Revisiting Restitution: A Reparative Agenda for Enforcement of the Foreign Corrupt Practices Act

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The United States' anti-corruption efforts do little to repair, and may even perpetuate, the inequities exacerbated by transnational public corruption. The U.S. Government has collected approximately $28 billion in criminal penalties by prosecuting U.S. firms for foreign corrupt practices, yet it regularly fails to provide restitution to those victimized by such offenses. This failure persists despite compelling legal, practical, and ethical reasons for doing so. These counterweights include statutory obligations to award restitution to all victims of federal offenses against property, the profitability of enforcement efforts, and the existence of separate U.S. Government programs that operationalize workable reparations models in the kleptocracy regulation context. This failure is, in large part, due to distinctive difficulties that arise as to the desirability and practicability of criminal restitution in the public corruption context. Beyond the analytical difficulty in determining precisely who a public corruption offense victimizes, restitution paid to foreign governments defrauded by U.S. bribe-payers may risk enabling culpable persons and institutions on the demand-side of the charged conspiracy. This Note examines these difficulties from a doctrinal perspective. Thereafter, this Note offers several considerations for policymakers to weigh as they develop improved restitution policies. Finally, this Note recommends that the United States clarify,

standardize, and decolonize its policies and practices regarding restitution for foreign corruption offenses.

INTRODUCTION

In 2004, the U.S. Department of Justice (DOJ) charged James H. Giffen with violating the Foreign Corrupt Practices Act of 1977 (FCPA).[1] Between 1995 and 2000, Giffen had paid $84 million in bribes to the Prime Minister of Kazakhstan, Nursultan Nazarbayev, and other senior Kazakh officials, in exchange for "lucrative" oil concessions in the recently independent former Soviet republic.[2] The conspiracy funneled hundreds of millions of dollars through Swiss bank accounts and, according to the indictment, defrauded both "the Government of Kazakhstan of funds to which it was entitled from oil transactions" and "the people of Kazakhstan of the right to the honest services of their elected and appointed officials."[3] According to the DOJ, Giffen's conspiracy not only illicitly enriched the bribe-payers and

1. United States v. Giffen, 379 F. Supp. 2d 337, 340–41 (S.D.N.Y. 2004); *see also* Int'l Rsch. & Exchs. Bd., *The BOTA Foundation: Final Summative Report*, U.S. DEP'T OF JUST. (Feb. 12, 2015) [hereinafter BOTA Final Report], https://www.justice.gov/opa/file/798316/download [https://perma.cc/N6MT-GN39] .

2. Indictment at 2–3, *Giffen*, No. 03-CR-404.

3. *Id.* at 3–4.

bribe-recipients, but also aggrandized Nazarbayev, inflicting a deep and destabilizing wound on public institutions in the fledgling polity.[4]

The U.S. Government's (USG) disposition of what was the "highest-profile" FCPA prosecution at the time reflected the DOJ's dedication to reparations, as prosecutors undertook unprecedented and ambitious efforts to repatriate Giffen's illicitly obtained assets to Kazakhstan.[5] As the criminal case proceeded, the DOJ simultaneously pursued civil forfeiture against Giffen's assets held in Swiss accounts.[6] Then, in 2007, the DOJ entered into a trilateral agreement with Swiss and Kazakh authorities to establish the BOTA Foundation, a charitable organization endowed with $115 million of Giffen's assets, all seized through that collateral proceeding.[7] Between 2009 and 2014, the BOTA Foundation operated as "the largest child and youth welfare foundation" in Kazakhstan, delivering critical services to over 200,000 individuals.[8] Giffen's case is heralded as a model for how the proceeds and instrumentalities of wrongdoing may be sustainably reinvested in the communities that ultimately suffer as a result of grand corruption.[9]

Making the case even more unusual, Giffen successfully defended the FCPA charges by showing that "his conduct was known and approved at the highest levels" of the USG,[10] and that he helped ensure that the Kazakh oil reserves "would be controlled by American

4. *Id.*; *see also* Arkady Dubnov, *Kazakhstan: A Coup, a Counter-Coup and a Russian Victory*, AL JAZEERA (Jan. 16, 2022), https://www.aljazeera.com/opinions/2022/1/16/a-coup-a-counter-coup-and-a-russian-victory-in-kazakhstan [https://perma.cc/LB4J-8PVM] (describing how, more than twenty years later, in January 2022, Kazakhstan was still reeling from deadly political upheaval and protests due to corruption in its energy sector).

5. Richard L. Cassin, *No Punishment For 'Hero' Giffen*, FCPA BLOG (Nov. 22, 2010), https://fcpablog.com/2010/11/22/no-punishment-for-hero-giffen/ [https://perma.cc/63SZ-L86Q].

6. Pablo J. Davis, *"To Return the Funds at All": Global Anti-Corruption, Forfeiture, and Legal Frameworks for Asset Return*, 47 U. MEMPHIS L. REV. 291, 292 (2016).

7. *Id.* at 326.

8. BOTA Final Report, *supra* note 1, at 4–5.

9. *See, e.g.*, Press Release, Sheila Jackson Lee, Congresswoman Sheila Jackson Lee Introduces Bipartisan Legislation Urging the Creation of a $458 Million Victims of Terror Protection Fund Utilizing the Abacha Forfeited Funds (Oct. 27, 2015), https://jackson-lee.house.gov/media-center/press-releases/congresswoman-sheila-jackson-lee-introduces-bipartisan-legislation-0 [https://perma.cc/CA4T-5XST].

10. Davis, *supra* note 6, at 325; *see also* United States v. Giffen, 379 F. Supp. 2d 337, 341 (S.D.N.Y. 2004) ("Giffen contends that his activities with senior Kazakh officials were at the behest of the Central Intelligence Agency, the National Security Council, the Department of State and the White House.").

rather than Chinese or Russian companies."[11] Giffen eventually pled guilty to a misdemeanor tax charge, for which he received no fine or prison time.[12] After the court reviewed privileged documents showing Giffen's bribes "advanced the strategic interests of the United States and American businesses in Central Asia," the court even "acknowledge[ed Giffen's] service" and sought to assist him "'reclaim his reputation.'"[13] The biggest FCPA prosecution to date eventually "fizzled out"[14] following disclosure of the USG's underhanded endorsement of foreign bribery as "an instrument of resource control."[15]

Giffen's prosecution thus represents critical contradictions within and failures of U.S. foreign policy. On one hand, the USG deployed ingenuity and dedication in delivering reparations to Giffen's victims, helping cement the USG's leadership in the global fight against corruption. On the other hand, the case is emblematic of the incoherence at the heart of the USG's regulation of foreign corruption—in this instance, governmental complicity in the very harms criminalized by Congress and prosecuted by the DOJ.

Public corruption[16] arises from simple transactions, but inflicts a reverberating, deleterious toll on society,[17] costing the global

11. Peter Maass, *The Fuel Fixers*, N.Y. TIMES MAG. (Dec. 23, 2007), https://www.nytimes.com/2007/12/23/magazine/23wwln-phenomenon-t.html [https://perma.cc/WCM5-FCDP].

12. Davis, *supra* note 6, at 326.

13. *Id.* at 325.

14. *Id.*

15. Maass, *supra* note 11.

16. Formulating a precise definition of corruption is beyond the scope of this Note, which adopts an approximation of Transparency International's definition of corruption as "the abuse of entrusted power for private gain." *What is Corruption?*, TRANSPARENCY INT'L, https://www.transparency.org/en/what-is-corruption [https://perma.cc/5RTX-9PCL]. However, this Note's references to such offenses are legalistic and individual, as opposed to institutional, in nature. *See generally* John G. Peters & Susan Welch, *Political Corruption in America: A Search for Definitions and a Theory, or if Political Corruption is in the Mainstream of American Politics why is it not in the Mainstream of American Politics Research?*, 72 AM. POL. SCI. REV. 974 (1978); Lawrence Lessig, *Institutional Corruptions* 3–8 (Edmond J. Safra Ctr. for Ethics, Working Paper No. 1, 2013), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2233582 [https://perma.cc/6SJC-YGTR].

17. Corruption weakens governance and administrative capacity; inappropriately privileges select private interests; denies equal access to effective public benefits; reorganizes officials' incentives; operationalizes recklessly produced public works; furthers income inequality; stifles competition from smaller and medium enterprises; corrodes public trust; deprives citizens of the right to economic self-determination; and perpetuates cycles of independent human rights abuses. *See* KEVIN E. DAVIS, BETWEEN IMPUNITY AND IMPERIALISM: THE REGULATION OF TRANSNATIONAL BRIBERY 61–64, 236 (2019); *see also* Vito Tanzi, *Corruption Around the*

economy an estimated $3.6 trillion annually.[18] Two key questions ask: Who bears these costs, and what do anti-corruption efforts do to lighten their burden? These questions are particularly salient in the context of transnational corruption. Transnational corruption can exacerbate inequality within polities where it occurs,[19] but also inequality *between* polities, as transnationally mobile bribe-payers expropriate public wealth from countries with vulnerable political institutions.[20]

Current U.S. anti-corruption efforts do little to correct this dynamic. Congress enacted the FCPA—a watershed event in the regulation of transnational capitalism—in the wake of revelations about widespread malfeasance by over 400 U.S. multinational corporations.[21] The FCPA criminalizes various forms of foreign bribery, including U.S. firms' paying "anything of value" to foreign officials to "secur[e] any improper advantage."[22] Congress seemingly aimed to address the inequities caused by corruption, as well as the market inefficiencies and corresponding legitimacy crises bribery can foment at home and abroad.[23]

World: Causes, Consequences, Scope, and Cures, 45 IMF STAFF PAPERS 559, 582–83 (1998); Mary Hallward-Driemeier, *Who Survives? The Impact of Corruption, Competition and Property Rights Across Firms* (World Bank Dev. Rsch. Grp., Pol'y Rsch. Working Paper No. 5084, 2009), https://openknowledge.worldbank.org/bitstream/handle/10986/4276/WPS5084.pdf?sequence=1&isAllowed=y [https://perma.cc/59T5-VUUM]; INT'L COUNCIL ON HUM. RTS., CORRUPTION AND HUMAN RIGHTS: MAKING THE CONNECTION 16 (2009), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1551222 [https://perma.cc/US6N-CVVL].

18. Stephen Johnson, *Corruption is Costing the Global Economy $3.6 Trillion Dollars Every Year*, WORLD ECON. F. (Dec. 12, 2018), https://www.weforum.org/agenda/2018/12/the-global-economy-loses-3-6-trillion-to-corruption-each-year-says-u-n [https://perma.cc/D9W7-ENRA].

19. WHITE HOUSE, U.S. STRATEGY ON COUNTERING CORRUPTION 4 (2021), https://www.whitehouse.gov/wp-content/uploads/2021/12/United-States-Strategy-on-Countering-Corruption.pdf [https://perma.cc/UA37-DNA2] [hereinafter Biden Strategy]; George B. Radics, *Globalization, Corruption, the Structural-Historical Perspective*, 49 PHIL. SOC. REV. 39, 39 (2001); Delphia Lim et al., *Access to Remedies for Transnational Public Bribery: A Governance Gap*, 1 HARV. L. & INT'L DEV. SOC. 4, 4 (2013).

20. Munyae M. Mulinge & Gwen N. Lesetedi, *Interrogating Our Past: Colonialism and Corruption in Sub-Saharan Africa*, 3 AFR. J. POL. SCI. 15, 16 (1998).

21. *See* U.S. SECS. & EXCH. COMM'N, NO. 71-389 O, REPORT OF THE SECURITIES AND EXCHANGE COMMISSION ON QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES (1976).

22. 15 U.S.C. § 78dd-1.

23. H.R. REP. NO. 95-640, at 4–5 (1977):

> Corporate bribery also creates severe foreign policy problems for the United States. The revelation of improper payments invariably tends to embarrass friendly governments, lower the esteem for the United States among the citizens

While the FCPA has provided a useful mechanism to deter future misconduct, FCPA enforcement also sidelines the interests of, and fails to provide justice to, foreign corruption's victims, in clear tension with and plausible contravention of federal statutes mandating victim restitution, as well as principles of international law.[24] Since the FCPA's enactment, the USG has collected over $28 billion in FCPA penalties.[25] The U.S. Department of the Treasury typically retains these penalties, even though such revenue represents assets derived from illicit misappropriations of a foreign state's sovereign wealth.[26] Meanwhile, communities impacted by FCPA offenders' predations are typically not compensated. As Congress observed in May 2019, only $5 billion of "the $20 . . . to $40 billion lost by developing countries annually through corruption . . . has been repatriated in the last 15 years."[27]

Providing restitution to victims of foreign bribery is not without legitimate challenges. Because victims are technically nonparties to prosecutions, restitution operates as an awkward appendage to prosecutions. Additionally, selecting a reliable, worthy proxy to disburse funds to broad classes of victims entails risks, including, in the case of foreign government proxies, dedicating costly anti-corruption efforts to funding organizations headed by the very individuals involved in the demand-side of the charged conspiracy.[28] Such concerns feature

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> of foreign nations, and lend credence to the suspicions sown by foreign opponents of the United States that American enterprises exert a corrupting influence on the political processes of their nations.

See also S. REP. NO. 95–114, at 6 (1977). *See generally* Kevin E. Davis, *Why Does the United States Regulate Foreign Bribery: Moralism, Self-Interest, or Altruism?*, 67 N.Y.U. ANN. SURV. AM. L. 497 (2012).

24. Emile van der Does de Willebois et al., *Using Civil Remedies in Corruption and Asset Recovery Cases*, 45 CASE W. RESERVE J. INT'L L. 615, 617 (2013) (arguing that enforcement "misses an important component" and should redirect "attention towards . . . restorative justice.").

25. *Enforcement Actions*, FOREIGN CORRUPT PRACTICES ACT CLEARINGHOUSE, https://fcpa.stanford.edu/enforcement-actions.html (last visited Dec. 15, 2021). For all citations to the FCPA Clearinghouse's data to follow, the author compiled and calculated data from this clearinghouse herself, with a data cutoff date of December 15, 2021. *See infra* notes 175, 177, 190, 193, 206, 224, 242, 254, 257.

26. U.S. GOV'T ACCOUNTABILITY OFF., GAO-17-268T, FEDERAL FEES, FINES, AND PENALTIES: OBSERVATIONS ON AGENCY SPENDING AUTHORITIES 2 n.2 (2016) (citing 31 U.S.C. § 3302(b) as "the miscellaneous receipts statute").

27. H.R. REP. NO. 116-60, at § 2(a) (2019).

28. For a discussion of the respective meanings of supply-side and demand-side corruption, see ORG. FOR ECON. COOP. & DEV. [OECD], FOREIGN BRIBERY ENFORCEMENT: WHAT HAPPENS TO THE PUBLIC OFFICIALS ON THE RECEIVING END? at 3 (2018),

prominently in USG denials of restitution in any form to petitioners. Restitution can also be insufficient from the victims' perspective, chiefly because it depends on governmental action and discretion.

Nevertheless, restitution is a plausibly useful tool—with both symbolic and practical value—in a limited field, and its absence raises particularly high stakes. To begin, the underlying offense robs victims of resources that could be utilized to obtain redress through other means.[29] And even if victims have resources to litigate against well-financed multinational corporations, remedies available in tort or contract law apply more readily to defendants' shareholders and competitors than to victimized general populations in foreign countries.[30] Lastly, the unfairness and inefficiency of placing a redundant litigative burden on victims, after prosecutors already prove their case, is compounded by the situation of FCPA offenses and FCPA enforcement within the legacies of colonialism and neocolonialism.[31] Put simply, colonial and neocolonial exploitation of developing states may have aided the development of the very conditions underpinning the failures of restitution, including prevalent corruption.

This Note examines the intersection of the FCPA and the DOJ's statutory obligations to provide restitution to victims of offenses against property. By analyzing the federal laws mandating restitution and the USG's practices with respect to providing restitution

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https://www.oecd.org/corruption/Foreign-Bribery-Enforcement-What-Happens-to-the-Public-Officials-on-the-Receiving-End.pdf [https://perma.cc/KQE4-Y4XF]:

> The supply side of foreign bribery relates to what bribers do—it involves offering, promising or giving a bribe to a foreign public official to obtain an improper advantage in international business. In contrast, the demand side of foreign bribery refers to the offence committed by public officials who are bribed by foreign persons.

29. Corruption also inflicts diffuse harm on a broad class of citizen-victims, decreasing the likelihood all victims are aware of their injury. DAVIS, *supra* note 17, at 64.

30. De Willebois et al., *supra* note 24, at 617–18. Civil remedies for public corruption—found within claims arising under *qui tam* intentional tortious interference with economic relations, fraud, breach of contract, aiding and abetting breach of fiduciary duty, the Racketeer Influenced and Corrupt Organizations Act, and anti-trust—are limited in various ways: not applicable to extraterritorial conduct; covering an underinclusive, but related set of conduct; only applying under a fractured landscape of state law; or only extending compensation to competitors and shareholders of corrupt enterprises, rather than the victimized public. Lim et al., *supra* note 19, at 12.

31. *See* DAVIS, *supra* note 17, at 16:

> That challenge [to the contemporary paradigm for the regulation of transnational bribery] hearkens back to the critiques of neo-imperialist practices of the late nineteenth and early twentieth centuries. Neo-imperialist interventions in Africa, Asia, and Latin America were defended as ways of bringing good governance to benighted peoples but were criticized for being ineffective, illegitimate, and unfair exercises of power by some groups of people over others.

for foreign corruption offenses, this Note aims to shed light on a much-overlooked area of prosecutorial and judicial responsibility and on the unsettled applicability of restitution to foreign corruption offenses.

This Note proceeds in three Parts. Part I provides background on the legislative history and substantive contours of federal statutes mandating criminal restitution. Part II characterizes USG practices with respect to restitution provision and draws lessons from other means used to compensate corruption victims. Part III articulates the costs of the status quo, as well as the potential benefits and risks of expanding restitution. This Note concludes with recommendations for scholars, civil society, international actors, and the USG. Chiefly, this Note recommends the USG standardize and clarify its restitution policy to resolve the indeterminism into which current practices cast prosecutors, courts, defendants, and those harmed by domestic and transnational public corruption.

I. U.S. LAW ON VICTIMS' RIGHTS TO RESTITUTION

The idea that criminal law should embrace—and may exist for the purpose of enforcing upon society—a reparative agenda is neither novel nor ahistorical, finding roots in ancient legal codes.[32] Although restitution had been previously implemented as part of some state, local, and administrative proceedings, criminal restitution was not formally incorporated into U.S. federal law until the 1980s.[33] Today, federal legislation provides a more uniform concept of criminal restitution as a form of compensation that is ordered as part of a sentence and seeks "to make the victim whole."[34] Nonetheless, how the federal statutes mandating criminal restitution apply to white-collar offenses—or, more generally, crimes effectuating less direct harm on broad and diverse classes of victims—is less settled. With only vague and

32. Richard E. Laster, *Criminal Restitution: A Survey of Its Past History and An Analysis of Its Present Usefulness*, 5 U. RICH. L. REV. 71, 74–80, 88–90 (1970). For instance, laws represented in the Old Testament, like several other legal traditions, prioritized victim compensation over both punitive fines remedying public harm and sacrifices to God, effectuating individual penitence. Jeremiah Unterman, *What Repentance Really Meant in the Torah—and Why It Matters Today*, CTR. HEBRAIC THOUGHT (July 29, 2020), https://hebraicthought.org/torah-repentance-why-it-matters-now/ [https://perma.cc/EK4W-BJZU] ("[R]estitution to the victim *precedes* the reparation offering at the sanctuary—therefore, compensation to the victim takes precedence over reparation to God!").

33. *See* Catharine M. Goodwin, *Looking at the Law: The Imposition of Restitution in Federal Criminal Cases*, 62 FED. PROBATION 95, 95–96 (1998); Cortney E. Lollar, *What is Criminal Restitution?*, 100 IOWA L. REV. 93, 114–15 (2014).

34. *Restitution*, BLACK'S LAW DICTIONARY (11th ed. 2019).

sometimes competing pronouncements in the statutes, courts have differed in the extent to which they are willing to find victims of public corruption eligible for restitution.

This Part explores the evolution of the federal law mandating restitution, as well as federal courts' interpretations of victims' eligibility. In particular, this Part describes the conceptual tools available to courts as they navigate the following puzzles in public corruption cases: (1) whether the harm suffered by the public was sufficiently direct to warrant restitution; and (2) whether institutions defrauded by a complicit agent can be disentitled from restitution on the basis of the institution's constructive participation in the conspiracy.[35]

A. Legislative History of the Restitution Statutes

The U.S. victims' rights movement—which advocates for reparations and more extensive and considered victim participation in the criminal justice system—gained greater visibility during the 1980s, when President Reagan established a Task Force on Victims of Crime.[36] Writing in its final 1982 report that the "neglect of crime victims is a national disgrace,"[37] the Task Force detailed how victims were traumatized and "burdened by a system designed to protect them,"[38] before recommending that states and the federal government should "require restitution in all cases."[39] The Task Force forcefully stated, "innocent victims [] have been overlooked, their pleas for justice . . . unheeded, and their wounds—personal, emotional, and financial—. . . unattended."[40] The report even proposed a Constitutional amendment securing crime victims' rights.[41]

That same year, Congress passed the Victim and Witness Protection Act (VWPA), which established victims' rights to be notified

35. *See infra* notes 130–168 and accompanying text.

36. Paul G. Cassell et al., *Crime Victims' Rights During Criminal Investigations? Applying the Crime Victims' Rights Act Before Criminal Charges Are Filed*, 104 J. CRIM. L. & CRIMINOLOGY 59, 63 (2014).

37. LOIS HAIGHT HERRINGTON ET AL., PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME: FINAL REPORT, at vii (1982) [hereinafter Task Force Report].

38. Cassell et al., *supra* note 36, at 63.

39. Task Force Report, *supra* note 37, at 18.

40. *Id.* at ii.

41. *Id.* at 114. The VRA never passed, but its cyclical turns through Congress in the 1990s and early 2000s served as a recurring impetus for legislation on the subject. *See Victims' Rights Constitutional Amendment*, OFF. OF VICTIMS OF CRIM., https://www.ncjrs.gov/ovc_archives/ncvrw/1999/amend.htm [https://perma.cc/VH82-BSRM].

of and participate in criminal proceedings.[42] The VWPA authorized, but crucially did not require, restitution.[43] Echoing the Task Force's report, Congressional findings in the VWPA characterized the justice system as "unresponsive" to victims "forced to suffer" again "as a result of contact with [the] criminal justice system."[44] The Act's legislative findings detailed how victims "lose valuable property to a criminal only to lose it again . . . to Federal law enforcement,"[45] juxtaposing that unjust deprivation with the system's reliance on victims: "Without the cooperation of victims . . . the criminal justice system would cease to function."[46] Accordingly, the VWPA encouraged the USG to take on a "leadership role" in "ensuring that victims of crime" receive restitution.[47]

In 1996, Congress responded to continued victims' rights advocacy by enacting the landmark piece of legislation establishing a right to restitution, the Mandatory Victims Restitution Act (MVRA).[48] The MVRA not only permits but *requires* the USG to arrange and courts to order the defendant to "make restitution . . . notwithstanding any other provision of law."[49] Accompanying the MVRA were appropriations specifically for the DOJ's implementation of restitution.[50]

Yet again, in 2004, Congress revisited the criminal justice system's treatment of victims and enacted the more expansive Crime Victims' Rights Act (CVRA).[51] Courts and commentators have interpreted the CVRA to further operationalize the MVRA's restitutive

42. Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, § 5 (1982) [hereinafter VWPA].

43. *Id.*

44. *Id.* § 2(a)(2).

45. *Id.* § 2(a)(7).

46. *Id.* § 2(a)(1) (finding "with few exceptions" victims are "ignored" or "used as tools").

47. *Id.* § 2(a)(3).

48. 18 U.S.C. §§ 3663A, 3664. Prior to the MVRA, in 1990, Congress passed the Victim's Rights and Restitution Act, which obligates Federal officials in every enforcement agency to identify victims "[a]t the earliest opportunity after the detection of a crime," to notify victims of their rights, including their right to restitution, and to protect victims' property from damage. 34 U.S.C. § 20141(b).

49. 18 U.S.C. § 3663A(a)(1).

50. Paul G. Cassell, *Recognizing Victims in the Federal Rules of Criminal Procedure: Proposed Amendments in Light of the Crime Victims' Rights Act*, 2005 B.Y.U. L. Rev. 835, 863–64 (2005).

51. Crime Victims' Rights Act, Pub. L. No. 108-405 (2004) (codified at 18 U.S.C. § 3771).

rights and to codify even more substantive rights.[52] Specifically, the CVRA affirmed victims' rights, *inter alia*, to have "reasonable, accurate, and timely" notice of and inclusion in "any public court proceeding"; "to be informed in a timely manner of any plea bargain or deferred prosecution agreement"; "to be treated with fairness"; and to receive "full and timely restitution as provided in law."[53] Furthermore, the CVRA obligates the DOJ "and other departments . . . engaged in the . . . investigation, or prosecution of crime [to] *make their best efforts* to see that crime victims are notified of, and accorded, [their] rights."[54] A key innovation was the CVRA's allowing victims to assert their own rights, despite being non-parties to prosecutions, through petitions for writs of mandamus to appellate courts.[55]

Collectively, these pieces of legislation, to which this Note refers as the "restitution statutes," provided a pathway to ending what one of the CVRA's sponsors, Senator Diane Feinstein, called the criminal justice system's obliviousness to victims "ignored, cast aside, and treated as non-participants in a critical event in their lives . . . by prosecutors to [sic] busy to care enough, by judges focused on defendant[s'] rights, and by a court system that simply did not have a place for them."[56]

B. Substantive Dimensions of the Restitution Statutes and Their Implementation

Under the restitution statutes, "person[s] directly and proximately harmed as a result of the commission" of several types of offenses, including those against property in which a victim suffered physical injury or pecuniary loss, are restitution-eligible "victims."[57] A long line of cases confirm bribery and other forms of corruption

52. CHARLES DOYLE, CONG. RSCH. SERV., RL33679, CRIME VICTIMS' RIGHTS ACT: A SUMMARY AND LEGAL ANALYSIS OF 18 U.S.C. § 3771 (2021); *see also* United States v. Ruzicka, 331 F. Supp. 3d 888, 893 (D. Minn. 2018).

53. 18 U.S.C. §§ 3771(a)(2), (8), (6).

54. *Id.* § 3771(c)(1) (emphasis added).

55. *Id.* § 3771(d)(3); United States v. Atl. States Cast Iron Pipe Co., 612 F. Supp. 2d 453, 459–60 (D.N.J. 2009). The statutes create no private right of action. 18 U.S.C. § 3771(d)(6); s*ee also, e.g.*, United States v. Johnson, 983 F.2d 216, 221 (11th Cir. 1993).

56. 150 CONG. REC. 7296 (2004) (statement of Sen. Dianne Feinstein).

57. 18 U.S.C. §§ 3663A(a)(2), (c)(1).

qualify as offenses against property that trigger mandatory restitution.[58]

The application and operationalization of restitution nonetheless invites several additional questions, such as: How is restitution measured? Who decides which persons qualify as victims, and who facilitates payment? When in the process are victims' losses calculated and verified? This Section aims to shed light on these issues and describe how courts have defined the substantive contours of the statutes.

1. The Function and Measure of Restitution

Restitution is defined generally as a remedy "restoring someone to a position [they] occupied before a particular event."[59] Although restitution coincides with criminal sentencing and operates as a payment between private persons, courts have distinguished restitution from both criminal penalties and civil damages.[60] Whereas the rationale for penalties is punitive and dissuasive, restitution's objective is "not to punish the defendant, but to 'make the victim[] whole' again."[61] Accordingly, restitution awards are not governed by laws governing penalties, such as due process limitations on sentencing.[62] Likewise, restitution is also distinct from and usually more limited than civil damages: For instance, courts have held that restitution awards cannot include punitive damages,[63] but can include interest.[64]

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58. United States v. Razzouk, 984 F.3d 181, 186–89 (2d Cir. 2020) ("[A]ccepting bribes" is "an offense against property" within the meaning of the MVRA.).

59. Hughey v. United States, 495 U.S. 411, 416 (1990) ("[T]he ordinary meaning of 'restitution' is restoring someone to a position he occupied before a particular event, see, *e.g.*, Webster's Third New International Dictionary 1936 (1986); Black's Law Dictionary 1180 (5th ed. 1979) . . . .").

60. *Id.*; United States v. Green, 722 F.3d 1146, 1149 (9th Cir. 2013).

61. United States v. Hunter, 618 F.3d 1062, 1064 (9th Cir. 2010).

62. The Supreme Court has expressed reluctance to relocate the court's restitution-determining authority to juries, which would be required for penalties. *See, e.g.*, Oregon v. Ice, 555 U.S. 160, 171–72 (2009); *Green*, 722 F.3d at 1149.

63. United States v. Shepard, 269 F.3d 884, 887 (7th Cir. 2001); United States v. Seward, 272 F.3d 831, 839 (7th Cir. 2001) (excluding consequential or incidental damages). Courts differ on whether restitution encompasses victims' attorneys' fees. *Compare* United States v. Arvanitis, 902 F.2d 489, 497 (7th Cir. 1990) (restitution excludes attorney's fees), *with* United States v. Dodd, 978 F. Supp. 2d 404, 423 (M.D. Pa. 2013) (restitution can include attorney's fees).

64. *Shepard*, 269 F.3d at 886. Nevertheless, restitution is comprehensive. *See, e.g.*, United States v. Smith, 944 F.2d 618, 626 (9th Cir. 1991) (restitution includes interest accrued on loan during time of misappropriation).

Restitution, aiming to "make victims whole," is measured by the actual losses suffered by the victim, as opposed to the defendant's wrongful gain.[65] Technically, under the statutes, courts are required to order the "return [of] the property to the [victimized] owner of the property or someone designated by the owner."[66] However, if return of the property itself "is impossible, impracticable, or inadequate," the defendant must pay "an amount equal to [the] value of the property."[67] The only factor courts may consider in assessing restitution is victims' *actual* "economic, emotional, or psychological losses."[68] The actuality requirement prohibits recovery by claimants who theoretically were victimized, but, in fact, benefitted from the offense.[69] Moreover, defendants' wrongful gain cannot be "used as a proxy for actual loss,"[70] especially because corruption victims' losses often well exceed illicit enrichment.[71]

Other considerations beyond actual loss—including defendants' means and possibilities of civil recovery—remain off-limits for courts.[72] While the "availability of a civil suit can no longer be considered by the district court in deciding the amount,"[73] subsequent damages awarded in victims' suits against defendants in state or federal court must be discounted by previously-awarded restitution, and vice versa.[74] Compensation from insurance companies similarly

65. Lollar, *supra* note 33, at 97; *Hunter*, 618 F.3d at 1064; United States v. Harvey, 532 F.3d 326, 341 (4th Cir. 2008) ("[R]estitution must be based on . . . amount of actual loss. Profit gained . . . may not be used in its stead.").

66. 18 U.S.C. § 3663A(b)(1).

67. *Id.* (emphasis added). The property's value is calculated on the date of sentencing and of deprivation. Whichever value is higher is used. If a portion of the property was returned, the value of the returned property is subtracted. *Id.*

68. Lollar, *supra* note 33, at 97.

69. United States v. Frazier, 651 F.3d 899, 905 (8th Cir. 2011). This requirement would disqualify, to give a rare example, a defrauded government entity that received top-quality services from a bribe-paying contractor at a lower-than-market price. *See, e.g.*, United States v. Kilpatrick, 798 F.3d 365, 388 (6th Cir. 2015).

70. United States v. Zangari, 677 F.3d 86, 92 (2d Cir. 2012) (quoting *Harvey*, 532 F.3d at 340).

71. United States v. Dodd, 978 F. Supp. 2d 404, 408 (M.D. Pa. 2013). In *Dodd*, a contractor misappropriated $1.1 million in federal funds intended for a $24 million construction project in an economically disadvantaged area. The United States "identified twelve entities that claim[ed to] qualify as victims and [were] owed restitution" totaling $21.4 million. *Id.*

72. United States v. Kerekes, 531 F. App'x 182, 184 (2d Cir. 2013).

73. United States v. Cienfuegos, 462 F.3d 1160, 1168 (9th Cir. 2006).

74. 18 U.S.C. § 3664(j)(2); *see also Cienfuegos*, 462 F.3d at 1168.

cannot factor in.[75] Overall, restitution awards are to be made in a proverbial vacuum, disregarding other possible avenues of recovery and defendants' financial position.

2. Procedural Triggers and Fallbacks: When Do Rights Attach and How Are They Operationalized and Protected?

The MVRA mandates restitution only for those specific offenses underlying the charges on which the defendant is convicted.[76] If prosecutors decide to enter plea agreements with respect to only one or several charges the defendant faces, victims' mandatory restitution can be limited.[77] Resultingly, non-prosecution agreements (NPAs) and deferred prosecution agreements (DPAs) typically do not trigger the USG's restitutive obligations—although prosecutors could use their discretion to require that defendants pay restitution as part of such agreements.[78] The Eleventh and Fifth Circuits, for instance, have reached contrary rulings on whether, under the CVRA, victims have other rights beyond restitution, such as the right to be notified of plea negotiations or to confer with prosecutors, that are triggered pre-indictment by the commencement of a criminal investigation, even where no convictions are ultimately obtained.[79]

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75. 18 U.S.C. § 3664(f)(1)(B). This rule endorses the idea that well-resourced companies can subsequently follow up with or sue doubly compensated victims and can also receive restitution as the victim's successor in interest. *Id.*

76. 18 U.S.C. § 3663A(a)(1).

77. Hughey v. United States, 495 U.S. 411, 416 (1990).

78. S. REP. NO. 104-179, at 19 (1995). For an example of prosecutors requiring defendants to pay reparations in some form to a defrauded government via a DPA, see *infra* note 223.

79. *Compare In re* Wild, 994 F.3d 1244, 1268 (11th Cir. 2021) (CVRA rights to be notified and confer with prosecution do not attach during the investigation stage. The victim's "reading of [the CVRA] would . . . require law-enforcement officers to 'confer' with victims . . . before conducting a raid, seeking a warrant, making an arrest, interviewing a witness, convening a lineup, or conducting an interrogation."), *with In re* Dean, 527 F.3d 391, 394 (5th Cir. 2008) ("'There are clearly rights under the CVRA that apply before any prosecution is underway.' . . . include[ing] the CVRA's establishment of victims' 'reasonable right to confer with the attorney for the Government.'") (quoting United States v. BP Prods. N. Am. Inc., 610 F. Supp. 2d 655 (S.D. Tex. 2009)). Other rights codified in the statutes, such as the right to confer with prosecutors, hold significant weight. Conferring with and involving victims earlier in investigations may change prosecutors' minds towards pursuing resolutions that provide victims with adequate redress. For instance, in a fraught opinion that denied restitution to Jeffrey Epstein's victims, the Eleventh Circuit acknowledged that "by all accounts . . . as a matter of best practices, prosecutors should have consulted with [all of Epstein's victims] before negotiating and executing Epstein's NPA." *In re Wild*, 994 F.3d at 1269.

Regardless of *when* rights attach, the USG does have the burden under the restitution statutes to identify and notify victims, as well as prove victims' losses, though victims may offer assistance in this process.[80] In fulfilling its obligation to notify broad classes of victims of white-collar crimes,[81] the USG can bypass individual class member notification by identifying and notifying a bona fide victim representative or proxy.[82] Restitution is typically paid for by defendants, although the DOJ Crime Victims Fund can provide restitution to victims of indigent defendants at the DOJ's discretion.[83] Throughout this process, the DOJ is prohibited from waiving defendants' restitution—even when dealing with cooperative defendants for whom prosecutors seek sentence reduction[84]—and from accepting restitution on behalf of the USG, in its potential capacity as a victim, before ensuring "that all [other] victims [first] receive full restitution."[85]

Under the statutory allocation of responsibility, the DOJ identifies and notifies victims; the U.S. Probation and Pretrial Services System assists with the assessment of losses based on the evidence provided by prosecutors, victims, and other sources; and the courts order restitution.[86] Calculating restitution might be fairly straightforward following the USG's extensive presentation of evidence of the

80. United States v. Reifler, 446 F.3d 65, 122 (2d Cir. 2006); United States v. Martinez, 690 F.3d 1083, 1088–89 (8th Cir. 2012); United States v. Shabudin, 701 F. App'x 599, 602 (9th Cir. 2017).

81. 18 U.S.C. § 3663A(c)(1)(B). Victims need not be *identified* in the indictment, information, or any other procedural step to recover. United States v. Mueffelman, 400 F. Supp. 2d 368, 383 (D. Mass. 2005); *In re* Stewart, 552 F.3d 1285, 1289 (11th Cir. 2008).

82. 18 U.S.C. § 3663A(c)(1)(B). However, if individual disbursement is a component of the proposed restitution award, the proxy must be capable of eventually identifying, contacting, and disbursing to individual victims. In cases "with large numbers of victims," the USG must notify all victims, but can utilize shortcuts effectuating constructive notice, such as by posting on a USG or a trustee website. United States v. Olivares, No. 3:13-cr-00335-MOC, 2014 WL 2531559, at *3 (W.D.N.C. June 5, 2014) (citing United States v. Madoff, 465 F. Supp. 3d 343 (S.D.N.Y. 2009).

83. Lollar, *supra* note 33, at 98.

84. 18 U.S.C. § 3663A(a)(1); *see also* United States v. Puentes, 803 F.3d 597, 606 (court 2015). Prosecutors, however, have discretion to negotiate NPAs that avoid incurring obligations to victims. According to its own terms, the CVRA must not be "construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction." 18 U.S.C. § 3771(d)(6).

85. MVRA, *supra* note 48, § 3664(g)(i).

86. *Id.* § 3664(a). Court should delegate to probation officers "to obtain" and report "information sufficient for the court to exercise its discretion in fashioning a restitution order," including, "to the extent practicable, a complete accounting of the losses to each victim, [and] any restitution owed pursuant to a plea agreement." *Id.*

offense during trial.[87] Moreover, conveniently, victims' eligibility and losses need not be proven beyond a reasonable doubt, nor with "absolute precision"; rather, restitution requires only "a rational basis in the record."[88] The First Circuit has observed that "the legislative history clearly signals a congressional preference for rough remedial justice."[89] That court reasoned, "Congress visualized the [VWPA] as 'authoriz[ing] the court to reach an expeditious, reasonable determination of appropriate restitution by resolving uncertainties with a view towards achieving fairness to the victim.'"[90] Courts need not, but can, extend proceedings to gather further evidence on victims' losses.[91] Courts also have the powers to grant restitution where prosecutors object,[92] or where fact patterns present complex, multi-dimensional harm,[93] and to order restitution be paid to individuals other than victims.[94]

Throughout this process, the statutes place only two limitations on courts: First, as previously discussed, awards must be measured appropriately, i.e., by reference to victims' actual losses. Second, district courts denying restitution and appellate courts denying writs of mandamus petitions must "clearly state on the record" and in writing their reasons for doing so, which must conform to a statutory exception.[95]

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87. United States v. Vaknin, 112 F.3d 579, 586–87 (1st Cir. 1997).

88. United States v. Salas-Fernández, 620 F.3d 45, 48 (1st Cir. 2010). Restitution is not "an entirely standardless proposition" nor "woven solely from the gossamer strands of speculation and surmise." *Vaknin*, 112 F.3d at 587.

89. *Vaknin*, 112 F.3d at 586–87.

90. *Id.*

91. MVRA, *supra* note 48, § 3664(d)(4)–(5). If victims' losses cannot be ascertained ten days prior to sentencing, the court must "set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing." *Id.* § 3664(d)(5). Victims discovering additional losses after the fact can also petition the court for an amended restitution order up to sixty days after the discovery of additional losses. *Id.*

92. *See* United States v. OZ Afr. Mgmt. Grp., LLC, No. 16-CR-515, 2019 WL 4199904 (E.D.N.Y. Aug. 29, 2019).

93. *See* MVRA, *supra* note 48, § 3663A(c)(3); *see also* United States v. Padgett, 892 F.2d 445, 449 (6th Cir. 1989). One victim's waiver of restitution does not nullify the USG's obligations to *other* victims. United States v. Hamburger, 414 F. Supp. 2d 219, 226–27 (E.D.N.Y. 2006). Courts can order defendants redirect waived restitution to anyone else or the Crime Victims Compensation Fund. *Id.*

94. United States v. Kones, 77 F.3d 66, 70 (3d Cir. 1996) (citing United States v. Seligsohn, 981 F.2d 1418, 1422 (3d Cir. 1992)).

95. 18 U.S.C. §3771(b)(1) (obligating courts to "clearly state[] on the record" the "reasons for any decision denying relief under the [CVRA]."); *In re* Brown, 932 F.3d 162, 173–74 (4th Cir. 2019).

3. Eligibility: Directly and Proximately Harmed Persons, Successors in Interest, and Proxies

Restitution is only mandated for those persons "directly and proximately" harmed by defendants' conduct.[96] Courts have developed several guidelines to determine which elements of injuries are sufficiently linked to the offense conduct to count toward restitution.[97] First, restitution is not ordered for "a loss which would have occurred regardless of the defendant's conduct."[98] Second, the crime cannot be "too far removed, either factually or temporally, from the loss."[99] Yet, intervening causes exacerbating a loss, such as a "collapsing real estate market," do not undermine restitution's validity, as long as the victims' loss was reasonably foreseeable given the offense conduct.[100] Relatedly, restitution only remedies those harms "inherent to the offense, rather than tangentially linked."[101] In sum, if criminal conduct for which the defendant is convicted substantially contributed to a reasonably foreseeable loss that would not have occurred but for the conduct, restitution is mandated.[102]

Courts have held that various types of entities, including corporations[103], governments (foreign,[104] municipal,[105] state, and

96. MVRA, *supra* note 48, § 3663A(a)(2); *see also* United States v. Atl. States Cast Iron Pipe Co., 612 F. Supp. 2d 453, 469 (D.N.J. 2009).

97. United States v. Vaknin, 112 F.3d 579, 586 (1st Cir. 1997).

98. *Atl. States Cast Iron Pipe Co.*, 612 F. Supp. 2d at 469–70 (citations omitted); *see also In re* Fisher, 640 F.3d 645, 648 (5th Cir. 2011).

99. *Atl. States Cast Iron Pipe Co.*, 612 F. Supp. 2d at 469–70 (citations omitted).

100. *Vaknin* 112 F.3d at 586–90; *In re Fisher*, 640 F.3d at 648; *In re* Stewart, 552 F.3d 1285, 1288 (11th Cir. 2008); *In re* McNulty, 597 F.3d 344, 352 (6th Cir. 2010).

101. *In re McNulty*, 597 F.3d at 352; Paroline v. United States, 572 U.S. 434, 445 (2014) (Liability is precluded "in situations where the causal link between conduct and result is so attenuated that the consequence is more aptly described as mere fortuity[.]"); *In re* Rendón Galvis, 564 F.3d 170, 173 (2d Cir. 2009) (denying restitution from Colombian paramilitary leader convicted for drug trafficking to murder victim's mother, as the murder was not inherent in nor reasonably foreseeable from the drug-trafficking).

102. OFF. GEN. COUNS. UPDATE, PRIMER: CRIME VICTIMS' RIGHTS 15–16 (2019) https://www.ussc.gov/sites/default/files/pdf/training/primers/2019_Primer_Crime_Victims.pdf [https://perma.cc/LR3Y-9V6H].

103. United States v. Benedict, 855 F.3d 880, 886 (8th Cir. 2017).

104. United States v. Bengis, 631 F.3d 33, 40 (2d Cir. 2011) (holding South Africa is a victim under the MVRA).

105. United States v. Atl. States Cast Iron Pipe Co., 612 F. Supp. 2d 453, 474 (D.N.J. 2009) ("[M]unicipality was [a] victim of conspiracy to misappropriate its insurance funds.") (citing United States v. Carrara, 49 F.3d 105, 106–09 (3d Cir. 1995)).

federal,[106]), third parties, competitors, shareholders, and even those adversely affected by attempted crimes,[107] can be "victims" for restitution purposes. Several modes of analysis are relevant to the issue of compensating public corruption victims. First, courts have awarded restitution to persons occupying varying points along a theoretical chain of victimization, on the implicit theory that victims foreseeably pass along loss to others.[108] For instance, courts have held that successors in interest to primary victims, such as lenders, can be "victims" within the meaning of the statutes, as harm to successors can be a reasonably foreseeable, natural consequence of certain offenses.[109] Likewise, third parties that have appropriately compensated the victim, such as insurance firms, can be compensated in the victim's place.[110] The decision whether to compensate persons at one stage of the chain as opposed to another has received sparse treatment in case law. Yet, the few relevant decisions show the judiciary assigns restitution using convenient analytical devices, focusing either on immediate or ultimate harm.

Courts have also awarded governmental agencies and other institutions restitution in their capacity to serve as proxies for more directly harmed victims. In *United States v. Woodard*, the Eleventh Circuit affirmed a district court order requiring a former police officer, who embezzled seized funds from the Atlanta Police's property control unit, to pay restitution to the City of Atlanta, rather than directly paying the citizens whose property was embezzled.[111] Although the city "had no proprietary interest" in the assets, Atlanta was appropriately chosen as the recipient to manage disbursement to other victims. Because "it would be impractical to separate loss amounts for individual claimants," the city qua proxy could receive restitution on the understanding it would disburse funds to and be held accountable by

106. United States v. Ekanem, 383 F.3d 40, 43 (2d Cir. 2004); United States v. Mei Juan Zhang, 789 F.3d 214, 217 (1st Cir. 2015); State v. Gatewood, 452 P.3d 1046, 1050 (Or. Ct. App. 2019).

107. United States v. Maldonado-Passage, 4 F.4th 1097, 1103 (10th Cir. 2021).

108. *See, e.g.*, *Ekanem*, 383 F.3d at 43 (holding that the federal Government, rather than the Department of Agriculture, was the victim of a defendant official's embezzlement from federally funded program run by the Department).

109. United States v. Martin, 803 F.3d 581, 593 (11th Cir. 2015); United States v. Hymas, 780 F.3d 1285, 1293–94 (9th Cir. 2015).

110. MVRA, *supra* note 48, § 3664(j)(1); United States v. Frazier, 651 F.3d 899, 906 (8th Cir. 2011). Courts have also denied restitution to insurance companies, who can be technically defrauded, yet may assume such risk within their business model. Fed. Ins. Co. v. United States, 882 F.3d 348, 355 (2d Cir. 2018).

111. United States v. Woodard, 459 F.3d 1078, 1082, 1088 (11th Cir. 2006).

victimized individuals.[112] In another case, *United States v. Boscarino*, the Seventh Circuit held that a brokerage could be granted restitution, even though the firm had passed along the costs of its victimization to a client, the City of Rosemont.[113] The brokerage "was not entitled to this money vis-à-vis Rosemont, but it ha[d] rights superior to those of" the defendants.[114] Moreover, it was "just a way station for the funds," meaning "[o]nce [the defendant] reimburses the immediate victim, [the brokerage] will be able to repay Rosemont."[115] Hence, institutions having little to no proprietary claim on their own can serve as proxies or intermediaries for those suffering actual loss.

Courts have also validated the related principle of community restitution, i.e., when a grassroots organization seeks restitution, not on behalf of individual victims to whom it can subsequently manage differentiated disbursement, but on behalf of a community to remedy a collective injury.[116] For instance, in *United States v. Bold*, a non-profit filed a motion for restitution on behalf of a community harmed by a mortgage fraud scheme affecting 800 homes in "poorer Cincinnati neighborhoods."[117] The court acknowledged that "an organization does not forfeit its right to restitution simply because it seeks restitution for a 'community' . . . instead of some more discrete or specifically described group of individuals."[118]

4. The Statutory Exception for Complexity Rendering Restitution Impracticable

One primary statutory exception limits the right to restitution.[119] Under the CVRA, if courts find that determining "complex

112. *Id.* at 1088.

113. United States v. Boscarino, 437 F.3d 634, 637 (7th Cir. 2006) ("Instead of determining the ultimate incidence of costs created by criminal activity, judges should direct restitution to the immediate victim; other persons' rights in the funds then may be sorted out under normal rules of contract and property law.").

114. *Id.*

115. *Id.*

116. United States v. Bold, 412 F. Supp. 2d 818, 825–26 (S.D. Ohio 2006).

117. *Id.* at 820–21.

118. *Id.* at 825–26.

119. The MVRA also contains a disfavored and lightly utilized numerosity exception, which is diminished by the CVRA. Under the MVRA, if courts find "the number of identifiable victims is so large as to make restitution impracticable," the court need not, but still can, order restitution. It has rarely been litigated and cited by either defendants or prosecutors. MVRA, *supra* note 48, § 3663A(c)(3)(A). In one complex fraud case in which it was cited, the Second Circuit described

issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process," then the court need not, but still can, order restitution.[120] If courts deny restitution, they must record their analysis under this balancing framework.[121]

Despite this obligation, the jurisprudence lacks clear, substantive guideposts for determining when the restitution's burden outweighs the victim's need.[122] The complexity exception does not plausibly justify restitution denial simply when courts would need to call for further testimony to determine restitution,[123] as both the MVRA and CVRA expressly contemplate procedures for courts' solicitation of further information from probation officers and others.[124] More plausibly, the complexity exception could be invoked if courts struggle to disassociate losses caused by the defendant from those caused by other factors.[125] The exception might also apply when numerous defendants claim varying types and amounts of loss.[126]

Nonetheless, courts can always push forward despite complexity,[127] and several courts have opined that judges should.[128] For

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the defendant's efforts to exempt himself from restitution based on the sheer size of his victim class as legally unconvincing and "at best a disingenuous effort to avoid a consequence of his criminal behavior." United States v. Catoggio, 326 F.3d 323, 327–28 (2d Cir. 2003), *aff'd*, 698 F.3d 64 (2d Cir. 2012). The CVRA, enacted subsequently, instructs that in cases featuring a large volume of victims, the court must nonetheless "fashion a reasonable procedure to give effect to [the victims' rights] that does not unduly complicate or prolong the proceedings." 18 U.S.C. § 3771(d)(2).

120. MVRA, *supra* note 48, § 3663A(c)(3).

121. *See In re* Brown, 932 F.3d 162, 173–74 (4th Cir. 2019).

122. MVRA, *supra* note 48, § 3663A(c)(3).

123. United States v. Kones, 77 F.3d 66, 68 (3d Cir. 1996).

124. *Id.*

125. United States v. Martinez, 690 F.3d 1083, 1089 (8th Cir. 2012); United States v. Shabudin, 701 F. App'x 599, 602 (9th Cir. 2017)

126. United States v. Sharma, No. 1:18-CR-340-1, 2021 WL 861353, at *3 (S.D.N.Y. Mar. 8, 2021) (denying restitution in a complex bitcoin fraud case where a class of thousands of victims was internally differentiated by those who were victimized in the primary market and the "secondary market").

127. *See* United States v. Gushlak, 728 F.3d 184, 192–93 (2d. Cir. 2013) (writing the MVRA "plainly does not require the district court to surrender whenever one or more complex issues of causation or loss calculation appear . . . the statute explicitly contemplates [] the court weigh against the burden of ordering restitution the victims' interests . . . commit[ing] the balancing to the [court's] discretion").

128. *See, e.g.*, United States v. Bold, 412 F. Supp. 2d 818, 829 (S.D. Ohio 2006); United States v. Hand, 863 F.2d 1100, 1104 (3d Cir. 1988).

instance, the Third Circuit has held the exception should only apply in "unusual cases" and should not exempt the USG from restitution where "mere '[d]ifficulties of measurement'" present themselves.[129] Likewise, Sixth Circuit courts have found restitution should not be "lightly refuse[d] . . . simply because calculating an award may present complications" or "overwhelm the Court and Probation Office."[130]

5. The Equitable Exception of *In Pari Delicto*: How Conspiratorial Victims Can be Disentitled from Restitution

Although not codified in relevant statutes, courts have adopted an equitable exception to the restitution statutes with particular significance for public corruption cases: the conspirator disentitlement doctrine, also known as *in pari delicto* or "in equal fault."[131] Arising from civil cases yet finding traction in the criminal restitution context, the exception applies when courts conclude that restitution claimants participated in and benefitted from the offense.[132] Underpinning the exception is a sense that costly USG anti-corruption efforts should not compensate wrongdoers.[133] As the Second Circuit wrote in *United States v. Reifler*:

> [A]ny order entered under the MVRA that has the effect of treating coconspirators as "victims," and thereby requires "restitutionary" payments to the perpetrators of the offense of conviction, contains an error so fundamental and so adversely reflecting on the public reputation of the judicial proceedings that we may, and do, deal with it *sua sponte*.[134]

In Reifler, the Second Circuit ordered that a district court's restitution order be remanded because the initially proffered list of

129. *Bold*, 412 F. Supp. 2d at 829 (citing *Hand*, 863 F.2d at 1104).

130. *Id.*

131. *In Pari Delicto*, BLACK'S LAW DICTIONARY (11th ed. 2019).

132. *See generally* Allan B. Diamond & Jon Maxwell Beatty, *In Pari Delicto: The Inequitable Application of an Equitable Doctrine*, 30 AM. BANKR. INST. J. 36 (2011). The exception has been applied to preclude restitution even if claimants are victimized in the mode envisioned by the statute.

133. *Id.* Defendants and the USG have challenged restitution orders on *in pari delicto* grounds. Defendant's incentives to lower liability are self-evident, but the USG's challenges likely stem from prosecutors' familiarity with the mechanics of the charged offense and the involvement of uncharged persons.

134. 446 F.3d 65, 127 (2d Cir. 2006).

victims included some defendants who held accounts in the entity they defrauded alongside innocent account holders.[135]

The stakes of *Reifler* were relatively minimal, as many deserving victims were also going to recover even if one defendant was marginally compensated. Other cases present greater perversions of justice, in which judicial resources and a well-intentioned, notionally redistributive statutory mechanism could be used to reward and further enable wrongdoers. For instance, in 2010, the Ninth Circuit considered awarding, but ultimately denied, restitution to Ukrainian businessperson Peter Kiritchenko, who claimed he was extorted by the former Prime Minster of Ukraine Pavlo Lazarenko.[136] Lazarenko embezzled hundreds of millions of dollars during his yearlong tenure and was charged with money laundering in 2001.[137] Given the longstanding cooperation and close personal relationship between Lazarenko and Kiritchenko,[138] the Ninth Circuit held Kiritchenko had "deep and willing complicity in the heart of the conspiracy," ruling "in the absence of exceptional circumstances, a co-conspirator cannot recover restitution."[139]

Alongside policy concerns of utilizing restitution to reimburse wrongdoers, courts have simultaneously emphasized the risk of unjustly denying restitution to vulnerable individuals harmed by defendants. In *United States v. Sanga*, the same Circuit awarded restitution to Annie Marie Quinlob, who had suffered physical abuse and labor violations by the defendant following her undocumented migration to the United States.[140] The court ordered the defendant to pay Quinlob restitution, reasoning that Quinlob's culpability in the unlawful migration was outweighed by her lack of agency in the offensive conduct and her financial inability to independently recover damages through

135. *Id.* at 125–27.

136. United States v. Lazarenko, 624 F.3d 1247 (9th Cir. 2010).

137. TRANSPARENCY INT'L, GLOBAL CORRUPTION REPORT 13 (2004); *see also* Second Superseding Indictment, United States v. Lazarenko, 555 F.Supp.2d 1029 (N.D. Cal. July 19, 2001) (No. CR-00-0284).

138. Lazarenko was godparent to Kiritchenko's children and the two often vacationed together. Leslie Wayne, *A Ukrainian Kleptocrat Wants His Money and U.S. Asylum*, N.Y. TIMES (July 7, 2016), https://www.nytimes.com/2016/07/07/business/international/a-ukrainian-kleptocrat-wants-his-money-and-us-asylum.html [https://perma.cc/E9T8-9Y53]; *see also Lazarenko*, 555 F. Supp. 2d at 1031–32.

139. *Lazarenko*, 624 F.3d at 1251–52.

140. 967 F.2d 1332, 1334–35 (9th Cir. 1992).

litigation.[141] In applying the conspirator disentitlement doctrine to FCPA cases, courts must consider whether foreign governments—capable of serving as proxies for victimized individuals, yet undeniably implicated in the offense—bear greater similarities to Quinlob or to Kiritchenko.

Courts have also grappled with how to translate the analysis of natural persons' complicity to institutional complicity of corporations and public sector organizations.[142] To what extent should institutions, as legal persons, be identified with and held accountable for their errant agents? Courts have not developed general criteria for institutional disentitlement, but have, in discrete cases, considered one or more recurring factors. Some factors focus on the agent's position and conduct, such as whether the agent was a senior executive, as opposed to a lower-level employee,[143] and whether the agent acted alone or in concert with others.[144] Courts have also looked to evidence about the institution's characteristics and behavior. Specifically, courts have considered whether the institution or its leadership: (1) benefited from the offense alongside the agent;[145] (2) knew of or was "willfully blind" toward the criminal conduct,[146] as opposed to being deceived and deprived of honest services;[147] (3) formally or informally admitted responsibility or fault;[148] (4) was complicit in the charged offense specifically or a separate (charged or uncharged) offense;[149] (5) had

141. *See id.* at 1335; *see also Lazarenko*, 624 F.3d at 1251–52 (citing *Sanga*, 967 F.2d at 1251, and observing that "Quinlob was not barred from recovery simply by virtue of having been a co-conspirator initially . . . . '[A]ny criminal complicity . . . stopped at the point at which she became the object of, rather than a participant in[,] the criminal goals of the conspirators.'").

142. *See* Fed. Ins. Co. v. United States, 882 F.3d 348, 366 (2d Cir. 2018).

143. *In re* Wellcare Health Plans, Inc., 754 F.3d 1234, 1240 (11th Cir. 2014); *see also* RESTATEMENT (THIRD) OF AGENCY § 6.08 cmt. b (AM. L. INST. 2006).

144. *See* United States v. Bryant, 655 F.3d 232, 254 (3d Cir. 2011).

145. *See Fed. Ins. Co.*, 882 F.3d at 368; United States v. Barrett, 51 F.3d 86, 89 (7th Cir. 1995) ("[C]ommon sense dictates that when an employee acts to the detriment of his employer and in violation of the law, his actions normally will be deemed to fall outside the scope of his employment and thus will not be imputed to his employer.").

146. *See Fed. Ins. Co.*, 882 F.3d at 369; United States v. Lazar, 770 F. Supp. 2d 447, 451 (D. Mass. 2011).

147. *See* United States v. Skowron, 839 F. Supp. 2d 740, 745 (S.D.N.Y 2012); United States v. Martinez, 978 F. Supp. 1442, 1454 (D.N.M. 1997).

148. *See Fed. Ins. Co.*, 882 F.3d at 367; United States v. Boscarino, 437 F.3d 634, 637 (7th Cir. 2006); *In re Wellcare Health Plans, Inc.*, 754 F.3d at 1239; *see also* RESTATEMENT (THIRD) OF AGENCY § 207 cmt. b (AM. L. INST. 2006).

149. *See Fed. Ins. Co.*, 882 F.3d at 367.

motive to support the agent's illicit enrichment;[150] and (6) independently undertook measures to halt, investigate, and remedy the agent's actions.[151] An organization's failure in one or several of these dimensions might "suffice to justify disentitlement" from restitution.[152]

Despite the hurdles *in pari delicto* supposedly poses to corruption victims' ability to recover restitution via public institutions, two notable cases demonstrate limitations on the doctrine. In *United States v. Ojeikere*, the Second Circuit held claimants should only be disentitled on the basis of complicity in the charged offense, rather than on the basis of generally having bad records or greedy motivations.[153] In the case, the defendant was charged with two counts of wire fraud after leading a "so-called 'advance fee scheme,' in which the conspirators tricked victims into making substantial payments . . . purportedly to help obtain the release of large sums of money held in Nigeria."[154] The defendant argued the victims "all participated in what they thought was a fraudulent scheme to obtain money from Nigeria."[155] The Second Circuit disagreed, reasoning restitution "may not be denied simply because the victim had greedy or dishonest motives."[156] To be granted restitution, victims need to be innocent only with respect to the offense underlying the conviction. This holding implies that a domestic or foreign government's general reputation should not be used against it for disentitlement purposes.

A 2010 case from the Eastern District of Pennsylvania, *United States v. Kamuvaka*, suggests the doctrine should have limited application with respect to defrauded government institutions whose agents engaged in corruption.[157] *Kamuvaka* followed the conviction of a nonprofit's executives for embezzlement and fraud in the course of obtaining and performing a government health services contract with the City

150. *See* United States v. Lazarenko, 624 F.3d 1247, 1248–52 (9th Cir. 2010); United States v. Kamuvaka, 719 F. Supp. 2d 469, 477–78 (E.D. Pa. 2010); United States v. Emor, 850 F. Supp. 2d 176, 183 (D.D.C. 2012).

151. *See Skowron*, 839 F. Supp. 2d at 744; *Lazarenko*, 624 F.3d at 1252.

152. *Fed. Ins. Co.*, 882 F.3d at 367.

153. 545 F.3d 220, 222–23 (2d Cir. 2008).

154. Brief for Appellee at 3, United States v. Ojeikere, 545 F.3d 220 (2d Cir. 2008) (No. 07-1970-cr), 2008 WL 7515050, at *3.

155. *Ojeikere*, 545 F.3d at 222.

156. *Id.* ("Whatever illegal scheme the victims thought they were involved in, it was not a scheme to lose their own money, which they earned fairly (as far as we know), lost, and now want returned.").

157. 719 F. Supp. 2d 469, 471 (E.D. Pa. 2010).

of Philadelphia.[158] The case's central inquiry was whether the City deserved restitution, following significant evidence of its nepotistic "cozy indifference" toward the contractor's abuses.[159] The City's nonchalance persisted even when the contractor's provision of substandard services resulted in tragedy: In 2006, a disabled child assigned to the contractor's care died of starvation and neglect, but the contractor was allowed to continue providing public services.[160] Acknowledging *in pari delicto*, the court nonetheless ordered the defendant pay the City $1,000,000 in restitution, reasoning that "since 'the City is a public entity, the true first-line victims in this case are the taxpayers, and there is no just reason to punish them for the bad acts of some City employees.'"[161]

The court also questioned whether the equitable doctrine applies at all to interpreting federal statutes. The court reasoned that the restitution statutes establish a right to restitution "[n]otwithstanding any other provision of law" and thus convey "clarion congressional intent to provide restitution to as many victims and in as many cases as possible."[162] The court concluded the City, which represented "thousands of taxpayers[,] not all 'contented'" by corruption, deserved restitution.[163] *Kamuvaka* stands for the proposition that under the conspirator disentitlement doctrine (or perhaps despite it), restitution should still be granted to defrauded but troubled government institutions because of their inherent capacity to represent and serve "first-line" victims.[164]

This proposition is directly relevant to the FCPA context: The foreign government institutions targeted by FCPA offenses manifestly have been or are susceptible to corruption to some extent. Yet, such institutions can still represent the public of the jurisdiction in which the offense took place, i.e., the "first-line" victims deprived of the government's honest services. Such institutions are also victims of fraud

158. *Id.* at 471.

159. *Id.* at 475–76. Given the official nonchalance responding to such abuses and evidence the City gave the contractor "'six weeks' advance notice of the precise date the auditors would arrive, and . . . the names of those families to be 'audited,'" the court characterized the audits as a "charade." *Id.* at 476.

160. Vernon Clark, *Three in the Danieal Kelly Starvation Case are Sentenced to Prison for Up to 5 Years*, PHILA. INQUIRER (Oct. 21, 2011), https://www.inquirer.com/philly/news/local/20111021_Three_in_the_Danieal_Kelly_starvation_case_are_sentenced_to_prison_for_up_to_5_years.html [https://perma.cc/P2DD-M3TX].

161. *Kamuvaka*, 719 F. Supp. 2d at 478.

162. *Id.* at 479; *see also* 18 U.S.C. § 3663A(a)(1).

163. *Kamuvaka*, 719 F. Supp. 2d at 478–79.

164. *Id.* at 478.

in their own rights. *Kamuvaka* implies that even though a government may be disentitled in its capacity as a victim in and of itself, additionally disentitling a government in its *representative* capacity is an analytically distinct task and a potentially undesirable outcome.

It is important to note a 2013 Southern District of New York decision that may complicate, but does not diminish, the salience of the *Kamuvaka*'s application to FCPA cases. In *Republic of Iraq v. ABB AG*, Iraq sued several U.S. business entities for tortiously and corruptly transacting with the former Iraqi regime led by Saddam Hussein and effectively misappropriating Iraqi sovereign wealth.[165] Addressing the issue of whether successive, more transparent regimes should be identified with and disentitled on the basis of the conspiratorial conduct of prior, dictatorial regimes, the Southern District adopted a theory under which "the consequences of one government's acts may redound to the sovereign even after that government has been replaced."[166] Although the case represents a theory under which successive regimes would face an uphill battle in reasserting their victim status and restitution rights, the court's judgment does not foreclose foreign governments' eligibility for restitution given several crucial distinctions. First, the case did not arise out of the restitution context, but rather a civil suit. Second, the court relied on principles of international law and bypassed analogous—but contrary—domestic precedent, affirming the restitution eligibility of state and local sovereigns.[167] Third, one may question whether the sovereign nation-state with a continuous international legal personality is the appropriate denominator for disentitlement purposes, whereas focusing on a specific regime, agencies or instrumentalities of a government, and even particular officials is also feasible when assessing disentitlement.

Given the entirety of the preceding framework, one can see the unique tensions that arise at the intersection of restitutive obligations and cases of foreign bribery and public corruption. Nevertheless, reconciling the competing values of conspirator disentitlement and restitution seems possible, if decisionmakers (1) appreciate courts' discretion and the numerosity of proxies through which restitution can be channeled in most contexts; (2) select an appropriate denominator for determining institutional culpability; and (3) privilege as proxies institutions that, whatever their general character or reputation, are capable

165. 920 F. Supp. 2d 517, 524 (S.D.N.Y. 2013).

166. *Id.* at 536.

167. *See Kamuvaka*, 719 F. Supp. 2d at 478; United States v. Kilpatrick, 798 F.3d 365, 388 (6th Cir. 2015) (holding subdivisions of state and local government in Michigan which were implicated in the corrupt offense nonetheless entitled to restitution, presumptively despite *in pari delicto* concerns, on a theory of fraud).

of providing some modicum of justice to citizens and "first-line" victims.[168]

II. THE DEARTH OF RESTITUTION IN U.S. REGULATION OF FOREIGN BRIBERY

The United States pioneered several aspects of the regulation of transnational corruption, largely in response to malfeasance by U.S. multinational corporations and to exposés on foreign kleptocrats' exploitation of weakly-regulated areas of the U.S. financial system.[169] In particular, the USG has spearheaded several noteworthy programs to provide accountability for the *demand-side* of corrupt transactions—bribe-recipients over whom the USG lacks criminal jurisdiction.[170] For instance, in 2010, the DOJ established the Kleptocracy Asset Recovery Initiative (KARI), which works "where appropriate" to return to "people harmed by [] acts of corruption and abuse of office" assets that foreign government officials or their agents have laundered through the United States.[171] The Initiative seemingly embraces both outward (i.e., reparative) and inward (i.e., utilitarian) policy objectives. As to its reparative dimension, KARI aims to correct an injustice exacerbated by the U.S. financial system's obscuration of beneficial ownership, for the sake of foreign governments and the people they serve. Additionally, KARI seemingly aims to disentangle U.S. businesses from illegally obtained assets, for the sake of the integrity and stability of the U.S. market.[172]

However, unlike efforts to regulate the demand-side of foreign bribery, regulation of the supply-side—of bribe-payers over whom the USG typically has criminal jurisdiction—has focused more exclusively on deterrence through penalizing wrongdoers and depriving

168. *Kamuvaka*, 719 F. Supp. 2d at 478.

169. *See supra* notes 21–23.

170. *See* OECD, *supra* note 28, at 3 (discussing the distinction between and meanings of supply-side and demand-side corruption).

171. Kleptocracy Asset Recovery Rewards Act, H.R. 5603, 114th Cong. § 2(a)(3) (2016).

172. *Id.* In January 2021, Congress even passed the Kleptocracy Asset Recovery Rewards Act (KARRA), which established a whistleblower rewards program to facilitate and incentivize private participation in the work of the Initiative. Kleptocracy Asset Recovery Rewards Act, Pub. L. No. 116-283, 134 Stat. 4834 (2021). Under the pilot program, whistleblowers providing "information leading to" seizure of assets "derived from foreign government corruption[,]" may be eligible to receive up to $5 million as a reward. *Id.* §§ 9703(b)(1), 9703(j)(8).

them of the means of further abuse.[173] Supply-side regulation began with the 1977 passage of the FCPA, which was "policed weakly until the early 2000s," when the USG "began to devote significant resources to its enforcement."[174] By the late 2010s, the USG collected an average of $3.97 billion in criminal penalties for FCPA-related violations per year,[175] eclipsing the enforcement costs for the entire criminal division by a factor of ten.[176] Recognizing the prevalence of foreign bribery and the DOJ's inability to reach all misconduct, the DOJ even launched a voluntary disclosure program in 2016, allowing offenders to obtain lighter financial penalties and easier sentencing in exchange for self-reporting misconduct.[177]

Despite the profitability of FCPA enforcement, supply-side regulation has largely failed to follow the example of demand-side enforcement practices and to implement more enterprising, reparative elements. Specifically, the USG has largely failed to utilize the primary tool available to it in this context: restitution. Restitution not only would serve reparative ends on the supply-side of anti-corruption regulation, as KARI does on the demand-side; it also is required by statute in appropriate circumstances.

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173. Samuel J. Hickey, *Remediation in Foreign Bribery Settlements: The Foundations of a New Approach*, 21 CHI. J. INT'L L. 367, 369 (2021) ("[A]nti-corruption efforts of Western nations focus on policing and punishing those under their jurisdiction . . . .").

174. *Id.* at 373. Hickey directs readers to Barbara Black's scholarship to explain the shift in enforcement of the FCPA. *See* Barbara Black, *The SEC and Foreign Corrupt Practices Act: Fighting Global Corruption Is Not Part of the SEC's Mission*, 73 OHIO ST. L.J. 1093, 1096–1110 (2012) (explaining that the enforcement delay was likely due to initially robust corporate pushback to the FCPA and the SEC's lack of interest in enforcing the anti-bribery provisions of the FCPA, compared to the accounting provisions, and suggesting that enforcement may have picked up in the 2000s with the passage of the Sarbanes Oxley Act and following the Enron scandal).

175. *See Total and Average Sanctions Imposed on Entity Groups per Year,* STAN. L. SCH.: FOREIGN CORRUPT PRACTICES ACT CLEARINGHOUSE, https://fcpa.stanford.edu/statistics-analytics.html?tab=2 [https://perma.cc/2UNT-AMUL] (last visited Dec. 15, 2021). Since 2014, the average penalty has stood between $150 million and $1 billion. *Id.*

176. *See infra* notes 256–257 and accompanying text.

177. *Criminal Division Launches New FCPA Pilot Program*, U.S. DEP'T OF JUST. (Apr. 5, 2016), https://www.justice.gov/archives/opa/blog/criminal-division-launches-new-fcpa-pilot-program [https://perma.cc/2Y4Y-LKVT] [hereinafter DOJ Pilot Program Press Release]. Forty-two percent of all enforcement actions ever have resulted from self-reporting. *Key Statistics from 1977 to Present*, STAN. L. SCH.: FOREIGN CORRUPT PRACTICES ACT CLEARINGHOUSE, https://fcpa.stanford.edu/statistics-keys.html [https://perma.cc/VDP7-7KS7] (last visited Dec. 15, 2021). This demonstrates the extent to which businesses have dedicated "substantial resources" to internalize compliance and "avoid liability." Hickey, *supra* note 173, at 373.

A. The Absence and Denial of Restitution Within FCPA Enforcement

Despite statutory obligations to notify and provide restitution to victims of federal offenses, the USG's lead enforcers of the FCPA—the DOJ and the Securities and Exchange Commission (SEC)—have neither institutionalized nor routinized victim notification or the facilitation of restitution from U.S. persons convicted of FCPA violations to victims.[178] While restitution has not been entirely absent from FCPA enforcement, the USG has undertaken an ad hoc, irregular, and reactive approach to providing restitution to victims of transnational corruption.[179]

As of December 2021, the USG appears to have granted restitution per se, as opposed to a separate remedy, to foreign governments in only five FCPA cases, including in the first case prosecuted under the FCPA back in 1979.[180] However, restitution has been at issue and denied in a greater number of cases.[181] Those five awards, which granted restitution to the governments of the Cook Islands,[182] Niger,[183] Haiti,[184] Germany,[185] and Thailand,[186] respectively, were ordered in cases bearing no discernable distinctions from other FCPA enforcement actions. The cases involved resolutions from both plea deals and trials, and addressed foreign corruption in various forms, ranging from campaign finance violations and public procurement fraud to outright

178. Hickey, *supra* note 173, at 370.

179. *Id.* Hickey writes "the DOJ [has not] adopted any sort of comprehensive criteria to determine whether remediation should be pursued in a given case, which victims should receive it, or how they should receive it. As such, seeking remediation through foreign bribery settlement agreements has proven unprincipled and inconsistent in practice." *Id.*

180. Richard E. Messick, *Legal Remedies for Victims of Corruption Under U.S. Law*, *in* LEGAL REMEDIES FOR GRAND CORRUPTION: THE ROLE OF CIVIL SOCIETY 100, 102 (2019).

181. *Id.* This figure does not include cases of restitution to governments victimized by unilateral U.S. corruption. For example, in *Republic of Trinidad and Tobago ex rel. John Jeremie v. Birk Hillman Consultants*, the court ordered a U.S. contractor pay restitution to the government of Trinidad and Tobago following the contractor's unilateral fraud. Motion for Entry of Final Judgment at 3, Republic of Trinidad and Tobago *ex rel.* John Jeremie v. Birk Hillman Consultants, No. 04-11813-CA-30 (11th Cir. Apr. 7, 2023).

182. Information at 2, United States v. Kenny Int'l Corp., No. Cr. 79-372 (D.D.C. Aug. 2, 1979).

183. Plea Agreement at 2–3, United States v. Napco Int'l, Inc., No. 89-CR-047 (D. Minn. Mar. 10, 1989).

184. Amended Judgment at 7, United States v. Esquenazi, No. 1:09-CR-21010 (S.D. Fla. Nov. 3, 2011).

185. Plea Agreement at 698.79, United States v. F.G. Mason Eng'g, Inc., No. B-90-29 (D. Conn. 1990).

186. United States v. Green, 722 F.3d 1146 (9th Cir. 2013).

bribery.[187] Moreover, in each case, the USG did not clarify whether the restitution award was intended to compensate the government in its capacity as (1) a defrauded victim of a conspiracy, in which a U.S. bribe-payer colluded with a foreign official to defraud the foreign official of honest services and assets; or (2) a proxy for victimized persons over whom the defrauded government entity has jurisdiction.[188] One of these five cases even predates the enactment of the VWPA, which codified courts' authority to order restitution. Several other cases predate the MVRA's mandate to provide restitution.[189]

Beyond the limited cases in which restitution has been granted, courts have also denied restitution when the DOJ has challenged claimants' status as bona fide victims.[190] In the most notable case to date, a federal court denied a Costa Rican state-owned enterprise (SOE) restitution under the doctrine of *in pari delicto*.[191] In 2012, subsidiaries of Alcatel-France SA pled guilty to FCPA violations for paying bribes to obtain valuable public contracts in Costa Rica, Honduras, Malaysia, Bangladesh, Ecuador, Kenya, Nicaragua, Nigeria, and Taiwan.[192] Alcatel earned an estimated $48.1 million in profits from illicitly procured contracts, which were valued at $303 million.[193] The case may have ended the way the majority of FCPA enforcement

187. In the FCPA resolution providing restitution to the Cook Islands, the offense involved campaign finance violations. *See* Information at 2, *Kenny Int'l Corp.*, No. Cr. 79-372. The FCPA resolution providing restitution to Niger involved a bribery scheme to fraudulently qualify for a USG program involving subsidies. *See* Plea Agreement at 1, *Napco Int'l*, No. 89-CR-047. In the FCPA resolution providing restitution to Haiti, the offense involved bribes to Haitian officials in charge of telecommunications to receive preferential rates. *See* FCPAC, *supra* note 184. The FCPA resolutions providing restitution to Germany and Thailand both involved bribes paid in exchanged for public contracts. *See generally* Plea Agreement, *F.G. Mason Eng'g, Inc.*, No. B-90-29; *Green*, 722 F.3d 1146.

188. *See generally* Information, *Kenny Int'l Corp.*, No. Cr. 79-372; Plea Agreement, *Napco Int'l*, No. 89-CR-047; FCPAC, *supra* note 184; Plea Agreement, *F.G. Mason Eng'g, Inc.*, No. B-90-29; *Green*, 722 F.3d 1146.

189. The restitution ordered to the Cook Islands in 1979 as part of the prosecution of Kenny International Corp. predated the VWPA by three years. *See supra* text accompanying notes 38–42.

190. FCPAC, *Enforcement Action Dataset: United States of America v. Alcatel-Lucent France, S.A., et al.*, STAN. L. SCH.: FOREIGN CORRUPT PRACTICES ACT CLEARINGHOUSE, https://fcpa.stanford.edu/enforcement-action.html?id=284 (last visited Dec. 15, 2021).

191. *See* United States v. Alcatel-Lucent France, SA, 688 F.3d 1301, 1305–06 (11th Cir. 2012).

192. *Id.* at 1303.

193. FCPAC, *Case Information: United States of America v. Alcatel-Lucent, S.A.*, STAN. L. SCH.: FOREIGN CORRUPT PRACTICES ACT CLEARINGHOUSE, https://fcpa.stanford.edu/enforcement-action.html?id=527 (last visited Dec. 15, 2021).

actions do: with Alcatel paying the USG a hefty penalty, which, in this case, totaled $92 million.[194] However, Instituto Costarricense de Electricidad (ICE), the state-owned enterprise (SOE) whose officials were bribed as part of the conspiracy, contacted the DOJ to "advise that ICE was a victim of the conduct alleged."[195] The DOJ refused to treat ICE as a victim, asserting that ICE was "a participant"[196] and that "nearly half of ICE's board of directors" accepted bribes.[197] The district court ruled *ex tempore* on ICE's motion that ICE was disentitled,[198] citing the "pervasiveness of the illegal activity"; its "consistency over a period of years"; the "high-placed nature of the criminal conduct"; and involvement of "principals" and others in the organization.[199] ICE countered that the offense occurred in an organization of 15,000 employees and involved only six "rogue" officials, all of whom were "promptly terminated."[200] ICE's writ of mandamus petition to the Eleventh Circuit, which was ultimately denied,[201] is emblematic of *in pari delicto*'s application to FCPA enforcement and of the law's contentious extraterritorial reach. Even though the USG only prosecuted the supply-side bribe-payers over which it had jurisdiction, the DOJ still invoked punitive rationales for denying ICE restitution.

Several themes emerge from the implementation of restitution in FCPA cases (or lack thereof) to date. First, the USG has not clarified whether it aims to compensate foreign governments as institutional victims of fraud or as proxies for victimized persons within their jurisdiction. Second, the USG does not take a proactive approach to notifying victims of FCPA offenses or to facilitating restitution to such persons. This is the case despite the CVRA's instruction that federal prosecutors identify and notify victims (or victim class proxies), a statutory obligation imposed because ordinary victims cannot be expected to necessarily know of an ongoing prosecution, let alone comprehend their rights to restitution.[202] Rather, prosecutors and courts seemingly wait for victimized entities to petition for restitution before evaluating

194. *Alcatel-Lucent France, SA*, 688 F.3d at 1303.

195. Brief for Appellant Instituto Costarricense de Electricidad at 2–3, *Alcatel-Lucent France, SA*, 688 F.3d 1301 (No. 11-12716) [hereinafter ICE Brief].

196. *Id.*

197. Brief for Appellee United States at 37–38, *Alcatel-Lucent France, SA*, 688 F.3d 1301 (No. 11-12716).

198. *Alcatel-Lucent France, SA*, 688 F.3d at 1306.

199. ICE Brief, *supra* note 195, at 4–5.

200. *Id.* at 5–6.

201. *Alcatel-Lucent France, SA*, 688 F.3d at 1306.

202. *See supra* notes 80–85 and accompanying text.

those claims on a case-by-case basis. For instance, although Alcatel paid bribes in at least nine jurisdictions, restitution was seemingly only considered with respect to the one petitioning polity: Costa Rica.[203] Instead of engineering reparative schemes that contemplate all putative victims and the multifaceted nature of their injuries, the USG relies on the social value produced in simply disempowering and deterring wrongdoers. Third, when victims petition for restitution, the USG does not deploy transparent, objective criteria to evaluate victimhood, resulting in glaring enforcement irregularities. Richard Messick observes that in the few cases where restitution has been granted, courts and prosecutors deployed inconsistent and opaque measures, departing without explanation from the restitution statutes' mandate for calculations focused only on victims' actual losses.[204] In at least two cases, restitution was seemingly measured by the bribe amount, not the losses suffered by the state to which it was given.[205] This is a significant oversight, because actual losses may extend far beyond the bribe amount or illicit enrichment.[206] Thus, in the few instances where restitution was ordered, it was likely inadequate.

Whether as a result of passive omission or conscious denial, the USG's dominant praxis represents the persistent marginalization of transnational corruption victims, unjustified retention of property, and potential abandonment of statutory obligations.[207] Notably, in the

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203. FCPAC, *supra* note 190 (jurisdictions targeted by Alcatel's bribes included Bangladesh, Costa Rica, Ecuador, Honduras, Kenya, Malaysia, Nicaragua, Nigeria, and Taiwan).

204. Messick, *supra* note 181, at 105; *see, e.g.*, FCPAC, *supra* note 184.

205. *See generally* Plea Agreement § 3(d), United States v. Kenny Int'l Corp., No. Cr. 79-372 (D.D.C. 1979); Plea Agreement, *Napco Int'l, Inc.*, No. 89-CR-047.

206. *See,* FCPAC, *Enforcement Action Dataset: United States v. Kenny International Corp., et al.*, STAN. L. SCH.: FOREIGN CORRUPT PRACTICES ACT CLEARINGHOUSE, https://fcpa.stanford.edu/enforcement-action.html?id=435 (last visited Dec. 15, 2021) (The first prosecution under the FCPA entails a case in which a U.S. bribe-payer corruptly derailed a foreign country's elections, resulting in sprawling spill-over costs beyond the bribe amount, including the cost of loss of the public's faith in institutions, of running a secondary election, and of administering and investigating the initial violation.); *see also,* Joseph Cotterill & Owen Walker, *Mozambique Reeling from Credit Suisse 'Tuna Bond' Scandal*, FIN. TIMES (Oct. 24, 2021), https://www.ft.com/content/f8288871-6a21-447c-8031-f69aa8ee80fa [https://perma.cc/J423-D4UM]. Credit Suisse bankers' conspiracy with Mozambiquan officials to embezzle loaned funds produced disastrous consequences equal to the entire GDP of the Mozambiquan economy. *See* Gretta Fenner, *Mozambique's Tuna Bonds Scandal: Yes It's About Money, But More Than That – It's About Human Lives*, BASEL INST. GOV. (Oct. 21, 2021), https://baselgovernance.org/blog/mozambiques-tuna-bonds-scandal-yes-its-about-money-more-its-about-human-lives [https://perma.cc/4RQV-PC8Z].

207. Maud Perdriel-Vaissiere, Comment to *UNCAC Does Not Require Sharing of Foreign Bribery Settlement Monies with Host Countries*, GAB: GLOB. ANTI-CORRUPTION BLOG

mid-2000s, the DOJ apparently had established an Office of the Victims' Rights Ombudsman (VRO) to ensure DOJ compliance with the CVRA.[208] Nevertheless, the VRO's mandate was structured so as to be reactive to complaints, as opposed to proactive,[209] and the fruits of any of the VRO's efforts to reconcile the difficulties within this distinctive context are not yet visible to the public.

B. Lessons from Another Means of Victim Compensation: Forfeiture and Remission

In separate contexts, the USG has exercised sensitivity, proactivity, and inventiveness in compensating victims of transnational corruption or their proxies. Most notably, the DOJ's Money Laundering and Asset Return Section has led successful litigative efforts to freeze and seize the U.S.-based assets of foreign kleptocrats and to return such assets to victimized communities through a process known as remission.[210]

Like restitution, remission has a reparative function[211]—namely, to transfer assets implicated in or resulting from criminal activity to victims of that criminal activity.[212] Yet, unlike restitution,

(Sept. 28, 2014, 3:19 AM), https://globalanticorruptionblog.com/2014/09/16/uncac-does-not-require-sharing-of-foreign-bribery-settlement-monies-with-host-countries/ [https://perma.cc/5BXJ-TZC4].

208. *Crime Victims' Rights Ombudsman*, U.S. DEP'T OF JUST. (Feb. 22, 2021), https://www.justice.gov/usao/resources/crime-victims-rights-ombudsman [https://perma.cc/E49F-AN5N].

209. 28 C.F.R. § 45.10 (2016).

210. U.S. DEP'T OF JUST., RETURNING FORFEITED ASSETS TO CRIME VICTIMS: AN OVERVIEW OF REMISSION AND RESTORATION 2 (2010), https://www.justice.gov/usao-ks/file/629026/download [https://perma.cc/EZH2-J5Q6] (describing how remission can be used to return forfeited assets to victims, i.e., those "who ha[ve] suffered a specific pecuniary loss as a direct result of the crime underlying the forfeiture or a related offense").

211. The goals of the DOJ's Asset Forfeiture Program are "[t]o punish and deter criminal activity by depriving criminals of property used in or acquired through illegal activities," and "[t]o recover assets that may be used to compensate victims when authorized under federal law." U.S. DEP'T OF JUST., THE ATTORNEY GENERAL'S GUIDELINES ON THE ASSET FORFEITURE PROGRAM 1 (2018), https://www.justice.gov/criminal-mlars/file/1123146/download [https://perma.cc/WVP4-4JEK]. To be eligible for restoration (the relevant form of remission), victims must qualify under standards substantively like those of the restitution statutes. *Id.* at 2; *see also* 28 C.F.R. §§ 9.2, 9.8(a)(1) (2016).

212. *See* U.S. DEP'T OF JUST., *supra* note 211, at 1–4.

remission is predicated upon a USG civil forfeiture action,[213] rather than a criminal prosecution.[214] Remission is often deployed in circumstances where the USG seeks to hold a corrupt actor accountable, but only has jurisdiction over the person's assets, as opposed to the person. Hence, civil forfeiture leading to remission may be less desirable from a USG perspective where personal jurisdiction over a supply-side actor exists, allowing for full-throated criminal prosecution.[215] Accordingly, remission might be regarded as an available and actively utilized tool for reparations from corrupt actors on the demand-side of conspiracies. Restitution, meanwhile, is an available, yet underutilized tool for reparations from supply-side corrupt actors.

Analyzing the USG's implementation of a reparative agenda in the context of remission offers insights into how reparative programming might be incorporated into criminal enforcement infrastructure, i.e., the regulation of supply-side transnational corruption. Broadly, the USG's creative, albeit sporadic, deployment of remission signals that reparative transnational programs, particularly ones that utilize proxies for broad segments of foreign polities' populations, are neither unprecedented nor unimaginable for the USG. More specifically, the USG has proactively sought out and utilized various proxies—such as charitable enterprises, international organizations, and conditional infrastructure grants—to sustainably transfer funds to victims of corruption in the remission context. Studying both the achievements and

213. Because of the civil nature of the forfeiture action, the USG need only prove by a preponderance of the evidence that the assets were implicated in or the proceeds of an offense. 18 U.S.C. § 983(c)(1) (2016) ("the burden of proof is on the Government to establish, by a preponderance of the evidence, that the property is subject to forfeiture"); *see also* 18 U.S.C. § 981(a)(1)(A)–(B) (2016) (listing the grounds upon which assets may be subject to forfeiture).

214. U.S. DEP'T OF JUST., *supra* note 211, at 2.

215. Several other structural shortcomings render forfeiture and remission inadequate to address all victims' concerns. For one, the authority to "decide petitions for remission" and distribute assets "rests solely with the Attorney General" and the Chief of the Money Laundering and Asset Recovery Section (MLARS), whereas the DOJ and courts are *obligated* to fulfill victims' rights to restitution where the statutory conditions are satisfied. U.S. DEP'T OF JUST., ASSET FORFEITURE POLICY MANUAL 164 (2021) [hereinafter DOJ POLICY MANUAL], https://www.justice.gov/criminal-afmls/file/839521/download [https://perma.cc/Y8NR-NNPA]; *see also* 28 C.F.R. § 9.1(b)(2) (2016). Moreover, victims have "no right to a hearing" nor judicial review. U.S. DEP'T OF JUST., *supra* note 211, at 164; *see also* 28 C.F.R. § 9.4(g) (2016). Petitioners are only "entitled to one request for reconsideration," which is reviewed by another official within the same DOJ Section. U.S. DEP'T OF JUST., *supra* note 211, at 164. Petitions may be denied if officials deem remission "too difficult" or "impractical" due to a "large" number of victims. U.S. DEP'T OF JUST., *supra* note 211, at 167; *see also* 28 C.F.R. § 9.4(k)(3) (2016).

shortcomings of the USG's historical implementation of remission provides valuable lessons for those mandated to facilitate restitution.

The most notable case is the DOJ's 2007 transfer of $115 million of James H. Giffen's assets to the BOTA Foundation, an organization created by the DOJ, in partnership with Swiss and Kazakh authorities, for the very purpose of disbursing Giffen's assets.[216] While the criminal prosecution of Giffen dragged on for several years and ultimately did not result in an FCPA conviction,[217] the Civil Division presciently brought a collateral forfeiture action to commence reparations before the prosecution reached its final disposition. In the BOTA Foundation's five years of operations, the foundation returned "$115 million in assets associated with corruption to poor children [] and their families" in Kazakhstan.[218]

In another case, in 2020, the DOJ repatriated $312 million of Nigerian head of state Sani Abacha's assets to Nigeria on the condition the funds be invested in three externally-audited infrastructure projects: a bridge, expressway, and road based in "key economic zones."[219] The repatriation agreement exemplifies the tension the USG faces between placing conditions on repatriated assets, such as functional directives and external oversight, to increase the likelihood the assets are, in fact, dedicated to public purposes, and respecting a receiving sovereign's autonomy. In such circumstances, the processes by which the USG negotiates with foreign governments to utilize this funding toward specific projects and under certain conditions should be interrogated.

As another illustration, in 2021, the USG transferred $19.25 million of assets formerly belonging to Equatorial Guinea's Second Vice President, Teodoro Obiang, to charitable enterprises: a Maryland-based nonprofit and a United Nations (U.N.) mechanism, both of which provided COVID-19 relief in Equatorial Guinea.[220] The transfer certainly represents a victory for asset return in a landscape

216. BOTA Final Report, *supra* note 1, at 4; *see also* United States v. Giffen, 379 F. Supp. 2d 337, 340–41 (S.D.N.Y. 2004); Davis, *supra* note 6, at 326.

217. *See supra* notes 10–15 and accompanying text.

218. BOTA Final Report, *supra* note 1, at 5.

219. *U.S. Repatriates Over $311.7 Million in Assets to the Nigerian People that Were Stolen by Former Nigerian Dictator and His Associates*, U.S. DEP'T OF JUST. (May 4, 2020), https://www.justice.gov/opa/pr/us-repatriates-over-3117-million-assets-nigerian-people-were-stolen-former-nigerian-dictator [https://perma.cc/4MBP-9Y35].

220. *$26.6 Million in Allegedly Illicit Proceeds to Be Used to Fight COVID-19 and Address Medical Needs in Equatorial Guinea*, U.S. DEP'T OF JUST. (Sep. 20, 2021), https://www.justice.gov/opa/pr/266-million-allegedly-illicit-proceeds-be-used-fight-covid-19-and-address-medical-needs [https://perma.cc/8B65-VZGY] [hereinafter DOJ Obiang Press Release].

with few wins. Yet, the remission ordered via settlement was "disheartening small" as a "proportion of [Obiang's] corrupt gains."[221] Moreover, while the substantive nexus between the victims of Obiang's corruption and public health needs seems reasonable, it is not self-evident. Lastly, the settlement transferred the assets to a U.S.-based nonprofit and to an international organizations—two non-Equatorial Guinean entities—which possibly represents a diversion of reparations and a missed opportunity for domestic capacity-building.

These and other remission cases demonstrate the USG is willing to recognize foreign governments, international mechanisms, charitable enterprises, and possibly other types of proxies as legitimate executors of corruption victims' interests. That the USG does not regularly apply these tactics beyond the forfeiture context suggests a need for prosecutors to learn and borrow from the forfeiture experts within MLARS and for the USG to standardize its approach.

III. WAYS FORWARD—BENEFITS & RISKS OF EXPANDING RESTITUTION

Under the status quo, victims of transnational corruption are unlikely to be compensated for their losses, let alone comprehend the scope of their rights to compensation via the unreliable and inconsistent mechanisms deployed by the DOJ. This Part acknowledges the benefits of the status quo, before exploring the costs, including the consequences of maintaining a discretionary, obscured system of victim compensation, and the value and risks entailed in expanding restitution.

A. The Costs (and Benefits) of the Status Quo

The status quo undoubtedly achieves several benefits for all stakeholders, from enforcers to victims. First, the status quo of non-reparative FCPA enforcement does accomplish one of the aims of the FCPA, namely, to deprive corrupt actors, on both the supply and demand sides of transactions, of their ill-gotten gains, which has expressive and punitive value. Second, denying restitution to institutions whose agents engaged in the offense avoids the risk of repeat corruption and enabling wrongdoers.[222] Third, the USG's continuous

221. Davis, *supra* note 6, at 329.

222. This rationale is more persuasive if there is a low likelihood that the benefits of restitution awards will actually redound to victimized individuals.

flouting of the restitution statutes allows for considerable prosecutorial discretion, which theoretically permits other solutions, such as DPAs and NPAs with terms stipulating reparations and asset return, that might be preferable to restitution in situations where resources and political will coalesce.[223] Fourth, the DOJ's frequent use of DPAs and NPAs potentially allows a greater number of enforcement actions to occur, even if such agreements do not necessarily trigger restitutive obligations.[224] Alternatively (and cynically), imposing the additional work of facilitating restitution in complex FCPA cases on prosecutors might itself disincentivize prosecutors from seeking convictions.

Despite these benefits, the status quo also imposes non-negligible ethical, strategic, and legal costs. Should Congress or the DOJ opt to codify a statutory or regulatory exception to restitution's

223. For instance, in October 2021, the DOJ and British authorities entered into a global resolution in the form of a DPA to resolve an FCPA investigation targeting Credit Suisse AG for its role in the "tuna bond" scandal in Mozambique. *See Credit Suisse Resolves Fraudulent Mozambique Loan Case in $547 Million Coordinated Global Resolution*, U.S. DEP'T OF JUST. (Oct. 19, 2021), https://www.justice.gov/opa/pr/credit-suisse-resolves-fraudulent-mozambique-loan-case-547-million-coordinated-global [https://perma.cc/42RP-CHVT]. The scandal, which caused the World Bank to cut off aid to Mozambique and the International Monetary Fund to suspend an $165 million loan, involved Mozambiquan officials and Credit Suisse executives embezzling hundreds of millions of dollars from government bonds issued without the requisite approval of Mozambique's parliament. *Mozambique and the "Tuna Bond" Scandal*, SPOTLIGHT ON CORRUPTION (Feb. 9, 2021), https://www.spotlightcorruption.org/mozambique-and-the-tuna-bond-scandal/ [https://perma.cc/S79F-3LW5]. Credit Suisse AG, the parent company, accepted a DPA for wire fraud, see 18 U.S.C. § 1349, and the DOJ obtained a separate wire fraud conviction via guilty plea from Credit Suisse Securities (Europe) Limited, the subsidiary. *See* Deferred Prosecution Agreement, United States v. Credit Suisse Grp. AG, No. 21-521 (E.D.N.Y. Oct. 19, 2021); Plea Agreement, United States v. Credit Suisse Securities (Europe) Limited, No. 21-520 (E.D.N.Y. Oct. 19, 2021). While the district court presiding recognized the payment of restitution as "mandatory" under 18 U.S.C. §3663A and ordered over $20 million in restitution in conjunction with the subsidiary's conviction, none of the restitution recipients included Mozambiquan entities. Order at 1–2, United States v. Credit Suisse Securities (Europe) Limited, No. 21-520 (E.D.N.Y. July 22, 2022). Meanwhile, the DPA with the parent company required Credit Suisse to pay for $200 million of Mozambique's debt relief. Deferred Prosecution Agreement at 4(i), United States v. Credit Suisse Grp. AG, No. 21-521 (E.D.N.Y. Oct. 19, 2021). These interlocking enforcement actions demonstrate to some extent that restitution itself is not currently seen by practitioners as the ideal vehicle for reparations and that settlement agreements can be powerful tools for prosecutors to fashion reparations with greater flexibility.

224. According to Stanford's FCPAC, approximately 30% of DOJ negotiated resolutions end with NPAs and DPAs, while 66.04% of such negotiated resolutions occur through plea agreements. The remaining 4–5% of negotiated resolutions consist of declinations with disgorgement and consent agreements. These figures do not consider non-negotiated resolutions that go to trial. *See* FCPAC, *Types of DOJ Resolutions*, STANFORD L. SCH.: FOREIGN CORRUPT PRACTICES ACT CLEARINGHOUSE, https://fcpa.stanford.edu/statistics-analytics.html?tab=6 (last visited Dec. 15, 2021).

applicability to foreign bribery cases, expressly permitting a continuation of the status quo, the USG should be cognizant of and attempt to mitigate the following costs in formulating its policy.

1. Current Practices Induce Uncertainty-Based Inaction

First, the uneven recognition of victims' entitlement fosters consequential uncertainty among all stakeholders.[225] From a self-interested USG perspective, the indeterminacy removes an incentive for victims and proxies to voluntarily report corruption to the USG and participate in proceedings as prosecution witnesses.[226] Although foreign states' diplomatic posts in the United States likely become aware of FCPA investigations involving their polity and can report back to relevant authorities, institutionalizing notification of FCPA prosecutions, let alone restitution, might allow foreign states' to expand domestic enforcement against demand-side offenders. From a victim-centered perspective, the uncertainty also limits victims' and proxies' ability to fully understand their right to recover. Instead, definitionally disempowered victims must decide whether to invest limited, remaining resources in pursuing one uncertain avenue of redress over another, all while litigating against well-resourced multinational corporations. Victimized polities could theoretically proactively monitor enforcement and file time-sensitive petitions for restitution, but doing so should, arguably, not be their burden to bear. Current practices thus effectuate uncertainty with consequences as severe as blanket denial.

2. Current Practices Likely Defy Congressional Intent

The restitution statutes signal broad Congressional intent to provide justice meaningful to victims, without regard to most conceptual or practical hurdles.[227] Specifically, the history[228] and language of the restitution statutes reveals both: (1) Congressional intent to reform the system to provide victims with more than retribution against

225. Lim et al., *supra* note 19, at 5.

226. Cassell et al., *supra* note 36, at 67 ("Congress also thought [] victim participation in the criminal justice system could be instrumentally useful. For example, in protecting a victim's right to be heard by those determining a defendant's sentence, a victim might be able to provide important information that could alter that sentence.").

227. *See supra* Section I.A.

228. The sponsors of the restitution statutes had little sympathy for "prosecutors to [sic] busy to care[,] judges focused on defendant[s'] rights, and [] a court system that [] did not have a place for [victims]." 150 CONG. REC. 7296 (2004) (statement of Sen. Dianne Feinstein).

offenders; and (2) Congressional acknowledgement the USG should lead the way in developing ambitious victim-centered initiatives.[229] The current system fails to do both, persisting in wrongfully retaining victims' "valuable property."[230]

Several aspects of the legislative history, context, and evolution of the statutes indicate a liberal construction of the statute is appropriate. First, the FCPA drafters of the restitution statutes likely contemplated that the statutes' mandate would apply to white-collar offenses producing broad victim classes. The MVRA explicitly applies its restitutionary mandate to "offenses against property," and the FCPA was regularly enforced at the time of the restitution statutes' enactment and expansion (1990s–2000s).[231] Moreover, no explicit carve-out for the FCPA or white-collar offenses has been adopted since.[232] Second, Congress' agenda is evinced by consistent, decades-long expansion of restitution from a discretionary tool to a mandatory obligation imposed on the USG, the denial of which courts must justify.[233] Finally, popular support for criminal justice systems rooted in reparations can be found in thirty-six states' adoption of victims' rights amendments to state constitutions in the last three decades.[234] Accordingly, current USG practices likely depart from the policy envisioned by the framers of the restitution statutes and the FCPA.

Meanwhile, "providing remedies for transnational public bribery as a consistent and sustained practice [also] furthers the United States' foreign policy goals underlying the FCPA."[235] According to the House Committee on Interstate and Foreign Commerce report recommending the FCPA's enactment, the criminalization of foreign bribery was undertaken in response to revelations that "[m]ore than 400 corporations," including public and Fortune 500 companies, "have

229. United States v. Ekanem, 383 F.3d 40, 44 (2d Cir. 2004) ("[T]he intent and purpose of the MVRA [is] to expand, rather than limit, the restitution remedy."); S. REP. NO. 104-179, at 12 (1995), *as reprinted in* 1996 U.S.C.C.A.N. 924, 925; VWPA, *supra* note 42, § 2(a)(3) (encouraging the Federal government to take on a "leadership role" in "ensuring that victims of crime" receive restitution); Cassell et al., *supra* note 36, at 66.

230. VWPA, *supra* note 42, § 2(a)(2)–(7).

231. United States v. Razzouk, 984 F.3d 181, 187 (2d Cir. 2020).

232. *See supra* notes 119–121 and accompanying text (discussing the two statutory exceptions to the MVRA, i.e., the complexity exception and the numerosity exception).

233. *Ekanem*, 383 F.3d at 43. *See* S. REP. NO. 104-179, at 12 (1995), *as reprinted in* 1996 U.S.C.C.A.N. 924, 925; Cassell et al., *supra* note 36, at 66.

234. *State Victim Rights Amendments*, NAT'L VICTIMS' CONST. AMEND. PASSAGE, http://www.nvcap.org/states/stvras.html [https://perma.cc/U8AV-TA7L].

235. Lim et al., *supra* note 19, at 7; *see also* Lamb v. Phillip Morris, Inc., 915 F.2d 1024, 1029 (6th Cir. 1990).

admitted making questionable or illegal payments . . . well in excess of $300 million in corporate funds to foreign government officials."[236] Anticipating opposition on the House floor, the report emphasized the FCPA's long-term strategic value in ensuring "public confidence in the integrity of the free market system" and referred to corporations' prior misconduct as "unethical" and "counter to the moral expectations and values of the American public."[237] More generally, the legislative history of the FCPA is marked by a seething awareness of how foreign bribery casts a "shadow on all U.S. companies"; "lower[s] esteem for the United States among the citizens of foreign nations"; "lend[s] credence to the suspicions . . . that American enterprises exert a corrupting influence on the political processes of their nations"; "invariably tends to embarrass friendly governments"; and creates other "severe foreign policy problems for the United States."[238] The USG's retention of misappropriated assets undermines the policy objectives underlying the FCPA: namely, correcting the aforementioned harms and protecting the integrity of American foreign policy and the "image of American democracy abroad."[239] Hence, both the restitution statutes and the FCPA collectively and independently reinforce the imperative that the USG not remain oblivious to harm inflicted by FCPA offenses upon victims.[240]

3. Current Practices Legitimize Wrongful Deprivation and Perpetuate Transnational Disparity

Third, current practices legitimize an "ongoing and systemic transfer of value from the Global South [] to the Global North."[241] The failure to provide restitution legitimizes a proprietary deprivation suffered by foreign persons, who are typically located in portions of the Global South, including China, Brazil, and Iraq, among others, where

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236. H.R. REP. NO. 95-640, at 4–5 (1977):

> Corporate bribery also creates severe foreign policy problems for the United States. The revelation of improper payments invariably tends to embarrass friendly governments, lower the esteem for the United States among the citizens of foreign nations, and lend credence to the suspicions sown by foreign opponents of the United States that American enterprises exert a corrupting influence on the political processes of their nations.

237. *Id.*

238. *Id.*

239. S. REP. NO. 95-114, at 3 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 4098, 4101.

240. Cassell et al., *supra* note 36, at 66.

241. Andy Higginbottom, *A Self-Enriching Pact: Imperialism and the Global South*, 5 J. GLOB. FAULTLINES 49, 49 (2018).

FCPA enforcement concentrates.[242] Deprivations of public revenue could be quite consequential. For instance, in Cambodia—a nation recovering to this day from rapacious American bombing campaigns (1965–1973),[243] the Khmer Rouge genocide (1975–1979), civil war (1979–1992), and U.N. occupation (1992–1993)—public revenue is scant, but hard-won.[244] In 2002, overseas development aid exceeded 100% of government spending; by 2018, that fell to 21.9%, indicating the state's fiscal resilience.[245] Failing to return misappropriated wealth to any state, but especially one with a GDP per capita of $1,500[246] and where capital could be "transformative," could constitute a consequential injustice.[247] In sum, restitution's significance should not be understated in any context.

Especially when *in pari delicto* grounds denial, states with evidently troubled institutions are, ironically, denied resources that could allow them to build stronger systems of governance.[248] Several

242. FCPAC, *Heat Maps of Related Enforcement Actions: By Geography*, STANFORD L. SCH.: FOREIGN CORRUPT PRACTICES ACT CLEARINGHOUSE, https://fcpa.stanford.edu/geography.html [https://perma.cc/G5WP-L95Z] (last visited Dec. 15, 2021). U.S. victims of domestic corruption eventually benefit from the USG expenditures resulting from federal retention of criminal penalties, as the USG is theoretically beholden to its citizens. Because no such relationship exists between the USG and foreign victims, the latter do not reliably benefit from USG retention of FCPA penalties. For a U.N.-recognized definition of Global South countries, see *Global South Countries (Group of 77 and China)*, FIN. CTR. FOR S.-S. COOP., http://www.fc-ssc.org/en/partnership_program/south_south_countries [https://perma.cc/KDN2-Z2GQ].

243. *American Bombing 50 Years ago Still Shapes Cambodian Agriculture*, THE ECONOMIST (Mar. 20, 2021), https://www.economist.com/graphic-detail/2021/03/20/american-bombing-50-years-ago-still-shapes-cambodian-agriculture [https://perma.cc/5ZP3-GV9P].

244. Sophal Ear, *The Political Economy of Aid and Governance in Cambodia*, 15 ASIAN J. POL. SCI. 68, 75 (2007).

245. *Net ODA Received (% of Central Government Expense) – Cambodia*, WORLD BANK, https://data.worldbank.org/indicator/DT.ODA.ODAT.XP.ZS?locations=KH [https://perma.cc/T2WM-J9LZ].

246. *GDP Per Capita (Current U.S.$) – Cambodia*, WORLD BANK, https://data.worldbank.org/indicator/NY.GDP.PCAP.CD?locations=KH [https://perma.cc/A8A4-DBH6].

247. Juanita Olaya Garcia, *Reparations for Corruption: How Corruption Enforcement Ignores Victims' Rights*, UNCAC COALITION (Feb. 28, 2020), https://uncaccoalition.org/reparations-for-corruption-how-corruption-enforcement-ignores-victims-rights [https://perma.cc/3YYM-C72S].

248. For a report acknowledging both the upside value and downside risks of investment in or donations to jurisdictions with weak institutions, see OECD, DEVELOPMENT ASSISTANT AND APPROACHES TO RISK IN FRAGILE AND CONFLICT AFFECTED STATES 11 (2014),

scholars have opined that routinized corruption is a function of economic instability and informality, as opposed to willfulness.[249] In some cases, capital infusion might constitute an antidote to corruption and provide capacity-building resources, in addition to social programs in the immediate future. Especially if such a return is heavily publicized, nationals of foreign states might be more equipped to hold their governments accountable to efficiently use those funds toward public ends. By contrast, current practices do not exhibit tailored judgments as to the propriety of prospective restitution in each case. Rather, current practices default to perpetuating deprivations that wield the capacity to exacerbate corruption and its predicates.

Meanwhile, the USG obtains windfalls in the form of retained FCPA penalties, in part, because of that deprivation.[250] To be clear, criminal penalties paid by offenders to the DOJ are not mutually exclusive with restitution. Nor it is necessarily the case that the funds used to satisfy criminal penalties derive directly from the assets misappropriated in the offense. Offenders may satisfy penalties using funds derived from separate areas of the offender's coffers or separate streams of revenue and business activity. Nevertheless, when the USG collects FCPA penalties without seeking restitution, the offender's illicitly obtained wealth—which represents, in part or in whole, misappropriated sovereign wealth—ends up in the possession of the USG. The funds used to pay penalties to the USG may be *literally* distinct from those misappropriated in a given offense. But *functionally* such funds are fungible, as they jointly constitute the defendant's wealth and support the defendant's activities, whether lawful or unlawful.

Moreover, the FCPA only establishes penalty ceilings, rather than floors, meaning that prosecutors could theoretically request no

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https://www.oecd.org/dac/conflict-fragility-resilience/docs/2014-10-30%20Approaches%20to%20Risk%20FINAL.pdf [https://perma.cc/QZ3F-N9XU]:

> Donors take huge risks every day. . . . There are some very obvious downside risks. . . . Development agencies work through lots of third parties, including other governments, and enter into many deals that would not be governed by the same quality of legal institutions or business norms that could be enforced in advanced economies. . . . There are also upside risks that providers of development assistance take: some programmes could be and have been extremely transformational, and their results have outstripped in terms of value for money the kind of change one would expect for a similar project in a developed country. Development success can save and transform lives at a scale that most public spending could not. In short, development is a risky business, with many downside and some large upside risks.

249. Daniel Kaufmann, *Corruption and Fiscal Deficits in Rich Countries*, KAUFMANN GOVERNANCE POST (Apr. 20, 2010), https://web.archive.org/web/20101024035449/thekaufmannpost.net/corruption-and-fiscal-deficits-in-rich-countries/ [https://perma.cc/TCQ8-UMXB].

250. Restitution, a simple return of previously-held property, could never constitute a windfall, unless given to the wrong person.

monetary penalty (or just a sufficient amount to cover prosecution costs) and instead reserve most or all of defendants' available assets for restitution purposes.[251] Specifically, the FCPA requires that criminal penalties do not exceed $2,000,000 per count for juridical persons and $10,000 per count for natural persons.[252] Therefore, even in cases with insolvent defendants that cannot afford to pay both a penalty and restitution, the USG would not seemingly be required to seek the recovery of a penalty at all.

The USG should certainly be compensated for enforcement costs, but such costs constitute a fraction of penalties.[253] As of December 2021, the USG had collected approximately $28 billion in criminal penalties for violations of the FCPA alone.[254] These funds are ultimately deposited in the U.S. Treasury.[255] Although the aggregate costs of enforcing the FCPA over its history are not readily available, year-by-year figures provide useful illustrations. For instance, in 2020, the entirety of the Criminal Division of the DOJ, which prosecutes many other crimes beyond FCPA violations, requested $196 million in appropriations.[256] That year alone, FCPA penalties totaled $5.8 billion.[257] Foreign bribery seemingly generates a sizeable return

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251. 15 U.S.C. § 78dd-2(g).

252. *Id.*:

> Any domestic concern that is not a natural person . . . shall be fined not more than $2,000,000. . . . Any natural person that is an officer, director, employee, or agent of a domestic concern . . . shall be fined not more than $100,000 or imprisoned not more than 5 years, or both.

253. Lim et al., *supra* note 19, at 15; Margaux Hall & Vivek Maru, *From Bribery to Empowerment*, PROJECT SYNDICATE (Nov. 2, 2012), https://www.project-syndicate.org/commentary/using-foreign-bribery-fines-to-fund-legal-empowerment-by-margaux-hall-and-vivek-maru [https://perma.cc/B8DB-6L9F].

254. FCPAC, *Enforcement Actions (722)*, STAN. L. SCH.: FOREIGN CORRUPT PRACTICES ACT CLEARINGHOUSE, https://fcpa.stanford.edu/enforcement-actions.html (last visited Dec. 15, 2021).

255. U.S. GOV'T ACCOUNTABILITY OFF., GAO-17-268T, FEDERAL FEES, FINES, AND PENALTIES: OBSERVATIONS ON AGENCY SPENDING AUTHORITIES 2 n.2 (2016) (citing 31 U.S.C. § 3302(b) as "the miscellaneous receipts statute"); *see also* Hickey, *supra* note 173, at 370.

256. *General Legal Activities: Criminal Division (CRM),* U.S. DEP'T OF JUST., https://www.justice.gov/jmd/page/file/1489446/download [https://perma.cc/R8U5-J4C7].

257. FCPAC, *Total and Average Sanctions Imposed on Entity Groups per Year,* STANFORD L. SCH.: FOREIGN CORRUPT PRACTICES ACT CLEARINGHOUSE, https://fcpa.stanford.edu/statistics-analytics.html?tab=2 [https://perma.cc/7NHX-T4SY] (last visited Dec. 15, 2021).

on investment for the USG.[258] These profits could be directed, in part, to reparative efforts, but usually are not.[259]

Through FCPA enforcement, the USG aims to ensure, *inter alia*, that U.S. persons do not profit from predation on emerging economies and fragile contexts abroad. However, by retaining FCPA penalties, the USG effectively profits from such predation—strategically or inadvertently upholding a neocolonialist legacy of profiting from abuses overseas and widening transnational economic inequality.

4. Current Practices Exercise Illegitimate, Extraterritorial Power and Obscure Complicity

Fourth, current practices perpetuate neocolonialist power dynamics[260] by extraterritorially imposing U.S. prosecutors' ad hoc and opaque assessments of victims' worthiness to possess and use their own property.[261] One might argue in each denial or omission of restitution, the USG paternalistically denies the peoples of foreign states wealth to which they are entitled and, therein, an opportunity for self-

258. One may counter that the USG practice of criminal penalty sharing (CPS) absolves this issue. Although the USG has shared $13.1 billion with other governments via CPS, the goals of CPS are non-reparative. *Key Statistics*, *supra* note 177. CPS occurs when the USG decides, either on an ad hoc basis or pursuant to a treaty, to share or credit a portion of a penalty with a foreign government that provided investigative assistance or is prosecuting the same offense. CPS is an outgrowth of recent DOJ campaigns to prevent "piling on"—duplicative and aggregately disproportionate criminal penalties across multiple jurisdictions—by encouraging prosecutors to contact foreign jurisdictions, coordinate penalties, and avoid prosecutorial and investigative inefficiencies. Sean M. Berkowitz et al., *New DOJ Policy Will Curb "Piling On" Multiple Penalties for Same Corporate Misconduct*, JD SUPRA (May 14, 2018), https://www.jdsupra.com/legalnews/new-doj-policy-will-curb-piling-on-77441/ [https://perma.cc/36Z6-3ZHA]. CPS aims to coordinate penalties for the sake of allied enforcers and defendants, not to compensate victims, even though it might incidentally function to do so. This is evident from inconsistencies in CPS: The USG shares penalties in only some enforcement actions, only to a subset of foreign authorities that provided assistance in a given case, without a clear measure for the amount shared, and frequently without explication of its purpose in sharing.

259. Describing USG failure to adequately repatriate forfeited corrupted proceeds, Pablo J. Davis observes "institutional prestige" and "advancement" incentivize DOJ attorneys to obtain impressive wins on behalf of the USG, but not necessarily to think more comprehensively. Davis, *supra* note 6, at 334. Reforms could "reduce the perception of self-interested agency behavior," while offsetting enforcement costs. *Id.* at 353.

260. Mulinge et al., *supra* note 20, at 17 ("[C]olonialism [refers] to an international system of economic exploitation in which more powerful nations dominate weaker ones."). *See generally* KWAME NKRUMAH, NEOCOLONIALISM: THE LAST STAGE OF IMPERIALISM (1965).

261. DAVIS, *supra* note 17, at 66.

determination.[262] Restitution entails returning property to its rightful owner and not conferring some benefit or advantage, which might be more fairly subject to a conferrers' conditions. Access to restitution is nonetheless currently conditioned on prosecutors' opaque and untethered determinations of whether victims are governed by sufficiently representative government. Therein, the USG exercises arbitrary political and economic coercion over other states.[263]

Special attention should be paid to the ways contemporary discourse about foreign corruption in developing economies "echo[es] and sub-textually reinscribe[s]" imperialism's justification: namely, that developing economies are "incapable of self-governance."[264] Under this framing, "uncritical" USG assessments that foreign populations or the governments representing them are too corrupt to be worthy of restitution might even be regarded as components of a partially punitive, partially edifying "civilizing mission."[265] Several scholars observe that anti-corruption initiatives afford disparate treatment to polities in the Global North and South, subjecting the former to lesser scrutiny and greater deference.[266] For instance, Pablo J. Davis notes the DOJ's KARI disproportionately seizes assets of African, Asian, and, Latin American nationals, "bear[ing] an uncomfortable

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262. *See* International Covenant on Civil and Political Rights art. 1(1), May 10, 1977, S. TREATY DOC. NO. 95-20, 999 U.N.T.S. 171.

263. DAVIS, *supra* note 17, at 66.

264. Aghogho Akpome, *Discourses of Corruption in Africa: Between the Colonial Past and the Decolonizing Present*, 67 AFR. TODAY 10, 13 (2021). Akpome observes:

> The convenient downplaying or flattening-out of the historical and structural contexts of this focus has the effect—whether deliberate or accidental—of advancing centuries-old colonial notions that African societies lack the capacity to self-govern and that they require "foreign assistance" to solve their problems and achieve development. The argument that Africa needs foreign assistance—invariably from Western states and institutions and in diverse forms, including financial and technical aid, loans, foreign direct investment, and so forth—can be understood as a transformed modern-day reincarnation of the ancient narrative of the "civilizing mission" . . . .

Id. at 23 (citations omitted); *see also* Gabriel O. Apata, *Corruption and the Postocolonial State: How the West Invented African Corruption*, 37 J. CONTEMP. AFR. STUDS. 43, 43 (2019).

265. Akpome, *supra* note 264, at 20–24.

266. Gerhard Anders & Monique Nuijten, *Corruption and the Secret of Law: An Introduction*, *in* CORRUPTION AND THE SECRET OF LAW: A LEGAL ANTHROPOLOGICAL PERSPECTIVE 1, 3 (2009) (asserting "[e]ndemic corruption . . . represents the evil and primitive Other [in] global rhetoric about transparency and 'good governance,'" whereas corruption in the wealthier countries is treated as "incidental, . . . a few rotten apples."); *see also* Akpome, *supra* note 264, at 20 (noting Transparency International's claim of a "global remit" is belied by its "overwhelmingly focus[] on African countries in ways that suggest corruption is an African, rather than a human, issue").

resemblance to the North/South, developed/underdeveloped global divide."[267]

A decolonized, reparative approach to FCPA enforcement would not require enabling abusive or unrepresentative regimes; nor would it converge with a misguided, morally relativistic framework that pardons corruption. An alternative agenda would simply emphasize the following: (1) *even treatment* of polities across the Global North and South in disentitlement determinations and law enforcement cooperation; (2) the transparent deployment of objective, doctrinally grounded criteria for evaluating disentitlement; and (3) the exercise of reasonable caution against hasty conclusions about the extent of foreign corruption in sovereign polities. We can condemn corruption as a universal harm while simultaneously conceding that corruption by rogue foreign officials may not be, in all circumstances, for the DOJ to regulate. The legitimacy of the FCPA's extraterritorial scope, after all, partially derives from the U.S. regulation of U.S. persons and those who avail themselves of the U.S. financial system.[268] Insofar as the DOJ's restitution denials penalize foreign governments, questions about legitimacy naturally arise.

Furthermore, the denial of restitution based on *in pari delicto* obscures that the most active enforcers of anti-corruption law are partially responsible for fostering corruption and its precedents in the Global South.[269] The *Giffen* case provides reason to be cynical about

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267. Davis, *supra* note 6, at 333.

268. 15 U.S.C. §78dd-1(g)(1). The statute prohibits corrupt payments, defined by the statute, by

> any issuer organized under the laws of the United States, or a State, territory, possession, or commonwealth of the United States or a political subdivision thereof and which has a class of securities registered . . . or for any United States person that is an officer, director, employee, or agent of such issuer or a stockholder thereof acting on behalf of such issuer.

Id.; *see also* Davis, *supra* note 23, at 501–02 (discussing how the 1988 Amendments to the FCPA incorporated an affirmative defense for conduct that is legal in the jurisdiction in which it occurs, which signifies Congress' intent to retreat from imposing U.S. definitions of corruption upon the terms of how business is conducted in other countries).

269. For a discussion of how colonialist legacies in sub-Saharan Africa "impact[] the extent of corruption," see Mulinge et al., *supra* note 20, at 17. Mulinge notes:

> [A]ny comprehensive delineation of factors responsible for the emergence and entrenchment of corruption in sub-Saharan Africa must take a holistic view of the practice. . . . While [colonialism is] associated with the origins/birth of corrupt practices, [neocolonialism] is considered to be partially responsible for the entrenchment of it. . . . [T]he colonialists established economic, social and political structures that would continue to safeguard their interests long after they relinquished direct control of the colonies.

the United States' righteousness in assessing foreign states' susceptibility to corruption. There, despite the FCPA, USG factions endorsed bribery and U.S. companies' capture of the highest levels of the Kazakh government.[270] The case represents a phenomenon beyond interagency dissonance about the best means to accomplish policy: USG officials directed a superficially private citizen to defy a federal statute and participate in a race to the bottom that the USG publicly condemns.[271] The hypocrisy embodied in some denials of restitution disserves U.S. policy interests of maintaining legitimacy and credibility to partners, especially those in the Global South.[272]

5. Current Practices Facilitate Inefficient and Incoherent Expressions of U.S. Foreign Policy

Beyond being unfair, the status quo results in inefficiencies as USG agencies work redundantly or even against one another. The *Giffen* case is also emblematic of the current practices' lack of coherence with other expressions of U.S. foreign policy toward actors implicated in FCPA offenses. At the same time Giffen was indicted, Giffen's "supposed partner in bribery, President Nazarbayev, was welcomed not only at the White House but also at the Bush family compound in Kennebunkport."[273] This case and others demonstrate that the DOJ's disentitlement decisions, which assess corruption abroad, are not necessarily adopted by other USG agencies, nor carried over to other expressions of U.S. foreign policy.[274] This is possibly due to a mere lack of coordination; interdepartmental disagreement; a failure by the DOJ to develop (or in the very least make public) a set of objective, authoritative, and systematic criteria for disentitlement; or all

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Id. at 17, 20; *see also* Radics, *supra* note 19, at 49 (concluding that "if it were not for US colonial intervention in the Philippines, many of the 'patron-client' issues American scholars tend to analyze may never have existed").

270. Maass, *supra* note 11.

271. Davis, supra note 6, at 325.

272. Maass, *supra* note 11; Biden Strategy, *supra* note 19, at 6 (defining strategic corruption as occurring "when a government weaponizes corrupt practices as a tenet of its foreign policy").

273. Maass, *supra* note 11.

274. For instance, in disentitling Costa Rican government entities from restitution, the USG effectively asserted conditions of corruption sufficient to designate the bribe-recipients under Global Magnitsky Act financial sanctions imposed by the Treasury Department and § 7031(c) visa restrictions imposed by the State Department. However, those entities were not designated, and U.S. persons were allowed to continue doing business with those entities. [might need a citation to a source]

of the above.[275] One can imagine an alternative approach in which disentitlement decisions implicate USG sanctions, under the Global Magnitsky Act or other programs, which prohibit U.S. persons from doing business with designated actors, or vice versa. The USG could coordinate FCPA enforcement with numerous targeted programs that sanction entities for demonstrated participation in corrupt activities or human rights abuses.[276] If the USG is intent on pursuing the practice of bypassing restitution and disentitling claimants, its failure to do so with clear principles and under a cohesive interagency approach should be criticized for generating inefficiencies.

The incoherence may also negatively impact foreign relations. Restitution denials quell the risk of enabling bad actors or hostile foreign states, and function to implicitly assert a government's systemic corruption and illegitimacy. Denials have targeted states with which the United States has active people-to-people relations.[277] Mechanisms, such as the act of state doctrine, exist elsewhere in American jurisprudence to prevent courts from sitting in judgment of the validity of official acts of a foreign sovereign.[278] Legally, current restitution practices might run afoul of the act of state doctrine, but, more immediately, might confuse foreign governments and stand in contradiction to or frustrate the execution of other USG programs in a foreign polity.

6. Current Practices Undermine International Institutions and Commitments

Sixth, the failure to provide restitution stands in tension with international law, principally the U.N. Convention Against Corruption

275. *Cf.* W.S. Kirkpatrick & Co. v. Env't Tectonics Corp., Int'l, 493 U.S. 400 (1990) (a rare case in which the State Department supported an assertion by courts and the DOJ that a foreign government's acts are illegitimate).

276. *Resources for Human Rights Defenders*, HUM. RTS. FIRST, https://www.humanrightsfirst.org/topics/global-magnitsky/resources [https://perma.cc/88GU-KC8V].

277. Formal recognition entails mutual rights and obligations. Zivotofsky *ex rel.* Zivotofsky v. Kerry, 576 U.S. 1, 16 (2015) (noting the solemnity necessary for formal recognition, as it "may seem a hollow act if it is not accompanied by the dispatch of an ambassador, the easing of trade restrictions, and the conclusion of treaties"); *see also* RESTATEMENT (THIRD) OF FOREIGN RELS. L. § 203 cmt. a (AM. L. INST. 1987).

278. For pertinent treatments of the act of state doctrine that carves out a limited exception for clear indications of policy of the executive branch, see generally Bernstein v. Van Heyghen Freres, S.A., 163 F.2d 246 (2d Cir. 1947); *Modern Status of the Act of State Doctrine*, 12 A.L.R. Fed. 707 (1972).

(UNCAC), to which the United States is a party.[279] Under Article 57 of UNCAC, signatories must adopt measures "as may be necessary to enable [their] competent authorities to return confiscated property," including proceeds of corruption or embezzlement, to requesting states.[280] Confiscated property includes "[p]roceeds of crime derived from offences," "property the value of which corresponds to that of such proceeds," and "[p]roperty, equipment or other instrumentalities used in or destined for use in offences established in accordance with this Convention."[281] Although Article 57 only extends this obligation to requesting states, Maud Perdriel-Vaissiere has argued that Article 57 should be read in conjunction with Article 56, which encourages signatories to "proactively share information" with other states "without prior request" when doing so might "assist the receiving State Party in initiating or carrying out investigations . . . or might lead to a request by that State Party[.]"[282] Perdriel-Vaissiere observes that the UNCAC Technical Guide confirms the obligation to notify foreign governments of polities where bribes occurred.[283] Additionally, Article 57(3)(c) stipulates parties must "give priority consideration to returning confiscated property to the requesting State Party, returning such property to its prior legitimate owners or compensating the victims of the crime," thereby envisioning obligations to prioritize victim compensation that attach absent state requests.[284]

The failure to provide restitution also implicates separate principles of international law. For instance, in retaining misappropriated sovereign wealth, the USG effectively might erode foreign peoples' right to economic self-determination, enshrined in the International Covenant on Civil and Political Rights (ICCPR), which the United States ratified in 1992.[285] Article 1 of the ICCPR states: "All peoples have the right of self-determination" and "[b]y virtue of that right . . . may, for their own ends, freely dispose of their natural wealth and

279. In acceding to UNCAC, the United States made several reservations and declarations, though none indicates a contrary interpretation of its obligations. *See* U.N. Convention Against Corruption, *opened for signature* Dec. 9, 2003, S. TREATY DOC. NO. 109-6, 2349 U.N.T.S. 41 (entered into force Dec. 14, 2005).

280. *Id.* art. 57.

281. *Id.* arts. 31(1)(a)–(b).

282. Perdriel-Vaissiere, *supra* note 207 (arguing for similarly reading Article 53 of the Convention in conjunction with Article 56's mandate).

283. *Id.*

284. U.N. Convention Against Corruption, *supra* note 279, art. 57.

285. Kristina Ash, *U.S. Reservations to the International Covenant on Civil and Political Rights: Credibility Maximization and Global Influence*, 3 NW. J. HUM. RTS. 1, 2 (2005).

resources."[286] As Ndiya Kofele-Kale writes, states violate the right to economic self-determination when they "engage[] in the corrupt transfer of ownership of national wealth to those select nationals who occupy positions of power or influence."[287] U.S. anti-corruption enforcement, like corruption itself, might deny people the right to possess and freely dispose of their natural wealth and resources, which problematizes USG compliance with the ICCPR.[288]

From a broader perspective, the USG has led efforts to galvanize international cooperation in transnational bribery regulation.[289] USG failure to repatriate assets makes the USG more susceptible to the charge of selectivity in adopting and implementing binding international obligations.[290] Accordingly, current practices might undermine international cooperation generally and multilateral anti-corruption platforms in which the USG has invested extensively, such as the Organisation for Economic Co-operation and Development (OECD) and UNCAC.[291]

7. Current Practices Fail to Capitalize on Valuable Opportunities

Finally, current practices forego several worthwhile opportunities related to bolstering law enforcement, capacity-building, and fostering diplomatic trust. Current practices possibly fail to achieve

286. International Covenant on Civil and Political Rights, *supra* note 262, arts. 1(1)–(2).

287. Ndiva Kofele-Kale, *The Right to a Corruption-Free Society as an Individual and Collective Human Right: Elevating Official Corruption to a Crime Under International Law*, 34 INT'L L. 149, 165 (2000).

288. Andrew B. Spalding, *Corruption, Corporations, and the New Human Right*, 91 WASH. U. L. REV. 1365, 1365 (2014); Kofele-Kale, *supra* note 287, at 163–64.

289. Kofele-Kale, *supra* note 287, at 152–53.

290. Anya Wahal, *On International Treaties, the United States Refuses to Play Ball*, COUNCIL ON FOREIGN RELS. (Jan. 7, 2022), https://www.cfr.org/blog/international-treaties-united-states-refuses-play-ball [https://perma.cc/X46V-KEZT].

291. *See, e.g.*, *United States Will Host the 10th Conference of the States Parties (COSP) to the UN Convention Against Corruption (UNCAC) in 2023*, U.S. DEP'T OF STATE (Dec. 17, 2021), https://www.state.gov/united-states-will-host-the-10th-conference-of-the-states-parties-cosp-to-the-un-convention-against-corruption-uncac-in-2023/ [https://perma.cc/XY6K-6X6L]; *About the Mission: U.S. Mission to the Organization for Economic Cooperation & Development*, U.S. MISSION TO ORG. FOR ECON. COOP. & DEV., https://usoecd.usmission.gov/mission/oecd/ [https://perma.cc/JL3S-NXHB] ("The United States is a founding member of the [OECD]," the forerunner of which was established to administer the Marshall Plan following World War II. Additionally, the USG actively "works through the OECD to advance support for economic innovations and standards among publics in OECD member states, to advance shared values and interests, and to help set a welcoming business environment for U.S. firms.").

maximally efficacious FCPA enforcement.[292] Restitution incentivizes victim participation, lightening investigative burdens and perhaps bringing more offenses to law enforcement's attention. Restitution can also contribute to rehabilitation.[293] Requiring defendants to confront victims "impress[es] upon the mind of the criminal that he has injured a human being, not some impersonal entity known as the state."[294] This notion applies poignantly to FCPA enforcement, which has been criticized for enabling a casualized, pay-to-play compliance landscape.[295] Restitution thus carries expressive and deterrent, in addition to reparative, value. In other words, "[i]t completes the administration of justice."[296] Restitution also has expressive value for law and institutional development. As Juanita Olaya Garcia writes, it "makes it clear that what was damaged is worth repairing. It, therefore, taps into social norms that need to be changed or reinforced."[297] Reinvestment signals institutions merit investment and public trust—undoing one of grand corruption's more intractable harms, namely, the public's loss of faith in the institutions of governance.[298] A reparative agenda would thus fiscally and normatively support the proliferation and development of stable institutions.

Moreover, the routinization of restitution could build diplomatic infrastructure that could serve as a basis for reciprocal awards or future cooperation between governments on high-stakes issues. Regularizing intergovernmental restitution could build diplomatic channels that promote goodwill and de-escalate high-stakes relationships, such as that between the United States and China.[299] The Biden

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292. VWPA, *supra* note 42.

293. Laster, *supra* note 32, at 80.

294. *Id.* ("[R]estitution . . . could serve to keep the criminal-victim relationship alive long after the original offense.").

295. Maddie McMahon, *Why DOJ's New FCPA Corporate Enforcement Policy May Be a Step Backwards*, GLOB. ANTICORRUPTION BLOG (May 7, 2018), https://globalanticorruptionblog.com/2018/05/07/dojs-corporate-enforcement-policy-ignores-effects-of-reforming-culture/ [https://perma.cc/G54J-KPXD]:

> These justifications for the new [voluntary disclosure program] at first seem plausible, but they . . . overlook the impact of DOJ's enforcement posture on corporate culture. . . . [T]he new policy weakens incentives for companies to actively work to promote a pro-integrity corporate culture. For that reason, the new policy may end up worsening overall foreign bribery activity, even if both corporate self-disclosures and prosecutions of individuals increase.

296. Garcia, *supra* note 247.

297. *Id.*

298. *Id.*

299. *See, e.g.*, Teddy Ng & Liu Zhen, *Higher Risk of Accidental Clash as China Suspends US Defence Dialogue: Analysts*, S. CHINA MORNING POST (Aug. 6, 2022),

Administration's December 2021 Strategy on Countering Corruption recognizes diplomatic cooperation as a means to the end of diminishing corruption.[300] The inverse might be true as well: Restitution might also be a means of improving diplomatic relations.

B. Potential Recipients of Restitution

The jurisprudence and legislative history surrounding the restitution statutes affirm that several types of persons, from governments to civil society organizations (CSOs), could receive restitution for FCPA offenses, whether in their own right or as proxies for "first-line" victimized individuals.[301] If the USG indeed recognizes that restitution of some form is preferable to retention, certain institutional restitution recipients—all somewhat capable of representing individual victims' interests in a given case—might be preferable relative to one another. Each type of proxy or restitution recipient has its own benefits and shortcomings, which this Section summarizes.

1. Privileging Foreign Governments as Recipients for Restitution

Privileging foreign governments as potential destinations for restitution has several benefits—the first grounded in legitimacy, the second in efficiency, the third in law and development theory, and the fourth in diplomatic considerations. First, because public corruption expropriates public resources, returning property to the institution from which it came seems appropriate, whereas sending restitution to anyone else, including a CSO, represents a diversion from the rightful owner.[302] Providing restitution to foreign governments also bypasses paternalism concerns and affords foreign states opportunities to make self-determinative expenditures.[303] Second, foreign governments can

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https://www.scmp.com/news/china/military/article/3187953/higher-risk-accidental-clash-china-suspends-us-defence-dialogue [https://perma.cc/6QSR-W9QD]; Shannon Tiezzi, *Another US-China Dialogue Bites the Dust*, DIPLOMAT (Oct. 2, 2018), https://thediplomat.com/2018/10/another-us-china-dialogue-bites-the-dust/ [https://perma.cc/TMM7-5A6U].

300. Biden Strategy, *supra* note 19, at 34.

301. United States v. Kamuvaka, 719 F. Supp. 2d 469, 478 (E.D. Pa. 2010).

302. *See supra* Section III.A.3 (discussing how retention of a criminal penalty arising from an FCPA offense can represent yet another diversion of misappropriated funds from their prior owner, albeit a diversion to the USG).

303. *See supra* Section III.A.4 (discussing how retention could paternalistically deny foreign states wealth to which they are entitled and, therein, an opportunity for self-determination).

be corruption victims in both relevant senses recognized by courts: in their own right, as victims of the defendant's fraudulent conduct, and as a proxy for victimized persons.[304] Governments' role as proxy for restitution purposes is most intuitive compared to other possible recipients because governments, theoretically, exist for the very purpose of representing and serving citizen interests. The coincidence of two independently viable theories of victimhood reinforces governments' claim as legitimate and reasonable recipients.[305] Third, as discussed in the prior Section, awarding governments could also serve to support capacity-building for foreign political institutions that evidently, by the terms of the charged offense, could benefit from capital infusion.[306] Lastly, it could build diplomatic goodwill, trust, and a foundation for broader partnerships, which are especially valuable in an era rife with geopolitical contestation.

Several risks are nonetheless evident. Chiefly, the issue of compensating those responsible for the offense looms large. Especially if a foreign state's senior leadership was implicated in the conspiracy underlying the prosecution or if no local accountability or reformative measures have been undertaken, the USG will have reasonable concerns about dedicating resources to equipping corrupt actors who could inflict greater damage. As a technical matter, under *Ojeikere*, courts should not consider independent abuses, hostility to the United States, or whether the victim proxy is a democracy in assessing restitution eligibility, although those factors might coincide with culpability in the charged offense.[307] Yet, the fact that many FCPA enforcement actions target offenses in polities with unrepresentative or abusive regimes might urge the USG to privilege another type of proxy, if the USG ever develops a more detailed, substantive framework for restitution in public corruption cases. One question policymakers should consider is: Why, in the first place, are U.S. persons lawfully permitted to do business in polities governed by regimes about which the USG is *so* deeply skeptical and with which the USG

304. *See supra* Sections I.B.3, I.B.5 (discussing U.S. courts' findings that government agencies can be victims in their own right and can represent the victimized public within their jurisdiction).

305. The coincidence also diminishes the prospect of litigation with multiple victim representatives and redundant awards to citizen-victims, who might be compensated repetitively for the same harm through various proxies.

306. *See supra* Section III.A.3; Garcia, *supra* note 247 (observing visible investments in public institutions could generate a resurgence in public trust of such institutions and reinvigorate local efforts to hold those institutions accountable to transparent expenditures of reinvested capital).

307. United States v. Ojeikere, 545 F.3d 220, 222 (2d Cir. 2008).

is *so* hesitant to deal, that the USG refuses to treat the foreign government as a faithful executor of its peoples' interests?

Secondarily, cynics may argue restitution risks moral hazard and removes incentives for foreign governments to prosecute domestically, as the USG picks up enforcement slack. However, restitution could never constitute a windfall, as it effectuates reimbursement for actual loss. Nor could restitution compensate victims or proxies for the full value of what could have been achieved had revenue never been expropriated, but rather invested, as well as the less direct, but weighty externalities, such as citizens' loss of faith in public institutions and damage to a nation's creditworthiness, that often result from foreign bribery offenses. Accordingly, foreign governments will suffer net loss from corruption even if restitution is awarded. Moreover, if this concern would prevent restitution from occurring at all, the USG could incorporate into objective criteria for disentitlement in FCPA cases a consideration of whether foreign governments are pursuing independent accountability measures.

2. Acknowledging the Value Charitable Civil Society Organizations Can Provide

Ordering restitution to charitable CSOs as proxies for victimized populations also presents unique benefits and challenges. CSOs might be eligible to receive restitution in FCPA cases, given their capacity to deliver concrete services (e.g., health or education) to the population of a polity where the offense occurred.[308] Doing so could aim either: to replace the specific type of services denied to citizen-victims due to the offense; or to compensate citizen-victims generally for their suffering owed to substandard or harmful exercises of governmental authority. CSOs carry less political or strategic risk than governments, given the lower likelihood that CSOs would abuse the public in the same ways governments are liable to. CSOs might also

308. Cecilia Tortajada, *Nongovernmental Organizations and Influence on Global Public Policy*, 3 ASIA & PACIFIC POL. STUDS. 266, 268 (2016):

> Because NGOs are smaller than governments, they are presumed to be more efficient, to be more flexible in decision-making, to have lower service delivery costs, and to be better at working closely with poor populations and encouraging their direct participation. But these perceived advantages in reaching those for whom aid is intended have increasingly been disputed with reference to donor motives, government influence, organizational limitations, and internal agendas.

more effectively provide the public with tangible services than the government in many circumstances.[309]

Providing restitution to CSOs also present legitimacy concerns. The decision to award CSOs restitution possibly represents a paternalistic, punitive diversion of assets to a third-party. In selecting a particular CSO, the USG would have to select a capable and reliable CSO and be comfortable effectively usurping a sovereign's decision about how to manage public revenue and illegitimately dictating the terms on which a people enjoy their national wealth and resources.[310] Moreover, like governments, CSOs are susceptible to internal mismanagement, corruption, or political influence, which counteract the benefits of delivering restitution via CSOs.

Treating CSOs as proxies has precedent in the *Giffen* prosecution and other forfeiture and class action cases, indicating the model's legal and practical viability.[311] In recent years, KARI has increasingly relied on CSOs to disburse forfeited assets linked to corruption. For instance, as discussed in Section II.B, the DOJ's 2021 agreement with the Equatorial Guinean Second Vice President Obiang illustrates the promise and perils of CSO proxies.[312] That agreement laudably transferred millions to a U.S. nonprofit and a U.N. mechanism, both providing urgent services in a country with low rankings on "various public-health metrics."[313] Yet, that award, which transferred the funds to American and international organizations, could have been structured

309. Karl Thompson, *The Strengths and Limitations of NGOs in Development*, REVISE SOCIO. (Mar. 8, 2017), https://revisesociology.com/2017/03/08/ngo-strengths-limitations/ [https://perma.cc/4ECA-35EQ] (noting several advantages of allowing CSOs to operationalize aid as opposed to governments, including that CSOs can be "[g]enerally smaller and thus more responsive to the needs of local communities" on a more continuous basis and without "political agenda"); *see also* BOTA Final Report, *supra* note 1 at 5–6:

> Responsible repatriation via civil society is possible . . . . [H]aving a mission that . . . has the buy-in of civil society and government provides the opportunity to achieve real impact. . . . Civil society can contribute to each stage of the asset repatriation process. Civil society can conduct research, stakeholder mapping, and landscape analysis; help design asset-return mechanisms; manage or monitor the return of assets; synthesize learning and develop recommendations to inform future mechanisms; and conduct outreach and advocacy to promote the use of new knowledge in other contexts. Most importantly, civil society can advocate for citizens and amplify their voices throughout the asset-return process. Everyone benefits when civil society is engaged from the outset. (emphasis omitted)

310. *See supra* Section III.A.6 (discussing the right to economic self-determination under the ICCPR).

311. *See generally* KEVIN M. LEWIS, CONG. RSCH. REP., LSB10131, UPDATE: IS CY PRES A-OK? SUPREME COURT TO CONSIDER WHEN CLASS ACTION SETTLEMENTS CAN PAY A CHARITY INSTEAD OF CLASS MEMBERS 3 (2019).

312. DOJ Obiang Press Release, *supra* note 220; *see supra* Section II.B.

313. Davis, *supra* note 6, at 327–28.

in more thoughtful terms and attempted to a greater extent to build capacity and pay salaries in the victimized polity.

Those skeptical of practicability should look no further than the doctrine of *cy pres*, which is frequently invoked in the class action context. The doctrine of *cy pres* allows "distribut[ion of] some or all of the settlement proceeds to third-party organizations that engage in charitable activities related to the class members' injuries."[314] Displacing cumbersome, pro rata distribution of awards to individual class members, *cy pres* principles could be useful in public corruption cases for its capacity to: efficiently provide *de minimis* compensation to members of a large class; to recognize harm to non-party victims; and bypass administrative costs that "swallow up" funds.[315] Vocal critics, however, claim victims often see "little or no benefit" from *cy pres*, which "force[s victims] to provide financial support to organizations with which they may not agree," as a form of "compelled speech."[316] The legitimacy concerns apply with equal force to the restitution context. That corruption victims and class members are denied voices in resolving their claims renders awards to CSOs laudable, but imperfect.

3. Finding Fallbacks: Constructive Trusts, Official Aid, and Anti-Corruption Campaigns

Several other routes offer fallback options for managing the difficulties of returning funds to unreliable proxies.[317] Constructive trusts are one such option. An equitable and temporary remedy, constructive trusts are created by implication when a court rules that a person with legal title to property should not fairly be allowed to retain it.[318] In the bribery context, the USG might designate or serve as a

314. Lewis, *supra* note 311, at 2; *see also Cy Pres*, BLACK'S LAW DICTIONARY (11th ed. 2019).

315. Lewis, *supra* note 311, at 2.

316. *Id*. at 2–3. Some have even urged Congress to prohibit or restrict *cy pres*' application. The Supreme Court has not addressed *cy pres*' validity, but Justice Thomas has independently opined that *cy pres* results in injustice for absent class members. Franke v. Gaos, 139 S. Ct. 1041, 1045 (2019) (Thomas, J., dissenting) (Plaintiffs won a class action suit against Google for violating various privacy rights, resulting in a certified settlement in which Google agreed to pay non-party plaintiffs $5.3 million through six organizations that "promote public awareness and education and/or . . . support research, development, and initiatives[] related to protecting privacy on the Internet.").

317. *See* DOJ POLICY MANUAL, supra note 215, at 174.

318. *Trust*, BLACK'S LAW DICTIONARY (11th ed. 2019):

> This remedy is commonly used when the person holding the property acquired it by fraud, or when property obtained by fraud or theft (as with embezzled

trustee over property subject to restitution until a viable proxy, capable of faithfully representing the victims' interests, emerges.[319] As Pablo J. Davis observes, the constructive trust doctrine "offers a framework for reconciling the finality of [assets vesting in the USG] with a variety of possible equitable and legal remedies."[320] It also enables the decoupling of "legal title, held by the USG upon forfeiture, from equitable title, which could be asserted by victims' groups."[321] The ability to delay selecting an appropriate proxy would diminish the USG's ability to cite lack of appropriations or capacity at any given moment in omitting restitution. And overall, the promise of future reparations still recoups considerable value. Through such a promise, the USG would acknowledge its own lack of title to the property and victims' suffering and commit to return the property in the future.

Even so, providing restitution via constructive trusts is subject to concerns about unfair delay and paternalism. Trusts arguably infantilize their beneficiaries—a foreign state and its people—and subject restitution to the whims of a non-democratically appointed trustee, who might face lesser accountability than CSOs. Constructive trusts thus should represent viable fallbacks only where the USG and international community are united in concerns about compensating a specific foreign government and have exhausted other presently viable solutions.

Even more types of restitution recipients exist and have been utilized in the forfeiture context. For instance, USG agencies providing country-specific official development assistance, like the U.S. Agency for International Development (USAID), might be viable proxies, although such restitution would be subject to questionable

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> money) is exchanged for other property to which the wrongdoer gains title. The court declares a constructive trust in favor of the victim of the wrong, who is given a right to the property rather than a claim for damages.

319. Constructive trust doctrine requires victims "to trace their money to the seized funds," which is not required to claim civil damages. DOJ POLICY MANUAL, *supra* note 215, at 174. However, the burden of tracing would likely fall to the USG, given its utilization of the constructive trust as a means of satisfying its restitutive obligations to the victim. *Id.*:

> In *United States v. $4,224,958.57 (Boylan)*, 392 F.3d 1002, 1003–1005 (9th Cir. 2004), the Ninth Circuit held that victims of a large, fraudulent investment scheme established a sufficient legal interest in the seized proceeds through a constructive trust to confer on them standing to contest the forfeiture. Under this holding, government attorneys litigating forfeiture cases may be required to identify all potential victims of the fraud, notify them of the forfeiture action, and afford them an opportunity to file claims in the judicial proceeding.

320. Davis, *supra* note 6, at 349–53.

321. *Id.* at 353 (emphasis omitted).

political influence from the USG.[322] Restitution awards could also fund broad anti-corruption initiatives, as opposed to initiatives addressing victims' general welfare. The critical drawback of this approach is that *actual* victims receive no benefit. Rather, only potential victims would receive the benefits of preventative initiatives. Moreover, that approach would transfer funds only to replicate the current preventive and expressive functionality of the DOJ, which aims to halt offenders and deter potential wrongdoers.

C. Recommendations: Achieving Clarity and Balance in Reparative FCPA Enforcement

Action on multiple levels could improve the status quo, which currently denies, omits, and obscures restitution for victims of U.S. foreign bribery. Stakeholders could harness several tactics to move enforcement in the right direction.

1. Reforming and Clarifying Policy

Primarily, the USG should adopt clear principles, whatever their substance, to govern restitution in a transparent and objective manner. Effectively that means Congress, the DOJ's Office of the Legal Counsel, and other agencies should address conceptual questions that permeate the restitution statutes, either through independent legislation, an amendment, regulations, or advisory opinions. Points subject to continued debate include: the extent of the statutes' complexity exception; how the CVRA augments the MVRA; when the use of intermediaries is *required*; and how the conspirator disentitlement doctrine applies, if at all, especially to governmental institutions. Doing so would provide all stakeholders, including defendants, notice of their rights.

In crafting clearer, more uniform policies, policymakers should also contemplate the substantive considerations discussed in Sections III.A and III.B of this Note. Such considerations include (1) adopting a prima facie commitment to consistently and proactively arrange restitution in each FCPA and public corruption prosecution, (2) adhering to transparent criteria in executing victims' rights, and (3) recognizing the multiplicity of avenues through which restitution can become sustainable in any given case. Congress or the DOJ could devise a range of schemas capable of executing those baseline

322. For an example of the USG funding broad anti-corruption efforts in a foreign state, see Biden Strategy, *supra* note 19, at 28.

improvements (and more), while simultaneously mitigating key policy concerns. For instance, the USG could decide to award restitution, whenever possible, to the defrauded foreign governments, which arguably have the strongest claims.[323] The USG could pursue alternative arrangements if it disentitles a foreign government for that government's culpability in the charged offense. However, disentitlement should be the result of documented interagency analyses that apply clear, uniform criteria across cases. In particular, the USG could strategically pursue disentitlement only as a component of a whole-of-government policy response. After all, disentitlement theoretically occurs in response to credible findings that a foreign official or government engaged in corruption, which should trigger other policy levers, such as Global Magnitsky sanctions.[324] The USG might consider then—and only then—disentitling governments and pursuing restitution utilizing other proxies, such as CSOs or constructive trusts. Finally, local CSOs, as opposed to U.S. or international CSOs, could be privileged recipients of restitution to maximize capacity-building and victim agency.

Adoption of such a schema would heighten compliance with U.S. law and international commitments, boost U.S. credibility, enhance partnerships, promote efficiency and uniformity in foreign policy, and increase public awareness about the fight against corruption and its stakes. It would also provide limited fallback options so law enforcement does not empower complicit officials. For victims, this agenda would provide justice and clarity. For the international community, reforms would infuse much-needed capital into public institutions and represent a step toward undoing a history of (neo)colonialism perpetrated by Western states against the Global South. No longer would the USG profit, while foreign victims, marginalized by decades of colonialism and manufactured instability, are robbed of remaining sovereign wealth with impunity.

Also omitted from, but urgently needed in, the current legal framework is an external mechanism capable of overcoming passivity and holding prosecutors, probation officers, and courts—the executors

323. *See supra* Section III.B.1.

324. HUM. RTS. FIRST, *supra* note 276. In fact, the House 2022 appropriations bill for the DOJ appropriates $1 million to coordinate and improve the USG's implementation of Global Magnitsky Act sanctions, which are principally implemented by the Treasury Department, indicating a Congressional push for further interagency dialogue. H.R. REP. NO. 117-97, at 69 (2022).

of victims' rights—accountable.[325] The DOJ's VRO could potentially play more of a proactive, as opposed to reactive, role in this space.[326]

2. Building Capacity from Inside and Outside of Government

Meanwhile, the DOJ and SEC could engage in deeper interagency efforts, which would be mutually informative with respect to U.S. sanctions policy and would result in more coherent, influential foreign policy initiatives. Those agencies could also spearhead multilateral dialogues with foreign law enforcement agencies that more consistently facilitate restitution in transnational corruption cases, such as the United Kingdom's Serious Fraud Office, to obtain practical guidance on implementing restitution.[327] Civil society could also actively work with community representatives and citizen-victims to petition courts for restitution. Multilateral law-making bodies, situated within the U.N., the OECD, the International Law Commission, or elsewhere, could propose frameworks that enhance the prevalence of restitution and codify shared principles of disentitlement.

Lastly, scholars could contribute further research to assist the USG and like-minded enforcing states in developing the substantive criteria for restitution (in)eligibility and conceptualizing appropriate rules for determining governments' institutional liability. Most fundamentally, policymakers, prosecutors, courts, and civil society should be more aware of criminal restitution as a mechanism, its substantive and procedural dimensions, and its stakes in the foreign corruption context.

IV. CONCLUSION

The fight against corruption is increasingly a policy priority of the USG, with President Biden declaring anti-corruption to be "a core national security interest of the United States" in June 2021.[328] However, the contemporary policy agenda fails to address the people

325. Cassell, *supra* note 50, at 869. Currently, if victims are not notified, few controls exist to ensure USG accountability to victims.

326. *Crime Victims' Rights Ombudsman*, *supra* note 208; *see also* 28 C.F.R. § 45.10.

327. Hickey, *supra* note 173, at 384.

328. Biden Strategy, *supra* note 19, at 4. In the Biden Strategy, the word "victim" is not mentioned once. *Id.*

exploited and the polities destabilized by bribe-payers.[329] As Juanita Olaya Garcia writes, punishing corrupt actors "addresses only part of the problem if the hospital is still not working or the stolen money still hasn't reached the community it was intended for."[330] Today, restitution is the exception, rather than the rule. As a result, the extent of the abuse is concealed and ignored: "[T]he hospital is still ill-equipped, the bridge has fallen, or the taxpayers' money is still lost."[331]

And yet, policy need not be cemented in an opaque, unenterprising state. Despite the USG's failure so far to clarify its policy or dedicatedly bring restitution into the FCPA context, the United States has enjoyed a reputation as a forerunner in the global fight against corruption. The USG has not balked at introducing provocative innovations into the regulation of transnational corruption, from the establishment of the DOJ Fraud Section's voluntary disclosure program, to the Biden Administration's reform of beneficial ownership reporting requirements.[332] These and other initiatives have improved the integrity of the U.S. and global financial systems, while reshaping the playing field for multinational firms. Similarly bold tactics—including a renewed focus on affording victims visibility, dignity, and compensation—could very well be on the horizon.

The erasure of victims from the story of transnational bribery arguably banalizes corruption and licenses a pernicious idea that corruption is a benign inevitability of doing business in the global economy. Such erasure diminishes our collective willingness and ability to see the stakes of corruption. To be successful and galvanize multistakeholder cooperation, the fight against corruption will require a moral reframing—a recognition in and by our legal system that corruption inflicts concrete harms on society's most vulnerable. Adopting a reparative agenda for FCPA enforcement would require the USG to confront the harms perpetrated by U.S. businesses abroad, alongside the immense socioeconomic value for which U.S. businesses can be credited. It would require U.S. policy to glance back at and dignify those harmed by the excesses of underregulated global capitalism.

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329. *Fact Sheet: U.S. Strategy on Countering Corruption*, WHITE HOUSE (Dec. 6, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/12/06/fact-sheet-u-s-strategy-on-countering-corruption/ [https://perma.cc/ST8Y-8JWF].

330. Garcia, *supra* note 247.

331. *Id.*

332. DOJ Pilot Program Press Release, *supra* note 177; Jamie L. Boucher et al., *FinCEN Issues Long-Awaited Proposed Rule to Implement New Beneficial Ownership Reporting Requirements*, SKADDEN (Dec. 17, 2021), https://www.skadden.com/insights/publications/2021/12/fincen-issues-long-awaited-proposed-rule-to-implement [https://perma.cc/VLL9-GVST].

Yet, doing so would allow U.S. policymakers, businesses, and civil society to move forward in global engagement on more equitable and credible terms.

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