THE BEST DEFENSE: MONEY LAUNDERING PROSECUTIONS OF CORRUPT FOREIGN OFFICIALS

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ABSTRACT

In a series of recent, high-profile cases, the DOJ has successfully pursued criminal charges against corrupt foreign officials in American courts. But instead of charging these officials with accepting corrupt payments, the DOJ has prosecuted them for exploiting the U.S. financial system to launder their bribes.

Judges and scholars alike have questioned the legitimacy of this enforcement strategy, characterizing the money laundering charges as pretextual end-runs around the FCPA's asymmetric punishment regime. Yet from this common diagnosis, jurists and academics have raised distinct concerns. While judges have suggested that such prosecutions run afoul of substantive criminal law doctrines such as the Gebardi *principle, commentators have lamented the expressive deficiency of condemning corruption indirectly.*

This Note argues that judges and scholars have fundamentally misunderstood the DOJ's money laundering prosecutions of foreign officials. By treating these cases as mere attempts to combat foreign corruption, the critics have overlooked the additional harms that laundered bribes inflict on the United States. The infiltration of bribes into American institutions sullies the reputation of the U.S. financial system in the eyes of the international community. To ensure the American financial sector can effectively compete in the global market, the United States has a powerful interest in maintaining its real and perceived integrity. Recognizing the specific threats posed by laundered bribes not only dispels critics' doctrinal and expressive concerns, but also clarifies that, far from subverting the FCPA, these money laundering prosecutions promote its reputational aim.

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I. INTRODUCTION

Since its enactment in 1977, the Foreign Corrupt Practices Act (FCPA)[1] has proven immensely controversial.[2] Shortly after the FCPA's passage, critics decried its criminalization of foreign bribery, arguing that enforcing these prohibitions on firms with ties to the United States would put U.S. businesses at a disadvantage relative to their foreign competitors.[3] Receptive to these concerns, the Reagan and H.W. Bush administrations ensured the FCPA was not an enforcement priority for the Department of Justice (DOJ).[4] Accordingly, dissensus regarding the FCPA was so potent that the law remained "effectively dormant" for the two decades after its passage.[5]

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1. Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. §§ 78a, 78m, 78dd-1 to -3, 78ff).

2. Critics often attack the FCPA's ambiguous language. *See, e.g.*, Steven R. Salbu, *Redeeming Extraterritorial Bribery and Corruption Laws*, 54 AM. BUS. L.J. 641, 652–53 (2017) [hereinafter Salbu, *Redeeming Bribery Laws*]; Agnieszka Klich, Note, *Bribery in Economies in Transition: The Foreign Corrupt Practices Act*, 32 STAN. J. INT'L L. 121, 140 (1996). Commentators also contend that the FCPA's cultural insensitivity amounts to imperialism. *See, e.g.*, Steven R. Salbu, *Extraterritorial Restriction of Bribery: A Premature Evocation of the Normative Global Village*, 24 YALE J. INT'L L. 223, 227 & n.25 (1999). Others claim that the FCPA harms the inhabitants of corrupt countries by disincentivizing foreign direct investment. *See, e.g.*, Austin I. Pullé, *Demand Side of Corruption and Foreign Investment Law*, 4 J. INT'L & COMP. L. 1, 4 (2017).

3. *See, e.g.*, William L. Larson, Note, *Effective Enforcement of the Foreign Corrupt Practices Act*, 32 STAN. L. REV. 561, 569–70 (1980) ("[V]igorous enforcement against American corporations may cause those corporations to lose business. If American corporations are competing for business against foreign corporations whose governments have not passed antibribery statutes, in markets where corruption is an expected part of the political system, detection and prosecution of American bribery probably would result in foreign corporations dominating the market.").

4. *See* Rachel Brewster, *Enforcing the FCPA: International Resonance and Domestic Strategy*, 103 VA. L. REV. 1611, 1629 (2017).

5. *Id.* at 1621.

In the past thirty years, the number of FCPA prosecutions has increased steadily, as the enactment of similar anticorruption laws in other wealthy nations pursuant to the OECD Antibribery Convention has lessened perceived competitive disparities.[6] Commentators have responded to the FCPA's growing prominence with renewed concerns about its asymmetry.[7] But rather than focusing on the statute's differential treatment of U.S. businesses vis-à-vis foreign ones, this latest wave of scholarship has challenged the FCPA's harsh treatment of those who *offer or pay* bribes but not the foreign officials who *receive* them.[8] Academics have characterized this divergence as unjust, arguing that corrupt payments are often demanded by foreign officials, whose authority compels firms to comply.[9] Accordingly, these scholars claim the FCPA immunizes the real perpetrators of foreign corruption while punishing victimized businesses.

For all the fervor of these criticisms, corrupt foreign officials have indeed faced prosecution under U.S. criminal law.[10] In a series of recent, high-profile cases, the DOJ has successfully pursued criminal charges against foreign officials in U.S. courts.[11] But instead of charging these officials with accepting corrupt payments, the DOJ has prosecuted them for exploiting the U.S. financial system to launder their bribes.[12]

Judges and scholars alike have questioned the legitimacy of this enforcement strategy, characterizing the money laundering charges as pretextual end-runs around the FCPA's asymmetric punishment

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6. *See id.* at 1646; Brandon L. Garrett, *Globalized Corporate Prosecutions*, 97 VA. L. REV. 1775, 1832 (2011) ("The DOJ has prosecuted FCPA matters increasingly and, by its own description, aggressively. The numbers of FCPA prosecutions have increased from a handful each year to several dozen a year.").

7. *See, e.g.*, Lucinda A. Low, Sarah R. Lamoree & John London, *The "Demand Side" of Transnational Bribery and Corruption: Why Leveling the Playing Field on the Supply Side Isn't Enough*, 84 FORDHAM L. REV. 563, 567 (2015).

8. *See, e.g.*, Antonio Argandoña, *Corruption and Companies: The Use of Facilitating Payments*, 60 J. BUS. ETHICS 251, 261 (2005); Low, Lamoree & London, *supra* note 7, at 599; Salbu, *Redeeming Bribery Laws*, *supra* note 2, at 666; Garen S. Marshall, Note, *Increasing Accountability for Demand-Side Bribery in International Business Transactions*, 46 N.Y.U. J. INT'L L. & POL. 1283, 1285 (2014).

9. *See* Pullé, *supra* note 2, at 6 ("Many bribe providers in international transactions are in a position little different from the victim of extortion or blackmail."); *see also* Joseph W. Yockey, *Solicitation, Extortion, and the FCPA*, 87 NOTRE DAME L. REV. 781, 795 (2011) ("Companies also report that they frequently receive demands that constitute extortion.").

10. *See, e.g.*, Philip M. Nichols, United States v. Lazarenko*: The Trial and Conviction of Two Former Prime Ministers of Ukraine*, 2012 U. CHI. LEGAL F. 41, 41.

11. *See infra* Section III.A.

12. *See id.*

regime.[13] Yet from this common diagnosis, jurists and academics have raised distinct concerns. While judges have suggested that such prosecutions run afoul of substantive criminal law doctrines such as the *Gebardi* principle,[14] commentators have lamented the expressive deficiency of condemning corruption indirectly.[15]

This Note argues that judges and scholars have fundamentally misunderstood the DOJ's money laundering prosecutions of foreign officials. By treating these cases as mere attempts to combat foreign corruption, the critics have overlooked the additional harms that laundered bribes inflict on the United States. The infiltration of bribes into U.S. institutions sullies the reputation of the U.S. financial system in the eyes of the international community. To ensure the U.S. financial sector can effectively compete in the global market, the United States has a powerful interest in maintaining its real and perceived integrity.[16] Recognizing the specific threats posed by laundered bribes not only dispels critics' doctrinal and expressive concerns, but also clarifies that, far from subverting the FCPA, these money laundering prosecutions promote its reputational aim.[17]

To correct the widespread misconception that the money laundering charges brought against foreign officials are end-runs around the FCPA, this Note proceeds as follows: Part II surveys the structure of the FCPA and explains why Congress refused to impose liability on foreign officials who accept bribes. Next, Part II discusses how U.S. anti-money laundering (AML) prohibitions extend to foreign bribery. Part III analyzes the DOJ's recent prosecutions of corrupt foreign officials for money laundering and then details the doctrinal and scholarly concerns levelled against these enforcement actions. Part IV argues that these critics misconstrue the distinctive harms inflicted on the United States when foreign officials launder their bribes, and that appreciating these harms resolves the critics' concerns. Part V offers three policy reforms to help the DOJ guide federal prosecutors in deciding when the harms of money laundering warrant indicting corrupt foreign officials.

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13. *See infra* Sections III.B and III.C. For an outstanding analysis of the problem of pretextual prosecution, see Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583 (2005).

14. *See infra* notes 136–45 and accompanying text.

15. *See infra* Section III.C.

16. *See* John Coffee, Opinion, *Reputation Is Crucial for Bank Investors*, FIN. TIMES (Dec. 22, 2012), https://www.ft.com/content/26c1b3c6-4b5f-11e2-88b5-00144feab49a.

17. *See infra* Part IV.

II. Statutory Foundations: The Foreign Corrupt Practices and Money Laundering Control Acts

In light of the FCPA's expansive approach to liability for those who offer or pay bribes, the statute's refusal to criminalize receiving a bribe is striking. To understand Congress' silence, this Note delves into the FCPA's legislative history and reveals that the FCPA's purpose was not altruistically to end corruption around the globe, but rather to enhance the United States' international reputation. This overriding aim clarifies that the FCPA leaves corrupt foreign officials unpunished due to the diplomatic concerns with apprehending, trying, and incarcerating these defendants.

Like the FCPA, the United States' AML regime serves to promote the real and perceived integrity of American institutions.[18] The primary enforcement provision of the Money Laundering Control Act (MLCA)[19] covers a wide variety of U.S. financial services firms, protecting them from the proceeds of a list of enumerated crimes, known as predicate offenses.[20] In 2001, Congress intertwined the MLCA and FCPA by adding foreign bribery as a predicate offense, enabling the DOJ to prosecute corrupt foreign officials for laundering their bribes.[21] This Note completes its exposition of the statutory foundations of the DOJ's recent money laundering prosecutions by surveying the MLCA and its 2001 amendments.

A. *The Structure and Purpose of the FCPA*

As the first major effort to combat foreign corruption through a national statute,[22] the FCPA's passage marked a sea change in the

18. *See Money Laundering*, U.S. Dep't Treasury, https://home.treasury.gov/policy-issues/terrorism-and-illicit-finance/money-laundering (last visited Dec. 23, 2020) ("Money laundering facilitates a broad range of serious underlying criminal offenses and ultimately threatens the integrity of the financial system.").

19. Money Laundering Control Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986) (codified as amended in scattered sections of 18 U.S.C.).

20. *See* Michael Levi & Peter Reuter, *Money Laundering*, 34 Crime & Just. 289, 299 (2006) ("The list of predicate crimes establishes the legal basis for criminalizing money laundering; only funds from the listed crimes are subject to these laws and regulations.").

21. *See* United States v. Chi, 936 F.3d 888, 893–94, 897 (9th Cir. 2019) (discussing this amendment).

22. *See FCPA Compliance Guide*, GAN Integrity, https://www.ganintegrity.com/portal/compliance-quick-guides/united-states/ (last visited Jan. 7, 2021) ("The US Foreign Corrupt Practices Act (FCPA) of 1977 is the first major piece of national legislation aimed at combating bribery and the first to introduce corporate liability, responsibility for third parties and extra-territoriality for corruption offenses.").

global struggle against bribery.[23] The FCPA prohibits Securities Exchange Act reporting issuers,[24] U.S. residents,[25] and business entities organized in U.S. jurisdictions[26] from offering or paying anything of value, either directly or through an agent, to a foreign official, for the purposes of improperly influencing the official or obtaining or retaining business.[27] Indeed, even persons other than reporting issuers, U.S. residents, and U.S. domiciled business entities can be held liable for such offers or payments, if they occur while the person is in the United States.[28]

Under the FCPA, the term "foreign official" is defined expansively to include not only the employees of foreign governments but also the agents and employees of any "instrumentality" of a foreign government.[29] Without further statutory guidance on what constitutes an instrumentality, courts have fashioned multi-factored tests to determine when a particular entity is an instrumentality, such that its employees are statutory foreign officials.[30] Commentators generally view these tests as too unwieldy to rectify the ambiguity surrounding what constitutes an instrumentality.[31] In practice, the malleable notion of an instrumentality has dramatically expanded the FCPA's reach, as the DOJ has secured plea agreements for corrupt payments to a wide variety of state-owned and -affiliated enterprises.[32]

Another feature of the FCPA that significantly increases the number of potential defendants is the statute's preoccupation with preventing parties from insulating themselves from liability. The FCPA expressly

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23. *See* Press Release, Transparency Int'l, Protect U.S. Landmark Anti-Bribery Law (Jan. 20, 2020), https://www.transparency.org/news/pressrelease/protect_us_landmark_anti_bribery_law.

24. *See* 15 U.S.C. § 78dd-1(a)(2018).

25. *See* 15 U.S.C. §§ 78dd-2(a), 78dd-2(h)(1)(A). This also extends to any U.S. citizen or national. *See id.*

26. *See* 15 U.S.C. § 78dd-2(h)(1)(B). Covered U.S. individuals and firms are known as "domestic concerns." *See* 15 U.S.C. §§ 78dd-2(a), 78dd-2(h)(1)(A).

27. *See* 15 U.S.C. §§ 78dd-1(a), 78dd-2(a).

28. *See* 15 U.S.C. § 78dd-3(a).

29. *See* 15 U.S.C. § 78dd-1(f)(1)(A).

30. *See* Recent Cases, United States v. Esquenazi, *Eleventh Circuit Defines "Government Instrumentality" Under the FCPA, 752 F.3d 912 (11th Cir. 2014)*, 128 HARV. L. REV. 1500, 1500 (2015).

31. *See, e.g.*, *id.* at 1507 ("Although the court purported to define 'instrumentality' with an eye toward helping companies and regulators determine which SOEs fall within the FCPA's reach, it ultimately provided unwieldy guidelines that lower courts are unlikely to refine."); Matthew W. Muma, Note, *Toward Greater Guidance: Reforming the Definitions of the Foreign Corrupt Practices Act*, 112 MICH. L. REV. 1337, 1353 (2014).

32. *See* Salbu, *Redeeming Bribery Laws*, *supra* note 2, at 662–63.

prohibits corrupt payments by any "agent . . . acting on behalf of" the defendant.[33] It also criminalizes making payments to third parties with the knowledge that any portion of the value given will be offered or given to a foreign official for improper purposes.[34] While these provisions close what would otherwise be an obvious loophole in the statute, the ambit of these provisions is controversial, since even persons far removed from the underlying corrupt payments can be investigated and prosecuted under the FCPA.[35]

The FCPA lessens its broad reach through several express exemptions from liability. Payments to facilitate routine government action by a foreign official—popularly known as "grease payments"—are permitted.[36] But the DOJ and SEC have interpreted this exception narrowly to cover only payments for non-discretionary government action, such as "processing visas, providing police protection or mail service, and supplying utilities like phone service, power, and water."[37] Additionally, the FCPA provides affirmative defenses if the payment was lawful under the written laws and regulations of the foreign official's country, or if the payment was a reasonable and bona fide expenditure directly related to promoting the defendant's services or performing a contract with a foreign government.[38]

Yet the most significant exclusion from the statute is not express, but rather implied by omission. In contrast to the many private parties that face potential FCPA liability, the law does not criminalize foreign officials' receipt of corrupt payments.[39] Given the FCPA's otherwise harsh approach to bribery, officials' impunity can appear puzzling at first

33. 15 U.S.C. § 78dd-1(a). For a detailed examination of the agency principles undergirding the FCPA, see Marcela E. Schaefer, Note, *Should a Parent Company Be Liable for the Misdeeds of Its Subsidiary? Agency Theories Under the Foreign Corrupt Practices Act*, 94 N.Y.U. L. REV. 1654 (2019).

34. 15 U.S.C. § 78dd-1(a)(3).

35. *See* United States v. Kozeny, 667 F.3d 122, 133–35 (2d Cir. 2011) (holding conscious avoidance is sufficient to satisfy the FCPA's knowledge requirement); Andrew Weissmann & Alixandra Smith, *Restoring Balance: Proposed Amendments to the Foreign Corrupt Practices Act*, U.S. CHAMBER COM. 3 (Oct. 2010), https://instituteforlegalreform.com/research/restoring-balance-proposed-amendments-to-the-foreign-corrupt-practices-act/.

36. *See The Foreign Corrupt Practices Act: An Overview*, JONES DAY (Jan. 2010), https://www.jonesday.com/en/insights/2010/01/the-foreign-corrupt-practices-act-an-overview.

37. *See* U.S. DEP'T OF JUST. & U.S. SEC. & EXCH. COMM'N, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 25 (Nov. 14, 2012), https://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf.

38. *See* 15 U.S.C. § 78dd-1(c).

39. *See* United States v. Castle, 925 F.2d 831, 834 (5th Cir. 1991) ("Congress had absolutely no intention of prosecuting the foreign officials involved, but was concerned solely with regulating the conduct of U.S. entities and citizens.").

blush. The statute's silence is particularly notable, because the FCPA's drafters were well aware that they could allow the DOJ to prosecute foreign officials for accepting bribes.[40] Indeed, in prohibiting the payment of bribes, "[t]he FCPA arguably extends its jurisdictional reach to the full extent permitted under customary international law."[41]

To appreciate why Congress chose not to proscribe the receipt of corrupt payments by foreign officials, one must look to the FCPA's legislative history. The immediate impetus for the FCPA was the Watergate investigation, when the Special Prosecutor revealed that several U.S. corporations had illegally contributed to Nixon's reelection campaign.[42] This finding spurred a groundbreaking SEC investigation into the prevalence of bribery by U.S. corporations.[43] Over 400 firms availed themselves of the SEC's amnesty program, revealing a series of high-profile bribes, including Lockheed's payment of more than $12 million to Japanese Prime Minister Kakuei Tanaka.[44] Congress responded with the FCPA.[45]

In drafting the FCPA, legislators acknowledged that its purpose was to restore the United States' standing abroad. On the heels of the Vietnam War and Watergate crisis, the revelation of widespread bribery by U.S. businesses jeopardized international goodwill towards the United States, at a moment when it sought to win over hearts and minds for the Cold War.[46] A House Report on the FCPA explained the "need for the legislation"[47] by emphasizing the United States' reputational interest in preventing U.S. firms from engaging in corruption:

> Bribery of foreign officials by some American companies casts a shadow on all U.S. companies. . . . Corporate bribery also creates severe foreign policy problems for the United States. The revelation of improper payments invariably tends to embarrass

40. *See* H.R. REP. NO. 95-640, at 12 n.3 (1977) (discussing Congress' ability to enact extraterritorial criminal laws); *see also Castle*, 925 F.2d at 835 ("Congress knew it had the power to reach foreign officials in many cases, and yet declined to exercise that power.").

41. William Magnuson, *International Corporate Bribery and Unilateral Enforcement*, 51 COLUM. J. TRANSNAT'L L. 360, 398 (2013).

42. *See* 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, 498–99 (2012).

43. *See* Brewster, *supra* note 4, at 1622.

44. *See id.* at 1622–24.

45. *See* Davis, *supra* note 42, at 498–99.

46. *See id.* at 499–500; Lindsay B. Arrieta, *Attacking Bribery at Its Core: Shifting Focus to the Demand Side of the Bribery Equation*, 45 PUB. CONT. L.J. 587, 592–93 (2016).

47. H.R. REP. NO. 95-640, at 4 (1977).

> 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.[48]

Thus, Congress' primary motivation in passing the FCPA was to promote the United States' international standing, rather than altruistically rid the world of an ethically repugnant practice.[49]

This reputational purpose illuminates why the FCPA does not criminalize foreign officials' receipt of bribes. Legislators realized that such an invasive application of U.S. law would raise "inherent jurisdictional, enforcement, and diplomatic difficulties" that would undermine the statute's goodwill-enhancing purpose.[50] Indeed, the marginal reputational benefit of prosecuting foreign officials as well as U.S. firms would be negligible, since prosecuting domestic businesses already demonstrates a commitment to rooting out corruption without threatening the political stability of other countries.[51] In the eyes of foreign nations, these prosecutions would represent more of a threat than an assurance.

The FCPA's refusal to punish corrupt foreign officials therefore accords with the statute's overriding policy aim of bolstering U.S. credibility abroad. Even as the FCPA's broad provisions and reliance on agency principles evinced Congress' commitment to punishing U.S. persons who engaged in corrupt payments, the statute remained silent on the culpability of the foreign officials who receive such payments. Although facially inconsistent, legislative history reveals that the FCPA's

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48. *Id.* at 5.

49. *See* Daniel Pines, Note, *Amending the Foreign Corrupt Practices Act to Include a Private Right of Action*, 82 CALIF. L. REV. 185, 188 (1994) ("The legislative history of the FCPA indicates that it was enacted to counter the adverse effects to foreign governments, American foreign policy, and American business when American corporations bribe foreign officials."); Leah M. Trzcinski, Note, *The Impact of the Foreign Corrupt Practices Act on Emerging Markets: Company Decision-Making in a Regulated World*, 45 N.Y.U. J. INT'L L. & POL. 1201, 1208–09 (2013); *see also* Philip M. Nichols, *The Neomercantilist Fallacy and the Contextual Reality of the Foreign Corrupt Practices Act*, 53 HARV. J. ON LEGIS. 203, 209 (2016).

50. H.R. REP. NO. 94-831, at 14 (1977) (Conf. Rep.); *see also* United States v. Castle, 925 F.2d 831, 835 (5th Cir. 1991) (observing that these difficulties formed the policy basis for Congress' refusal to punish foreign officials).

51. Positioning the United States as a protector of global stability was a key facet of the statute's purpose. As President Carter explained upon signing the FCPA, "Corrupt practices between corporations and public officials overseas undermine the integrity and stability of governments and harm our relations with other countries." Presidential Statement on Signing the Foreign Corrupt Practices Act, 1977, 2 PUB. PAPERS 2157 (Dec. 20, 1977).

asymmetrical approach to liability is entirely coherent with the statute's reputational motivation.

B. *The MLCA's Treatment of Foreign Bribery*

The MLCA provides a further bulwark against the corrosive effects of transnational crime on the integrity of U.S. businesses. As the primary ex post enforcement provision of the U.S. AML regime, the MLCA operates in conjunction with ex ante requirements[52] that financial institutions verify the identities of their customers[53] and report suspicious transactions to the government.[54] These requirements seek to prevent the manipulation of U.S. financial institutions to disguise the origins or ownership of tainted funds.[55] This process of manipulation, known as money laundering, consists of three steps: placement, when the funds are introduced into the financial system; layering, when the funds are distanced from their point of origin, often through complex transactions involving networks of bank accounts and shell corporations; and integration, when the funds are converted into apparently legitimate assets.[56]

Although the Bank Secrecy Act of 1970[57] was the first federal statute to target money laundering by imposing ex ante requirements on financial institutions, Congress only criminalized money laundering in 1986 when it passed the MLCA.[58] The MLCA prohibits certain transactions involving the proceeds of a "specified unlawful activity."[59] These crimes, often referred to as predicate offenses, are enumerated in the

52. *See* Levi & Reuter, *supra* note 20, at 297 ("It is useful to think of the regime as having two basic pillars, prevention and enforcement. The prevention pillar is designed to deter criminals from using institutions to launder the proceeds of their crimes and to create sufficient transparency to deter institutions from being willing to launder. Enforcement is designed to punish criminals (and their money-laundering associates) when, despite prevention efforts, they have successfully laundered those proceeds.").

53. *See* Heba Shams, *The Fight Against Extraterritorial Corruption and the Use of Money Laundering Control*, 7 L. & BUS. REV. AM. 85, 132 (2001).

54. *See* Jesse S. Morgan, Note, *Dirty Names, Dangerous Money: Alleged Unilateralism in U.S. Policy on Money Laundering*, 21 BERKELEY J. INT'L L. 771, 780 (2003).

55. *See* Shams, *supra* note 53, at 110.

56. *See* Mariano-Florentino Cuéllar, *The Tenuous Relationship Between the Fight Against Money Laundering and the Disruption of Criminal Finance*, 93 J. CRIM. L. & CRIMINOLOGY 311, 326–29 (2003); Levi & Reuter, *supra* note 20, at 311 (analyzing placement, layering, and integration).

57. Pub. L. No. 91-508, 84 Stat. 1114 (1970) (codified as amended in scattered sections of 12 and 15 U.S.C.).

58. *See* Shams, *supra* note 53, at 112.

59. *See* 18 U.S.C. § 1956(a) (2018).

statute.[60] Transacting in the proceeds of a predicate offense is a crime if done with the intent to promote further predicate offenses, or knowledge that the transaction is designed to launder assets.[61] Additionally, transmitting or transporting the proceeds of a predicate offense with a similar intent or knowledge is a distinct violation of the MLCA.[62] Even a transaction that neither promotes a further predicate offense nor seeks to launder assets can result in criminal liability, if the transaction involves more than $10,000 that the defendant knows to be the proceeds of a crime.[63]

The MLCA's provisions are notoriously broad, leading two prominent scholars to conclude that the law "covers pretty much any handling of money or property that is connected to criminal activities."[64] There are more than 250 predicate offenses under the MLCA.[65] Although prosecutors must prove that the funds are the proceeds of a predicate offense beyond a reasonable doubt, they can do so regardless of whether the defendant was charged for the underlying crime.[66] Indeed, prosecutors can satisfy the elements of an MLCA claim even when the defendant is acquitted of the predicate offense.[67]

Congress enacted the MLCA to serve reputational ends that parallel those of the FCPA. While legislators originally emphasized the need to deter organized crime and trade in narcotics,[68] they also recognized the threat that money laundering posed to the real and perceived

60. *See id.* § 1956(c)(7) (defining specified unlawful activity).

61. *See id.* § 1956(a)(1).

62. *See id.* § 1956(a)(2).

63. *See* 18 U.S.C. § 1957(a); *see also* CHARLES DOYLE, CONG. RES. SERV., RL33315, MONEY LAUNDERING: AN OVERVIEW OF 18 U.S.C. § 1956 AND RELATED FEDERAL CRIMINAL LAW 24 (2017) ("The government must prove that the defendant knew the funds or other property in the transaction was 'criminally derived property,' that is, the proceeds, or funds derived from the proceeds, of criminal activity. The government need not show that the defendant knew that proceeds were the product of a 'specified unlawful activity,' but the proceeds must in fact be derived from a specified unlawful activity (predicate offense)." (citations omitted)).

64. Richman & Stuntz, *supra* note 13, at 629; *see also* Cuéllar, *supra* note 56, at 337 ("[A]lmost any post-crime activity undertaken by someone with money generated from some list of crimes risks criminal liability for money laundering.").

65. *See* United States v. Santos, 553 U.S. 507, 516 (2008) ("There are more than 250 predicate offenses for the money-laundering statute . . . .").

66. *See* United States v. Silver, 948 F.3d 538, 576 (2d Cir. 2020) ("Significantly, an individual need not have been *convicted* of the underlying criminal offense in order to be convicted of laundering the proceeds thereof.").

67. *See* United States v. Richard, 234 F.3d 763, 768–69 (1st Cir. 2000).

68. *See* S. REP. NO. 99-433, at 4 (1986) ("Money laundering is a crucial financial underpinning of organized crime and narcotics trafficking.") (quoting 132 CONG. REC. S9627 (daily ed. July 24, 1986) (statement of Sen. Biden)).

integrity of the U.S. financial system.[69] However, Congress did not originally deem the risk of corrupt foreign officials laundering their bribes sufficiently serious to include foreign bribery as a specified unlawful activity under the MLCA.

In amending the MLCA, the PATRIOT Act[70] revised Congress' prior assessment of the laundering risks of foreign bribery.[71] Following the September 11th attacks, legislators were determined to disrupt terrorist financing networks.[72] Advocates of stronger AML laws seized the opportunity, reviving prior proposals to amend the MLCA and combining them into the Financial Anti-Terrorism Act.[73] The House of Representatives passed the Financial Anti-Terrorism Act in a 412 to 1 vote, before the bill was incorporated into the PATRIOT Act.[74] By enacting the PATRIOT Act, Congress expanded the MLCA's list of predicate offenses to include "an offense against a foreign nation involving . . . bribery of a public official, or the misappropriation, theft, or embezzlement of public funds by or for the benefit of a public official."[75] Despite the PATRIOT Act's obvious focus on terrorist finance, legislators held fast to the MLCA's reputational purpose, explaining that the introduction of foreign bribery as a predicate offense would "send a strong signal that the United States will not tolerate the use of its financial institutions for the purpose of laundering the proceeds of such activities."[76]

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69. *See* H.R. REP. NO. 99-746, at 26 (1986) ("[T]he good reputation of financial institutions caught up in the web of laundered funds can be deeply scarred in the eyes of the public—even though its officers or employees are innoce[n]t.").

70. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified in scattered sections of 8, 12, 18, 21, 22, 28, 31, 47, and 50 U.S.C.).

71. *See* Kathleen A. Lacey & Barbara Crutchfield George, *Crackdown on Money Laundering: A Comparative Analysis of the Feasibility and Effectiveness of Domestic and Multilateral Policy Reforms*, 23 NW. J. INT'L L. & BUS. 263, 292 (2003).

72. *See* Cuéllar, *supra* note 56, at 360–61; Levi & Reuter, *supra* note 20, at 310.

73. 147 CONG. REC. H6939 (daily ed. Oct. 17, 2001) (statement of Rep. Bentsen) ("I rise today in strong support of H.R. 3004, the Financial Anti-terrorism Act of 2001. . . . This is not the first time that this legislation has come to light. . . . [W]hile we were unable to get it through the House and through the other body last year, and while our motivation last year was probably less focused on terrorism as it was on public corruption and other forms and drug-running corruption and other forms of money laundering, the body of the legislation is encompassed in this bill; and I am glad to see it is finally seeing the light of day.").

74. *See* Financial Anti-Terrorism Act of 2001, H.R. 3004, 107th Cong., Roll Vote No. 390 (2001).

75. 18 U.S.C. § 1956(c)(7)(B)(iv) (2018).

76. H.R. REP. NO. 107-250, at 55 (2001).

As amended by the PATRIOT Act, the MLCA expressly permits the DOJ to prosecute foreign officials who launder bribes through the U.S. financial system.[77] Foreign officials who violate the MLCA therefore stand in a curious legal position, since the FCPA grants them impunity for accepting bribes, while the MLCA treats that same activity as a predicate offense. This apparent tension is exacerbated by the fact that money laundering is often incident to corruption, since officials typically hide or spend their bribes.[78]

III. Bribery-Based Money Laundering Prosecutions and Their Critics

Corrupt foreign officials' precarious place in U.S. criminal law has not given the DOJ pause. Instead, the DOJ has secured convictions of foreign officials under the MLCA for laundering bribes in several high-profile cases.[79] These prosecutions have sparked judicial and scholarly critiques.[80] Although judges' and academics' objections raise distinct concerns—the former doctrinal[81] and latter expressive[82]—they rest on the common premise that the DOJ's money laundering charges are fundamentally end-runs around the FCPA.[83] This Part surveys three of the most significant money laundering cases against corrupt foreign officials, before examining the legal and scholarly criticisms of the DOJ's approach.

A. *Prosecuting Foreign Officials for Laundering Bribes*

When the DOJ prosecutes a foreign official for laundering bribes, the government's legal theory is relatively straightforward. For example, assuming bribery is illegal in the corrupt official's home country, a foreign official violates the MLCA if she transfers bribes into a U.S.

77. *See* Linda M. Samuel, *Developments in International Forfeiture and Money Laundering Cooperation*, 55 U.S. Att'ys Bull. 51, 58 (2007).

78. *See* Barbara Kowalczyk-Hoyer & Max Heywood, Top Secret: Countries Keep Financial Crime Fighting Data to Themselves 2 (2017) ("The majority of large-scale corruption scandals, from Ukraine to Brazil, have featured banks transferring or managing funds for the perpetrators and their associates."); Shams, *supra* note 53, at 118 ("In most cases . . . corrupt officials need to keep a façade of propriety in order to maintain their positions. For them money laundering becomes crucial. Even for brutal dictators, the risk of eventual revolution induces them to seek to keep their wealth or part of it out of the reach of their defrauded people in safe offshore money havens.").

79. *See infra* Section III.A.

80. *See infra* Sections III.B–III.C.

81. *See infra* Section III.B.

82. *See infra* Section III.C.

83. *See, e.g.*, *infra* notes 147, 167 and accompanying text.

bank account.[84] Due to the expansive nature of U.S. criminal jurisdiction, however, the connection to the United States need not be as direct as this paradigmatic case. If any aspect of the actus reus occurs in the United States, the DOJ can prosecute the foreign official for laundering her bribes.[85] Indeed, the mere fact that a bribe was wired through a U.S. bank or paid in U.S. dollar negotiable instruments establishes jurisdiction.[86] The primary difficulty for the DOJ's affirmative case is showing that the underlying corruption, qua predicate offense, violated the laws of a foreign nation.[87] This element forces federal courts to determine whether the relevant foreign law indeed criminalizes bribery for purposes of the MLCA,[88] and then engage in the more vexing task of actually applying the foreign law.[89] But while the legal dimensions of the prosecution's affirmative case remain generally unproblematic when the DOJ charges corrupt officials with money laundering, the underlying factual allegations are often nuanced, as the following three cases illustrate.

The first major money laundering prosecution of a corrupt foreign official was the case of Pavel Lazarenko. While Prime Minister of Ukraine, Lazarenko obtained millions of dollars from businesses operating in Ukraine by requiring them "to pay him fifty percent of their profits in exchange for his influence to make the business successful."[90] Businesses transmitted these funds to Lazarenko's bank accounts in Switzerland and Antigua, before he transferred the money to his U.S. accounts.[91] In 1997, Lazarenko's fortunes reversed when news outlets

84. *See supra* notes 61–63.

85. *See* Shams, *supra* note 53, at 129–30 ("U.S. criminal jurisdiction extends to offences that are committed in whole or in part within its borders. Because of the very fluid nature of the *actus reus* in money laundering, this territorial link to the U.S. jurisdiction can be stretched very far.").

86. *See id.* at 130.

87. *See* 18 U.S.C. § 1956(c)(7)(B) (requiring "an offense against a foreign nation").

88. Courts have developed tests to guide such assessments. *See, e.g.*, United States v. Chi, 936 F.3d 888, 897 (9th Cir. 2019) ("[B]ased on the common understanding of the term at the time the statute was enacted, 'bribery' contained several elements. First, it required two parties—one who 'paid,' 'offered,' or 'conferred' the bribe, and one who 'received,' 'solicited,' or 'agreed to accept' it. Second, it required something to be given by the bribe-giver—either a 'private favor,' a 'pecuniary benefit,' or 'any benefit.' And third, it required something to be given by the bribe-taker—either 'official action,' 'the recipient's decision, opinion, recommendation, vote or other exercise of discretion as a public servant,' or 'a violation of a known legal duty as public servant.' The foreign law at issue, Article 129 of the South Korean Criminal Code, contains all three requirements.").

89. Siddharth Dadhich, Note, *Old Dog, New Tricks: Fighting Corruption in the African Natural Resource Space with the Money Laundering Control Act*, 44 AM. J. CRIM. L. 71, 112 (2016).

90. United States v. Lazarenko, 564 F.3d 1026, 1030 (9th Cir. 2009).

91. *See id.* at 1031.

reported on the wealth he had amassed.[92] Fleeing Ukraine, Lazarenko arrived in New York City seeking political asylum.[93] Federal authorities took him into custody and charged him with violating the MLCA.[94] A jury ultimately convicted Lazarenko.[95] Because Lazarenko was indicted before the PATRIOT Act amendment added bribery as a predicate offense under the MLCA, prosecutors alleged that his bribes were proceeds of "extortion."[96] Appealing his conviction, Lazarenko argued that his misconduct constituted bribery rather than extortion. Writing for the Ninth Circuit, Judge McKeown rejected Lazarenko's contention, noting that "[a]t common law, extortion was a crime that resembled what we know as bribery, and involved an abuse of power by a public official."[97] This construction of the MLCA did not render the PATRIOT Act's addition of foreign bribery surplusage, since bribe givers could also be liable under that provision, unlike in cases of extortion.[98]

The DOJ brought another significant corruption-based money laundering case against Maria de los Angeles Gonzalez de Hernandez, an official at Venezuela's state-owned development bank.[99] Gonzalez accepted bribes from a U.S. broker-dealer, Direct Access Partners, in exchange for hiring its traders to execute bond transactions on behalf of the development bank.[100] Direct Access Partners inflated the mark-ups on purchases and mark-downs on sales of the securities and split the resulting $60 million in excess fees with Gonzalez.[101] To launder the funds further, Gonzalez transferred them through a complex of shell corporations and offshore accounts in numerous countries, including Switzerland.[102] While the broker-dealers pleaded guilty to violating the FCPA, Gonzalez pleaded guilty to an MLCA offense.[103]

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92. *See* Michael Wines, *Ukrainian Seeks U.S. Asylum*, N.Y. TIMES (Feb. 25, 1999), https://www.nytimes.com/1999/02/25/world/ukrainian-seeks-us-asylum.html.

93. *See id.*

94. *See Lazarenko*, 564 F.3d at 1032 (explaining that Lazarenko was charged with violating 18 U.S.C. § 1956(a)(1)(B)).

95. *Id.* at 1030.

96. *Id.* at 1032.

97. *Id.* at 1039.

98. *Id.*

99. *See* Low, Lamoree & London, *supra* note 7, at 585.

100. *See id.*

101. *See generally* Marshall, *supra* note 8, at 1296; Press Release, U.S. Dep't of Justice, High-Ranking Bank Official at Venezuelan State Development Bank Pleads Guilty in Manhattan Federal Court to Participating in Bribery Scheme (Nov. 18, 2013), https://www.justice.gov/usao-sdny/pr/high-ranking-bank-official-venezuelan-state-development-bank-pleads-guilty-manhattan.

102. *See* Press Release, Dep't of Justice, *supra* note 101.

103. *See id.*

A final example of the DOJ's money laundering enforcement efforts against corrupt foreign officials concerned Robert Antoine and Jean Rene Duperval. Three U.S. telecom firms bribed Antoine and Duperval in exchange for preferable rates from the state-owned Telecommuncations D'Haiti, where Antoine and Duperval were senior officials.[104] The U.S. firms disguised the bribes by transferring them to an intermediary entity, which in turn sent them to a shell company under false invoices.[105] Ultimately, the shell company used the bribes to buy real estate for Antoine and Duperval's benefit.[106] Antoine pleaded guilty to conspiracy to commit money laundering, but Duperval insisted on a trial.[107] After more than two years of litigation, a jury convicted Duperval of nineteen counts of MLCA violations.[108]

As these three cases demonstrate, the DOJ has proven willing to prosecute foreign officials for laundering bribes under the amended MLCA, despite the FCPA's insistence on immunity for those who accept bribes. But far from settling the status of corrupt foreign officials, the DOJ's success in these and similar cases has only increased opposition from critics who view these prosecutions as doctrinally and expressively suspect.

B. *Legal Challenges*

Despite the facial plausibility and demonstrated success of the DOJ's legal theory in its money laundering cases against corrupt foreign officials, these prosecutions raise several doctrinal concerns. Favorable precedent has obviated two major legal challenges for the DOJ's prosecutions of foreign officials—namely, potential immunity under the

104. *See* Bruce W. Klaw, *A New Strategy for Preventing Bribery and Extortion in International Business Transactions*, 49 HARV. J. ON LEGIS. 303, 335 (2012).

105. *See* Press Release, U.S. Dep't of Justice, Florida Businessman Pleads Guilty to Money Laundering in Foreign Bribery Scheme (Feb. 19, 2010), https://www.justice.gov/opa/pr/florida-businessman-pleads-guilty-money-laundering-foreign-bribery-scheme.

106. *See id.*

107. *See* Klaw, *supra* note 104, at 336; Press Release, U.S. Dep't of Justice, Former Haitian Government Official Sentenced to Prison for His Role in Money Laundering Conspiracy Related to Foreign Bribery Scheme (June 2, 2010), https://www.justice.gov/opa/pr/former-haitian-government-official-sentenced-prison-his-role-money-laundering-conspiracy.

108. *See* Klaw, *supra* note 104, at 336; Press Release, U.S. Dep't of Justice, Former Haitian Government Official Sentenced to Nine Years in Prison for Role in Scheme to Launder Bribes (Mar. 21, 2012), https://www.justice.gov/opa/pr/former-haitian-government-official-sentenced-nine-years-prison-role-scheme-launder-bribes.

Foreign Sovereign Immunities Act (FSIA)[109] and the act of state doctrine.[110] However, the most compelling judicial critique of the DOJ's enforcement efforts remains a live legal question. While the judiciary has signaled that these prosecutions might amount to end-runs around the will of Congress in violation of the *Gebardi* principle, no court has ever ruled on the issue.[111]

The FSIA's apparent problems for money laundering prosecutions of corrupt foreign officials have been dispelled through favorable case law.[112] Under the FSIA, "a foreign state shall be immune from the jurisdiction of the courts of the United States" unless the case satisfies an enumerated exception to this broad rule.[113] The FSIA's Delphic pronouncement has generated significant disagreement among courts.[114] Indeed, the Supreme Court recently declined to resolve a circuit split on whether the FSIA even applies to criminal cases.[115] Although the FSIA expressly exempts lawsuits regarding a foreign sovereign's "commercial activity,"[116] courts have rejected attempts to avoid the FSIA by characterizing money laundering as commerce.[117] Nevertheless, the

109. Foreign Sovereign Immunities Act (FSIA) of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended in scattered sections of 28 U.S.C.).

110. *See* Elizabeth Spahn, *Discovering Secrets: Act of State Defenses to Bribery Cases*, 38 HOFSTRA L. REV. 163, 183 ("The act of state doctrine is a judge-made doctrine resting on both international comity and domestic separation of powers policy underpinnings."). Professor Yockey has identified the FSIA and act of state doctrine as potential impediments to prosecuting corrupt officials. *See* Yockey, *supra* note 9, at 804–05 ("[Foreign official] defendants may seek sovereign immunity under the U.S. Foreign Sovereign Immunities Act, or they may invoke the act of state doctrine. . . .").

111. *See infra* note 144 and accompanying text.

112. *Cf.* JENNIFER K. ELSEA, CONG. RES. SERV., R41379, *SAMANTAR V. YOUSEF*: THE FOREIGN SOVEREIGN IMMUNITIES ACT (FSIA) AND FOREIGN OFFICIALS 9 (2013) (explaining that in light of recent decisions "individual foreign officials have limited recourse to the FSIA to shield themselves from liability in U.S. courts").

113. 28 U.S.C. § 1604 (2018).

114. *See* Shobha V. George, Note, *Head-of-State Immunity in the United States Courts: Still Confused After All These Years*, 64 FORDHAM L. REV. 1051, 1061 (1995).

115. *See* Lawrence Hurley, *U.S. Top Court Rebuffs Mystery Company in Mueller Subpoena Fight*, REUTERS (Mar. 25, 2019), https://www.reuters.com/article/uk-usa-court-mueller-grandjury-idUSKCN1R61KS; *see also* Sup. Ct. Emergency Appl. for Immediate Stay at 22–24, *In re* Grand Jury Subpoena, No. 18-A669 (Dec. 22, 2018) (describing the circuit split).

116. 28 U.S.C. § 1605(a)(2) (2018).

117. *See In re* Terrorist Attacks on Sept. 11, 2001, 349 F. Supp. 2d 765, 793 (S.D.N.Y. 2005) ("The Second Circuit noted in *Goodwin* that '[m]oney laundering is a quintessential economic activity,' but that statement has no bearing here. In *Goodwin* the court was not deciding whether money laundering is a commercial activity for purposes of the FSIA. The Second Circuit has made very clear that, for purposes of the FSIA, a commercial activity must be one in which a private person can engage lawfully. Since money laundering is an illegal activity, it cannot be the basis for

FSIA does not pose a serious threat to the DOJ's money laundering cases against corrupt foreign officials. As the Supreme Court clarified in *Samantar v. Yousuf*, individual foreign officials cannot invoke the protections of the FSIA, even for acts undertaken in their official capacities.[118] Thus, assuming the statute applies to criminal matters, the FSIA still does not immunize foreign officials who launder their bribes from prosecution.

Although the act of state doctrine presents a more formidable threat to money laundering prosecutions of foreign officials, precedent on this issue is similarly favorable for the DOJ.[119] The act of state doctrine provides that if adjudicating a case would require a U.S. court to declare invalid any act of a foreign sovereign performed within its own territory, then the court will abstain from hearing the dispute.[120] Unlike the FSIA, the act of state doctrine covers individual foreign officials' actions, making it a more plausible objection to the DOJ's money laundering prosecutions of corrupt foreign officials.[121] Nevertheless, courts have rejected challenges to these enforcement efforts based on the act of state doctrine.[122]

The most prominent ruling on this issue concerned James Giffen, an American economic advisor to President Nazarbayev of Kazakhstan.[123] For his assistance brokering international oil deals with companies like Mobil, Giffen received a diplomatic passport from Kazakhstan.[124] But beyond negotiating the transactions on behalf of Kazakhstan, Giffen

applicability of the commercial activities exception." (quoting United States v. Goodwin, 141 F.3d 394, 399 (2d Cir. 1997))).

118. Samantar v. Yousuf, 560 U.S. 305, 315 (2010). *Samantar* ended a longstanding circuit split on this question. *See* FED. JUDICIAL CTR., THE FOREIGN SOVEREIGN IMMUNITIES ACT: A GUIDE FOR JUDGES 38–39 (2013), https://www.fjc.gov/sites/default/files/2014/FSIAGuide2013.pdf.

119. *See* United States v. Giffen, 326 F. Supp. 2d 497, 502 (S.D.N.Y. 2004).

120. *See* W.S. Kirkpatrick & Co., Inc. v. Envtl. Tectonics Corp., Int'l, 493 U.S. 400, 405 (1990) ("In every case in which we have held the act of state doctrine applicable, the relief sought or the defense interposed would have required a court in the United States to declare invalid the official act of a foreign sovereign performed within its own territory."); Michael J. Bazyler, *Abolishing the Act of State Doctrine*, 134 U. PA. L. REV. 325, 327 (1986).

121. *See* Spahn, *supra* note 110, at 184–85 ("Unlike the FSIA, the act of state doctrine may be raised in cases where the foreign sovereign is not him or herself personally a defendant. In this respect, the act of state doctrine provides broader shields than the FSIA."). Indeed, in the final paragraph of *Samantar*, Justice Stevens noted that the defendant might still be immune due to the act of state doctrine. *See Samantar*, 560 U.S. at 325–26.

122. *See* Pamela K. Bookman, Note, *Solving the Extraterritoriality Problem: Lessons from the Honest Services Statute*, 92 VA. L. REV. 750, 751 (2006).

123. *See* Alexander Cooley & J.C. Sharman, *Blurring the Line Between Licit and Illicit: Transnational Corruption Networks in Central Asia and Beyond*, 34 CENT. ASIAN SURV. 11, 22 (2015).

124. *See id.*

also took portions of the proceeds, distributing the gains to himself and other senior officials through a network of offshore bank accounts and shell companies.[125] When Giffen returned to the United States in 2003, he was promptly arrested and charged with violating the FCPA and MLCA.[126] Giffen moved to dismiss the indictment, arguing that because he transmitted the funds while acting as an official agent of the Kazakh government, deeming the payments illicit would run afoul of the act of state doctrine.[127] The district court rejected Giffen's claim and instead adopted a rationale with wide-reaching implications for the DOJ's money laundering prosecutions of foreign officials: because the act of state doctrine only applies to official acts performed *within the foreign sovereign's territory*, transnational money laundering necessarily falls outside its protective ambit.[128] Accordingly, corrupt foreign officials who launder their bribes abroad cannot invoke the act of state doctrine to escape prosecution, regardless of whether their misconduct constitutes an official act of a foreign sovereign.

But the most damaging judicial challenge to the DOJ's money laundering prosecutions of foreign officials remains an open legal question. A bulwark against prosecutorial overreach in defiance of the will of Congress, the *Gebardi* principle is a well-established feature of U.S. criminal law.[129] The eponymous case of *Gebardi v. United States* concerned the Mann Act, which prohibited transporting a woman across state lines for the purpose of engaging in prostitution, debauchery, or for any other immoral purpose.[130] Though the statute did not impose any penalty on the transported woman, prosecutors indicted a transported woman for *conspiring* to violate the Mann Act.[131] The Supreme Court concluded that the indictment was invalid.[132] The Court admonished that conspiracy liability is improper for any class of individuals whose participation is an inseparable incident of an offense, yet whom Congress clearly intended to leave unpunished.[133] Otherwise,

125. *See id.*

126. *See id.*

127. *See* United States v. Giffen, 326 F. Supp. 2d 497, 502 (S.D.N.Y. 2004).

128. *See id.* at 503; Spahn, *supra* note 110, at 201 ("Because the actions alleged, delivering and laundering the alleged bribe money, occurred in the United States and in Switzerland, the territoriality element of the act of state doctrine cannot be met, even assuming arguendo that Giffen really was an official agent of the Republic of Kazakhstan.").

129. *See* Shu-en Wee, Note, *The* Gebardi *"Principles"*, 117 COLUM. L. REV. 115, 120 (2017).

130. *See* Gebardi v. United States, 287 U.S. 112, 118 (1932).

131. *See id.* at 115–16.

132. *See id.* at 123.

133. *See id.*

prosecutors could easily undermine legislative policy prescriptions and subvert the separation of powers.[134]

Courts have concluded that the FCPA's asymmetric approach to punishment is sufficiently analogous to the Mann Act to raise *Gebardi* concerns.[135] The Fifth Circuit in *United States v. Castle*[136] delivered a stern rebuke to the DOJ's early efforts to prosecute corrupt foreign officials.[137] *Castle* arose out of bribes that the employees of a U.S. firm, the Eagle Bus Company, paid to Canadian officials to secure a contract with the Saskatchewan provincial government.[138] When the DOJ charged the foreign officials with conspiring to violate the FCPA, the officials moved to dismiss the indictment.[139] The officials argued that because receipt of a corrupt benefit is inherently incident to bribery of a foreign official under the FCPA, and yet the statute leaves these officials unpunished, prosecuting corrupt foreign officials for conspiring to violate the FCPA is prohibited under *Gebardi*.[140] Adopting the reasoning of the district court below, the Fifth Circuit agreed with defendants.[141] To support its claim that in enacting the FCPA Congress intended to leave foreign officials unpunished, the *Castle* Court surveyed the statute's legislative history and concluded that the FCPA's refusal to criminalize the receipt of bribes reflected Congress' determination that "resolving the diplomatic, jurisdictional, and enforcement difficulties that would arise upon the prosecution of foreign officials was not worth the minimal deterrent value of such prosecutions."[142] Although the DOJ has since refrained from charging corrupt foreign officials with conspiracy to violate the FCPA, *Castle* has continued to cast a long shadow on the DOJ's attempts to prosecute foreign officials.[143]

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134. *See id.*; Wee, *supra* note 129, at 124 ("In the context of the *Gebardi* case itself, this policy not to punish meant that the conspiracy statute could not be used to frustrate the legislative policy to grant a certain class of people immunity from liability.").

135. *See, e.g.*, United States v. Hoskins, 902 F.3d 69, 101 (2d Cir. 2018) (Lynch, J., concurring) (explaining the *Gebardi* principle's applicability to the FCPA).

136. 925 F.2d 831 (5th Cir. 1991).

137. *See* Miwa Shoda & Andrew G. Sullivan, *Attacking Corruption at Its Source: The DOJ's Recent Efforts to Prosecute Bribe-Taking Foreign Officials*, 23 CAL. INT'L L.J. 29, 30 (2015).

138. *Castle*, 925 F.2d at 832.

139. *See id.*

140. *See id.*

141. *See id.* at 836 ("As in *Gebardi*, it would be absurd to take away with the earlier and more general conspiracy statute the exemption from prosecution granted to foreign officials by the later and more specific FCPA."); Dadhich, *supra* note 89, at 78.

142. *Id.* at 835.

143. *See* Shoda & Sullivan, *supra* note 137, at 30 ("The Fifth Circuit's decision in *Castle* largely halted enforcement efforts against bribe-taking officials for nearly two decades. However, over the

The seeds of doubt sown by *Castle* blossomed into a direct judicial challenge to the DOJ's money laundering prosecutions of foreign officials in *United States v. Siriwan*.[144] Just as in the prosecutions of Lazarenko, Hernandez, Antoine, and Duperval,[145] the defendant in *Siriwan* was a corrupt foreign official.[146] While serving as Thailand's minister of tourism, Juthamas Siriwan accepted bribes from two U.S. movie producers in exchange for awarding them lucrative government contracts.[147] To disguise these bribes, Siriwan and the Americans created the impression that Siriwan was dealing with multiple businesses by transmitting the funds from a series of U.S. bank accounts.[148] The DOJ charged Siriwan with violating the MLCA, based on the predicate offense of foreign bribery.[149] Even as Siriwan remained a fugitive in Thailand, he moved to dismiss the indictment through a special appearance of counsel.[150] At a hearing on Siriwan's motion, Judge Wu offered a direct judicial critique of the DOJ's money laundering cases against corrupt foreign officials:

> [B]ecause Congress has specifically exempted foreign officials from what I consider to be the bribery penumbra . . . I have trouble with the government's position that they can somehow get around it by charging money laundering as based upon the bribery as the specified unlawful activity when the foreign officials can't be guilty of that.[151]

In essence, Judge Wu contended that the money laundering charges were pretextual end-runs around the FCPA.[152] Invoking *Castle*, Judge Wu indicated that he planned to rule against the DOJ based on

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past five years the DOJ has launched a series of prosecutions of bribe-taking foreign officials under laws other than the FCPA.").

144. *See* Dadhich, *supra* note 89, at 107.

145. *See supra* Section III.A.

146. *See* Klaw, *supra* note 104, at 336.

147. *See* Dadhich, *supra* note 89, at 106.

148. *See* Jorge Mestre, *A Bribe New World: The Federal Government Gets Creative in Chasing Foreign Officials for Taking Bribes*, 26 U. FLA. J.L. & PUB. POL'Y 1, 17 (2015).

149. *See* Indictment at 16, United States v. Siriwan, No. 09-00081 (C.D. Cal. Jan. 28, 2009).

150. *See* GIBSON DUNN, 2019 YEAR-END FCPA UPDATE 21 (2020), https://www.gibsondunn.com/wp-content/uploads/2020/01/2019-year-end-fcpa-update.pdf.

151. Transcript of Hearing on Defendants' Motion to Dismiss the Indictment at 25, *Siriwan*, No. CR 09-81-GW (C.D. Cal. Feb. 7, 2012) (Wu, J.).

152. *See id.* at 16 ("[W]hat you're saying is: Well, even though we can't prosecute them for the bribery situation, we can prosecute them for engaging in a situation where they agreed to be paid by money which is sent to them, which is the bribe, as long as it involves our banking system.").

Gebardi.[153] Such a ruling would have significantly stymied the DOJ's efforts to enforce the MLCA based on foreign bribery; however, Judge Wu never issued the threatened decision.[154] Instead, Thai prosecutors instituted domestic criminal proceedings against Siriwan, leading Judge Wu to stay the case, and the DOJ to ultimately abandon its charges against him.[155]

While FSIA or act-of-state challenges to the DOJ's money laundering prosecutions of foreign officials are legally unavailing,[156] Judge Wu's claim that these prosecutions represent an improper end-run around the FCPA remains a potentially devastating objection to the DOJ's recent enforcement strategy.[157]

C. *Academic Critiques*

In addition to the foregoing legal challenges, the DOJ's prosecution of foreign officials for money laundering has faced significant scholarly criticism.[158] Though academic commentators share Judge Wu's view that the DOJ's money laundering prosecutions are pretextual,[159] they emphasize the expressive shortcomings of these cases, rather than their doctrinal deficiencies.[160]

Expressive theories of punishment are integral to contemporary criminal law scholarship.[161] On the expressive view, because criminal acts carry social meanings, the perpetrator of a crime sends a message

153. *See id*. at 9.

154. *See* Dadhich, *supra* note 89, at 107–08.

155. *See* GIBSON DUNN, *supra* note 150, at 21 (explaining that Siriwan ultimately received a fifty-year sentence in Thai court).

156. *See supra* notes 108–21 and accompanying text.

157. *See* Shoda & Sullivan, *supra* note 137, at 32 ("[G]iven that the DOJ's approach is still relatively new, and that there is no definitive appellate authority evaluating its propriety, an opportunity remains for foreign officials accused of laundering funds that flow from an FCPA violation to raise the legal issue highlighted in the *Siriwan* proceedings as a defense in future DOJ prosecutions. If it does turn out that this issue is dormant rather than dead, the resurrection of this question could pose a significant hurdle to the DOJ's efforts to 'attack corruption at its source.'" (citation omitted)).

158. *See, e.g.*, Klaw, *supra* note 104, at 337.

159. *See supra* note 144 and accompanying text.

160. *See infra* note 166 and accompanying text.

161. *See, e.g.*, Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363, 1364 (2000) (noting the "popularity of expressive theories" in legal scholarship); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2044 (1996) ("The criminal law is a prime arena for the expressive function of law.").

about the worth of the victim or the validity of a community norm.[162] Punishment sends an equal and opposite message, reaffirming the value of that which the transgressor has demeaned and refuting the transgressor's falsely professed superiority.[163] Accordingly, by criminalizing and punishing certain actions, the legal system reflects and reifies the values of the community.[164]

A commitment to the expressive dimension of criminal law underlies commentators' aversion to pretextual prosecutions. As Professors Richman and Stuntz explain, a disconnect between the transgression that motivated the prosecution and the crime ultimately charged muddies the law's expressive signals.[165] By condemning the wrong aspect of the defendant's conduct, pretextual prosecutions fail to refute the particular message of disrespect conveyed by the transgressor.[166]

Academic commentators concur that the DOJ's money laundering prosecutions of foreign officials are pretextual and therefore expressively deficient, even as scholars disagree on what messages the law should send in such cases. This shared view invariably associates the DOJ's bribery-based money laundering enforcement efforts to the FCPA—averring that prosecutors exploit the broad proscriptions of the MLCA to circumvent the FCPA's refusal to punish foreign officials.[167]

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162. *See* Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659, 1678 (1992) ("We care about what people say by their actions because we care about whether our own value, and the value of others, will continue to be respected in our society. The misrepresentation of value implicit in moral injuries not only violates the entitlements generated by their value, but also threatens to reinforce belief in the wrong theory of value by the community.").

163. *See id.* at 1686 ("[R]etribution is a response to a wrong that is intended to vindicate the value of the victim denied by the wrongdoer's action through the construction of an event that not only repudiates the action's message of superiority over the victim but does so in a way that confirms them as equal by virtue of their humanity.").

164. *See* Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 598 (1996) ("By imposing the proper form and degree of affliction on the wrongdoer, society says, in effect, that the offender's assessment of whose interests count is wrong. It follows, moreover, that when society deliberately forgoes answering the wrongdoer through punishment, it risks being perceived as endorsing his valuations; hence the complaint that unduly lenient punishment reveals that the victim is worthless in the eyes of the law.").

165. *See* Richman & Stuntz, *supra* note 13, at 586.

166. *See* Avlana Eisenberg, *Expressive Enforcement*, 61 UCLA L. REV. 858, 881 (2014) (analyzing how "prosecutors send expressive messages through their charging decisions").

167. *See, e.g.*, Mestre, *supra* note 148, at 24–25 ("The DOJ and SEC have decided to go after foreign bribe takers. In doing so, they have demonstrated a willingness to think creatively and stretch other criminal statutes to cover conduct that the FCPA expressly excludes . . . ."); Shoda & Sullivan, *supra* note 137, at 29 ("[T]he DOJ recently has changed course by side-stepping the FCPA and instead prosecuting these foreign officials under other laws, most commonly the

As quintessential pretextual prosecutions, the DOJ's money laundering cases therefore allegedly fail to challenge the real harm inflicted by the foreign officials' conduct.[168]

Despite their common diagnosis of the problem with the DOJ's approach, commentators diverge widely on how the criminal law should treat corrupt foreign officials who launder their bribes. For some, the FCPA's asymmetric approach to punishment is an ill-advised barrier in the global fight against corruption that Congress should eliminate.[169] These scholars view the DOJ's money laundering prosecutions as an inadequate attempt to combat foreign bribery, because these cases cannot condemn the officials' corruption directly.[170] As a cumbersome half-step towards criminalizing the receipt of bribes, the DOJ's money laundering cases are a poor substitute for simply amending the FCPA.[171]

Other scholars deem the DOJ's money laundering prosecutions an expressive failure because they vindicate problematic norms. Professor Davis contends that these money laundering cases perpetuate an anti-corruption enforcement strategy so untethered from the needs of corrupt countries' populations as to echo the imperialist interventions of the nineteenth century.[172] A more straightforward critique, which closely parallels the doctrinal concerns raised by Judge Wu in

Money Laundering Control Act and related conspiracy charges."); Marshall, *supra* note 8, at 1294 ("Since U.S. courts have rejected the direct prosecution of foreign officials both under the FCPA and under a conspiracy theory, the DOJ and even local District Attorney's Offices have attempted to prosecute foreign bribe-takers under money laundering and related statutes.").

168. *See* Klaw, *supra* note 104, at 362 ("U.S. enforcement officials who wish to prosecute foreign officials for bribery or extortion have thus been forced to resort to alternative statutes, such as the Money Laundering Control Act. This has made foreign prosecutions needlessly time consuming and difficult to prove.").

169. *See, e.g.*, Low, Lamoree & London, *supra* note 7, at 592–94.

170. *See id.* at 588; Yockey, *supra* note 9, at 835–36; Marshall, *supra* note 8, at 1292 ("There have been several attempts to prosecute or punish foreign officials who accept bribes under other theories, but 'the prosecutions are more costly and drawn out, and the sentences more lenient than need be.'" (citation omitted)).

171. *See* Klaw, *supra* note 104, at 337 ("[Bribery-based money laundering prosecutions] tend to be more difficult, more expensive and less effective than they would be if the FCPA were redrafted to cover corrupt foreign officials and dispense with the need to employ complex legal theories or argue about ambiguous jurisdictional issues.").

172. KEVIN E. DAVIS, BETWEEN IMPUNITY AND IMPERIALISM: THE REGULATION OF TRANSNATIONAL BRIBERY 15–16 (2019) ("Foreign anti-corruption institutions typically are not accountable to the public in the societies most affected by their activities. . . . [This] challenge hearkens back to the critiques of neo-imperialist practices of the late nineteenth and early twentieth centuries."); *see also id.* at 2 (discussing how money laundering laws are "pressed into service" to prosecute corrupt foreign officials).

Siriwan,[173] accuses the DOJ of pursuing a conception of corrupt foreign officials' culpability that is contrary to the asymmetric approach adopted by Congress.[174] Finally, the most radical objection to the DOJ's AML efforts characterizes such prosecutions as invariably undesirable, because they fail to express any coherent value whatsoever.[175]

Across a wide variety of scholarly perspectives, commentators have concluded that the DOJ's prosecutions of foreign officials for money laundering are pretextual, and therefore fail to convey the proper message about the officials' conduct. Viewing the DOJ's MLCA enforcement strategy as an end-run around the FCPA, scholars and judges alike have criticized the DOJ's recent money laundering cases based on a shared premise. But as the following Part demonstrates, these critiques are ultimately unavailing, because their common premise is incorrect.

IV. Correcting the Critics' Misconception

The judicial and academic criticism of the DOJ's bribery-based money laundering prosecutions is misguided. By assuming the DOJ's enforcement actions are mere attempts to circumvent the FCPA and combat transnational corruption, judges and scholars alike have overlooked the independent and significant reputational interest that the MLCA seeks to protect. Through an examination of the harm that the DOJ's bribery-based MLCA prosecutions address, this Part not only refutes the critics' key premise, but also resolves their particular doctrinal and expressive concerns.

A. *The Distinct Harms of Laundering Bribes*

Critics' characterization of the DOJ's money laundering prosecutions of foreign officials as purely pretextual[176] ignores the substantial harm inflicted when bribes infiltrate the U.S. financial system. Distinct

173. *See supra* notes 143–53 and accompanying text.

174. *See* Mestre, *supra* note 148, at 2 ("[T]he United States is taking a new approach to charging foreign officials who would not otherwise be accountable for taking bribes under the FCPA. . . . [P]rosecutors should not be permitted to go around the policy decisions made by Congress in the FCPA and essentially become legislators themselves.").

175. *See* Peter Alldridge, *The Moral Limits of the Crime of Money Laundering*, 5 Buff. Crim. L. Rev. 279, 318 (2001) ("Money laundering offenses have been put in place all over the globe. This essay has maintained that the arguments which might be made for the instantiation of such an offense do not support it. . . . There are good grounds for the existence of some powers of confiscation of the proceeds of crime, but they do not imply that laundering should also be a crime.").

176. *See supra* notes 152–54, 168–69 and accompanying text.

from the negative effects of transnational corruption, foreign officials' misuse of U.S. institutions to disguise and enjoy their bribes creates further costs. As Congress recognized in enacting the MLCA, the revelation that tainted funds have pervaded the U.S. economy diminishes the real and perceived integrity of U.S. enterprises.[177] While these reputational costs fall most obviously on the financial services industry, the insidious effects of laundered bribes also impact other sectors.[178]

The DOJ's successful prosecutions of corrupt foreign officials for money laundering exemplify the diverse areas of economic activity whose reputation is undermined by the introduction of proceeds from bribery:

Lazarenko's transmission of bribes into U.S. bank accounts[179] sowed distrust among the global populace as to the professional integrity of U.S. banks and cast doubt on their ability to monitor the riskiness of the assets they held.[180] Moreover, when officials like Lazarenko manipulate American banks into accepting their bribes, U.S. banking regulators appear incompetent.[181]

To launder her bribes, Gonzalez instead used an American broker to engage in deceptive securities transactions.[182] The misuse of U.S. capital markets to disguise the proceeds of corruption threatens to diminish the reputation of U.S. securities exchanges, introduce misleading signals into the market, and facilitate further trading-related crimes.[183]

Finally, the prosecutions of Antoine and Duperval illustrate how laundered bribes distort the prices of other assets. Converting their bribes into real estate,[184] Antoine and Duperval's actions are typical for corrupt foreign officials, whose combined holdings in real estate have inflated prices in major U.S. real estate markets.[185]

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177. *See supra* note 69 and accompanying text.

178. *Cf.* Levi & Reuter, *supra* note 20, at 290 ("The [AML] control regime in the United States has extended beyond banks, the original subjects, to a wide range of businesses such as car dealers, casinos, corner shop money transmission businesses, jewelers, pawnbrokers, and certain insurance companies.").

179. *See supra* note 88 and accompanying text.

180. *See* RENA S. MILLER & LIANA W. ROSEN, CONG. RESEARCH SERV., R44776, ANTI-MONEY LAUNDERING: AN OVERVIEW FOR CONGRESS 3 (2017).

181. *See id.*

182. *See supra* note 101 and accompanying text.

183. *See* Izeldin Elamin, Is Capital Market Integrity Really Essential for Anti-Money Laundering? 6 (Sept. 2018) (unpublished manuscript), https://www.researchgate.net/publication/329442808_Is_capital_market_integrity_really_essential_for_anti-money_laundering_AML.

184. *See supra* note 105 and accompanying text.

185. *See, e.g.*, Louise Story & Stephanie Saul, *Stream of Foreign Wealth Flows to Elite New York Real Estate*, N.Y. TIMES (Feb. 7, 2015), https://www.nytimes.com/2015/02/08/nyregion/stream-of-

Thus, the DOJ's money laundering prosecutions of foreign officials address a series of reputational threats to the U.S. economy that are distinct from the ills of corruption itself and consistent with the concerns that motivated Congress to enact the MLCA. Overlooking the specific harms that the DOJ's enforcement efforts seek to curb, critics have incorrectly assumed that these prosecutions merely reflect a desire to eliminate transnational corruption.[186] Because prosecutors vindicate a substantial independent interest when they charge foreign officials with money laundering, these prosecutions cannot be adequately understood as pretextual attempts to combat bribery outside the FCPA's asymmetric approach to punishment. Recognizing the distinctive threat to the United States posed by laundered bribes not only defeats a key assumption underlying the widespread criticism of the DOJ's enforcement efforts, but also, as the next Section shows, dispels the critics' legal and social objections.

B. *Resolving Critics' Concerns*

In light of the distinctive harms that the DOJ's bribery-based money laundering prosecutions address, critics' doctrinal and expressive concerns are unavailing. Whether under a narrow or broad reading of the *Gebardi* principle,[187] Judge Wu's challenge is unpersuasive, since the DOJ's enforcement of the MLCA neither parallels the end-run at issue in *Gebardi* nor undermines the policy logic of the FCPA. Scholars' expressive concerns likewise lack merit, because laundering bribes denigrates distinct national values that themselves warrant reaffirmation.

The DOJ's legal theory in prosecuting corrupt foreign officials for money laundering does not violate a narrow reading of the *Gebardi* principle. As originally articulated by the Supreme Court, the *Gebardi* principle prohibits using conspiracy or accomplice liability to prosecute one whose conduct is inseparably incident to a statutory offense, when the statute does not punish them.[188] If *Gebardi* applies solely to

foreign-wealth-flows-to-time-warner-condos.html (describing the problem of real estate purchases with corrupt funds in New York City); *see also* Pullé, *supra* note 2, at 11 ("[L]uxury real estate in the great cities of the world still continue[s] to be an irresistible lure for kleptocrats who find an ever willing cadre of local real estate agents, lawyers and accountants who will help them to acquire the dream properties on their wish list.").

186. *See supra* notes 152–54, 168–69 and accompanying text.

187. *See* Wee, *supra* note 129, at 125 (contrasting a narrow reading of *Gebardi* that adheres to the Supreme Court's original test and a broad reading that focuses on whether the prosecution subverts a general legislative policy).

188. *See* Gebardi v. United States, 287 U.S. 112, 123 (1932).

conspiracy or accomplice liability,[189] then prosecuting corrupt foreign officials under the MLCA cannot violate this principle.[190] Moreover, although the offenses are often associated,[191] money laundering is not inseparably incident to foreign corruption, since a corrupt official could easily keep her bribes without engaging in any prohibited transactions. This connection hardly approaches the logical inseparability between giving and receiving bribes that the Fifth Circuit stressed in *Castle*.[192] Thus, on a strict reading of *Gebardi*, the sole aspect of the DOJ's prosecutions of corrupt foreign officials that resembles *Gebardi* is the fact that the FCPA does not punish foreign officials.[193] Such a tenuous analogy is inadequate to invalidate the DOJ's enforcement strategy.

Judge Wu's *Gebardi* objection reflects a broader interpretation of the principle, as prohibiting prosecutions that employ expansive statutes as end-runs around more restrictive ones to circumvent the will of Congress;[194] however, appreciating the reputational harms inflicted by laundered bribes dispels Judge Wu's criticism, even under a capacious conception of *Gebardi*. First, this judicial critique rests on the dubious premise that the FCPA is narrower and more specific than the MLCA. While the MLCA reaches a wide range of misconduct,[195] the PATRIOT Act's amendments to the MLCA explicitly added foreign bribery as a predicate offense,[196] suggesting that the MLCA is a superior guide to the will of Congress in bribery-based money laundering cases.

Second, Judge Wu's criticism fails on its own terms, because far from subverting the policy motivations behind the FCPA, the DOJ's bribery-

189. *See* Jack C. Smith, Note, *Grappling with* Gebardi*: Paring Back an Overgrown Exception to Conspiracy Liability*, 69 DUKE L.J. 465, 469 n.23 (2019).

190. *Cf.* United States v. Castle, 925 F.2d 831, 836 (5th Cir. 1991) ("As in *Gebardi*, it would be absurd to take away with the earlier and more general *conspiracy statute* the exemption from prosecution granted to foreign officials by the later and more specific FCPA.") (emphasis added).

191. *See supra* note 78 and accompanying text.

192. *See Castle*, 925 F.2d at 836 ("[T]his Court finds in the FCPA what the Supreme Court in *Gebardi* found in the Mann Act: an affirmative legislative policy to leave unpunished a well-defined group of persons who were necessary parties to the acts constituting a violation of the substantive law.").

193. *See supra* note 39 and accompanying text.

194. *See* Transcript of Hearing on Defendants' Motion to Dismiss the Indictment at 25, United States v. Siriwan, No. CR 09-81-GW (C.D. Cal. Feb. 7, 2012) ("[T]he whole point of Congress in excepting foreign officials [from the FCPA] is to avoid certain problems when you prosecute foreign officials in this country for these types of criminal acts involving bribery, et cetera. Those are the same concerns when you attempt to go after these people for money laundering because they accepted bribes.").

195. *See supra* notes 64–67 and accompanying text.

196. *See supra* notes 70–75 and accompanying text.

based money laundering prosecutions *promote* the FCPA's goals. In enacting the FCPA, Congress sought to bolster the United States' standing in the international community.[197] A parallel reputational aim—albeit one targeted on the financial system instead of U.S. enterprise generally—led Congress to pass and amend the MLCA.[198] Given the severe reputational costs that arise when laundered bribes infiltrate the U.S. economy,[199] the DOJ's prosecutions uphold the MLCA's purpose by deterring such misconduct. Because the MLCA and FCPA serve an overlapping function, the DOJ's enforcement efforts also further the aims behind the FCPA. Of course, prosecuting foreign officials for money laundering raises some of the diplomatic concerns that legislators acknowledged in exempting foreign officials under the FCPA.[200] But in keeping with the FCPA's overall structure, Congress primarily exempted foreign officials due to the negligible reputational benefit of prosecuting foreign officials in addition to those who give bribes.[201] Conversely, as Congress recognized in amending the MLCA, a symmetric approach to punishing bribery-based money laundering is reputationally warranted, because introducing bribes into the U.S. financial system represents a more targeted affront to U.S. interests than merely accepting bribes from a U.S. firm in one's own country.[202] Leaving such affirmative incursions unpunished conveys a sense of vulnerability to the international community that is antithetical to the MLCA's purpose. Accordingly, despite the apparent tension between the FCPA and MLCA's treatment of corrupt foreign officials, appreciating the reputational harms at issue in money laundering cases demonstrates that these statutes offer a coherent policy logic—one that is fulfilled by the DOJ's enforcement efforts.

Academics' expressive concerns are similarly unfounded, since the United States' commitment to the integrity of its financial system provides an independent and non-pretextual justification for punishing foreign officials who launder their bribes. Appreciating the grave consequences of laundered bribes illuminates the normative message conveyed when corrupt foreign officials violate the MLCA: that the financial integrity of the U.S. economy is unworthy of respect. From an expressive perspective, foreign officials who denigrate this value should

197. *See supra* notes 46–49 and accompanying text.
198. *See supra* notes 69–75 and accompanying text.
199. *See supra* Section IV.A.
200. *See supra* note 50 and accompanying text.
201. *See supra* notes 50–51 and accompanying text.
202. *See supra* note 76 and accompanying text.

be punished to reaffirm the United States' commitment to the security of its economic institutions.[203] Because this jeopardized value independently justifies punishing foreign officials, critics' insistence that prosecuting corrupt foreign officials for money laundering is pretextual and therefore muddies the expressive waters is incorrect.

When commentators who support amending the FCPA to reach foreign officials criticize the DOJ for inadequately pursuing this goal through its money launder prosecutions,[204] their refusal to recognize the direct injuries condemned by the MLCA is conspicuously convenient for their policy agenda. But given that neither the FCPA nor the MLCA seeks to eradicate global corruption for its own sake, the academics' claim that the DOJ's cases against foreign officials represent altruistic global policing rather than enforcing the policies enacted by Congress is an implausible form of wishful thinking. Instead, the main implication of these criticisms is theoretical rather than practical, as they illustrate the difficulties of sending a clear social message through the overdetermined medium of punishment.[205]

Other scholars' concern that prosecuting foreign officials promotes problematic values is unavailing once one recognizes that these enforcement actions vindicate the United States' legitimate commitment to financial integrity. Davis's objection that U.S. prosecutors are too removed from the needs of corrupt countries' inhabitants to accountably serve their interests[206] is immaterial, since the DOJ's prosecutions further a compelling U.S. interest. The paternalism Davis decries cannot plausibly be the core value at stake when the DOJ maintains the United States' international reputation by pursuing individuals who exploit U.S. institutions to launder bribes. Much like the scholars who advocate for a more aggressive approach to anti-corruption enforcement, Davis attributes an implausibly altruistic motivation to the DOJ that is equally alien to the FCPA and MLCA. Additionally, the more sweeping challenge to the DOJ's enforcement of the MLCA—that it fails to promote any defensible value whatsoever[207]—is even less convincing in light of the straightforwardness of the United States' concern for its

203. *See* Joel Feinberg, *The Expressive Function of Punishment*, 49 MONIST 397, 407 (1965) ("A statute honored mainly in the breach begins to lose its character as a law, unless, as we say, it is *vindicated* (emphatically reaffirmed); and clearly the way to do this (indeed the only way) is to punish those who violate it.").

204. *See supra* notes 169–171 and accompanying text.

205. *See* Heidi M. Hurd, *Expressing Doubts About Expressivism*, 2005 U. CHI. LEGAL F. 405, 428 (noting the problem of ambiguity for expressive theories of punishment).

206. *See supra* note 172 and accompanying text.

207. *See supra* note 175 and accompanying text.

own financial integrity. Setting aside potential benefits to the global financial system, the United States has an obvious self-interest in maintaining the wellbeing of its markets.[208] Protecting its financial system is both normatively worthwhile and well within the United States' sovereign prerogative, such that the radical argument against the U.S. AML regime does not hold water.

Judicial and scholarly objections to the DOJ's bribery-based money laundering cases prove similarly uncompelling once one recognizes the distinct reputation harms these prosecutions address. Thus, as a matter of doctrine and policy, the DOJ's efforts are worthwhile. However, when such delicate cases should be brought remains an open issue. The next Part answers this question through several policy proposals.

V. Policy Implications for Exercising Prosecutorial Discretion

While the DOJ's cases against corrupt foreign officials who launder their bribes are generally desirable, federal prosecutors still must decide when a specific case of money laundering is sufficiently harmful to warrant enforcement.[209] Appreciating the statutory and expressive significance of the MLCA's foreign bribery provision therefore matters concretely, because the purposes of these prohibitions should guide how prosecutors exercise their ample discretion.[210] This Part offers three reforms to DOJ policy that would help ensure money laundering prosecutions of foreign officials serve Congress' interest in protecting U.S. economic integrity and avoid the appearance of pretext.

First, prosecutors should only bring MLCA charges against foreign officials when either a U.S.-based firm or an asset within U.S. territory is directly involved in the placement, layering, or integration of the bribery proceeds. Because jurisdiction under the MLCA is expansive, prosecutors are free to pursue corrupt foreign officials even when the impact on the United States is insubstantial—as when an official transmits bribes between two foreign accounts, such that the funds momentarily travel over U.S. wires.[211] Cases that merely implicate U.S. wires are so

208. *See* Jack Donnelly, Realism and International Relations 9 (2000) (discussing the fundamental role of national self-interest in international relations).

209. *See* U.S. Dep't of Just., Justice Manual § 9-27.110 cmt. (2020) (describing "[t]he prosecutor's broad discretion in . . . initiating or foregoing prosecutions").

210. For a thorough analysis of prosecutorial discretion, see Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 Iowa L. Rev. 125 (2008).

211. *See* Shams, *supra* note 53, at 130 ("[I]f illicit money was wired through a U.S. bank as part of a cross-border process of laundering, this transit will be sufficient to give the United States criminal jurisdiction over the whole process of laundering."); Matthew J. Spence, Comment, *American Prosecutors as Democracy Promoters: Prosecuting Corrupt Foreign Officials in U.S. Courts*, 114

unlikely to damage the credibility of the U.S. financial system that bringing these cases is a poor use of federal resources. Moreover, prosecuting corrupt foreign officials when their bribes do not travel through American entities or assets provides ammunition to critics who hope to prevent the DOJ from prosecuting bribery-based money laundering cases against foreign officials generally. To keep prosecutors from straying from Congress' purposes in enacting and amending the MLCA or creating the appearance of pretext, the DOJ should amend its internal money laundering guidance in the Justice Manual.[212] Adding a provision to clarify that, absent extraordinary circumstances, prosecutors should only pursue foreign officials for MLCA violations when a U.S.-based firm or asset is directly involved in a prohibited transaction would promote these best practices.

Second, the DOJ should require prosecutors to seek State Department approval before indicting any foreign official for bribery-based money laundering. Maintaining the United States' reputation abroad requires an acute awareness of the diplomatic sensitivities at play in prosecuting foreign officials in U.S. courts. Although the officials' home countries will presumably only approve of these enforcement actions in rare cases, such as regime changes, punishing foreign officials under the wrong circumstances could frustrate global partnerships, exacerbate regional conflicts, or destabilize fledgling democracies.[213] Cooperation between the DOJ and State Department would help achieve the necessary balance between the need to vindicate the United States' legal interest in financial integrity and the nuances of geopolitics. To foster this dialogue, the DOJ should further amend the Justice Manual to require State Department approval for any bribery-based prosecution of a foreign official.[214] Given the risk that the State Department will undervalue the DOJ's law enforcement aims and therefore exercise its veto powers too frequently, the DOJ's Office of International Affairs, which specializes in transnational enforcement,[215]

YALE L.J. 1185, 1190 (2005) (same); *see also* Shoda & Sullivan, *supra* note 137, at 30 ("Under the MLCA, prosecutors have jurisdiction over foreign nationals where any of the money laundering activity takes place in the United States and the value involved is greater than $10,000.").

212. *See* U.S. DEP'T OF JUST., JUSTICE MANUAL § 9-105.000 (2020).

213. *Cf.* Yockey, *supra* note 9, at 836 ("[M]oney laundering actions against corrupt foreign officials . . . suffer from the same diplomatic and jurisdictional concerns that initially led Congress to limit the FCPA's scope to cover active bribery only.").

214. *Cf.* Muma, *supra* note 31, at 1353 ("[T]his Note proposes a unique solution: amending the FCPA to require the State Department to define 'foreign official' and 'instrumentality' for each country, with these definitions creating a rebuttable presumption in court.").

215. *Office of International Affairs (OIA)*, U.S. DEP'T JUST., https://www.justice.gov/criminal-oia (last visited Dec. 23, 2020).

should be permitted to override the State Department's veto. This cooperative structure would mitigate the diplomatic difficulties inherent in money laundering prosecutions against corrupt foreign officials.

Third, prosecutors should not base their decision to prosecute foreign officials under the MLCA on the host countries' ability or willingness to charge the officials. The State Department and Office of International Affairs will certainly weigh issues of international comity in deciding whether to approve a proposed prosecution. But when prosecutors treat these considerations as primary, they pay insufficient heed to the United States' direct interest in punishing violations of its financial integrity. Furthermore, premising prosecution on the host country's resources suggests that MLCA cases against foreign officials are filling a void in international enforcement, altruistically policing violations when other governments cannot. Unsurprisingly, critics who favor amending the FCPA to punish foreign officials stress the primacy of host countries' enforcement capabilities.[216] To avoid the proliferation of this global policing mindset, the Assistant Attorney General in charge of the DOJ's Criminal Division should issue a policy memorandum following the aforementioned amendments to the Justice Manual, explaining that prosecutors should not consider in the first instance host countries' ability or willingness to punish corrupt foreign officials in deciding whether to pursue bribery-based MLCA cases.

This Part's three policy proposals would promote the MLCA's reputation-enhancing purpose and prevent enforcement patterns that appear pretextual. Guidance is particularly warranted for money laundering cases against corrupt foreign officials due to the complex factors that affect how the United States should act to enhance its reputation. Curbing prosecutorial discretion for bribery-based money laundering cases against foreign officials would allow prosecutors to focus on legal issues within their competence, while leaving questions of international diplomacy and comparative enforcement capabilities to individuals better suited to appreciate their intricacies.

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216. *See* Klaw, *supra* note 104, at 344 ("Congress should amend the FCPA to expressly authorize the criminal prosecution of corrupt foreign officials who solicit, extort and/or receive bribes, in cases where their home governments are unwilling or unable to do so."); Low, Lamoree & London, *supra* note 7, at 593 ("[B]efore starting a prosecution of demand-side [bribery], a nation should be required to determine if the home country of the foreign official is unable or unwilling to prosecute the offense itself."); Marshall, *supra* note 8, at 1312–13 ("A final concern about criminalizing demand-side bribery in international business transactions is the issue of invading the sovereignty of host nations. One way to address this concern would be to limit prosecutions of foreign national bribe-takers to instances where the host nation cannot or will not make a good-faith effort to prosecute or investigate those implicated in bribery schemes.").

VI. Conclusion

The DOJ's recent enforcement actions are the products of a complex legislative history. In the FCPA, Congress sought to restore the United States' diminished international standing by keeping firms with sufficient ties to the United States from bribing officials in foreign countries. Appreciating the minimal reputational benefits that would accrue from also prosecuting the officials in these cases, Congress refrained from punishing them in the FCPA. But foreign officials are not entirely beyond the long arm of U.S. criminal law. The MLCA, as amended by the PATRIOT Act, criminalizes a broad array of transactions involving the proceeds of international bribery. In passing these AML laws, Congress made clear that its purpose was to shore up the U.S. financial system's reputation for integrity. Thus, between the FCPA and MLCA, foreign officials who use U.S. institutions to launder bribes are in a strange position: immune from prosecution for the underlying bribery, but liable for laundering the proceeds of a predicate offense.

This intricate statutory scheme has not deterred the DOJ from bringing several high-profile MLCA cases against corrupt foreign officials in recent years. But these cases have drawn judicial and scholarly objections, as critics have characterized the legal theory in these cases as an end-run around the FCPA. While the judiciary has questioned this circumvention as potentially invalid under *Gebardi*, scholars have challenged the message conveyed by these prosecutions as expressively deficient.

Yet these critics overlook how laundering bribes inflicts distinct reputational harms on the United States, by undermining the perceived integrity of its banks, capital markets, and other economic sectors. Appreciating these harms not only refutes critics' common characterization of the DOJ's MLCA enforcement against foreign officials as pretextual, but also resolves the critics' specific doctrinal and expressive concerns.

Finally, this Note proposes three changes that the DOJ should adopt to ensure future bribery-based money laundering cases against foreign officials implement the will of Congress and avoid the appearance of pretextual prosecutions. Requiring prosecutors to show a U.S.-based firm or asset was directly involved in the laundering, seek State Department approval, and eschew considerations of host countries' enforcement capabilities would promote best practices in future cases.

While the interaction between the FCPA and MLCA plainly underscores the need for greater legislative clarity, the controversy surrounding the DOJ's enforcement actions also speaks to the need for scholars

and judges to consider the structural interplay between statutes more deeply before declaring them to be in conflict. Resolving the apparent tension between laws and revealing their deeper harmonies not only preserves the separation of powers, but also helps realize the ideal of coherence in U.S. law.[217]

217. *See generally* Joseph Raz, *The Relevance of Coherence*, 72 B.U. L. REV. 273, 313 (1992) ("Coherence gives weight to the actual past, to the concrete history of the law."); Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949, 950 (1988) (exploring the "profound and inescapable truth about law's inner coherence").