the welfare of the community. Such a communal self cannot be asserted rhetorically; transnational organizations, especially corporations, in designing laws and treaties, should emphasize

---

194. See Leslie E. Sponsel, *The Natural History of Peace: The Positive View of Human Nature and Its Potential*, in *A NATURAL HISTORY OF PEACE* 95, 106-07 (Thomas Gregor ed., 1996) (citing David Fabbro, *Peaceful Societies: An Introduction*, 15 *J. PEACE RES.*, 67-83 (1978)).

195. See *supra* notes 169-92 and accompanying text.



the importance of local organizations. Second, anthropology suggests that communal self-interest, public acknowledgment of the gift, and a spiritual involvement in the transaction, particularly involving generosity, prevent gift-giving from becoming corruptive. These communal protections reinforce the importance of the empowerment of people-sized institutions that can enculturate these norms.

Finally, gift-giving and mediating institutions can be linked to global business in a way that fosters peace.<sup>196</sup> Economics can initiate relationships necessary for peace building. To do so in a way that promotes and sustains peace rather than causes divisiveness is to encourage ethical business behavior. Ethical business behavior is best fostered when human beings can meaningfully connect their self-interest with the welfare of others. Because bribery harms the welfare of others, it should be fought for deontological, consequential, efficiency, communal, and peace-oriented reasons. We hope that the considerations raised in this paper will assist in that effort.

---

196. In fact, although beyond the scope of this paper, we would like to propose peace as a *telos* for global business ethics. See Timothy L. Fort, *Corporate Mahahiki: The Governing Telos of Peace*, 38 Am. Bus. L.J. (forthcoming 2001).