

2012

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### Recommended Citation

Carrington, Paul D. (2012) "Qui Tam: Is False Claims Law a Model for International Law?," *University of Chicago Legal Forum*: Vol. 2012, Article 5.

Available at: <http://chicagounbound.uchicago.edu/uclf/vol2012/iss1/5>

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# Qui Tam: Is False Claims Law a Model for International Law?

Paul D. Carrington<sup>†</sup>

## I. CAUSES OF CORRUPT GOVERNMENT

Benjamin Franklin observed that “[t]here is no kind of dishonesty into which otherwise good people more easily and frequently fall than that of defrauding the government.”<sup>1</sup> This was so in his time and it is so in ours because to many citizens the government is a distant anonymity having no moral claim upon themselves.<sup>2</sup> If money can be made by chiseling a distant anonymity, why not?

Moreover, many citizens sense that the line of moral conduct for those in public service is not always clearly drawn. The faint and sometimes indiscernible line between a campaign contribution and a bribe is a premier contemporary American example of

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<sup>†</sup> Professor of Law, Duke University. Presented at *The University of Chicago Legal Forum* Symposium on Combating Corruption, November 4, 2011. Bits of this paper can also be found in Paul D. Carrington, *Enforcing International Corrupt Practices Law*, 32 *Mich J Intl L* 129 (2010) and earlier utterances of the author in 2009 to the North Carolina General Assembly, in 2009 to the meeting of the Law and Society Association in Denver, in 2009 to the conference of the Inter-University Council Program in Dubrovnik, Croatia, and in 2011 to the Rockefeller Conference on Transnational Corruption in Bellagio, Italy. Research and editorial assistance was provided by Nir Schnaiderman, LLM Class of 2011, Duke University.

<sup>1</sup> Benjamin Franklin (writing as “B.F.”), Letter to the Editor, *On Smuggling, And Its Various Species*, *London Chronicle* (Nov 24, 1767), reprinted in Jared Sparks, 2 *The Works of Benjamin Franklin* 361 (Hilliard Gray 1836). See generally Benjamin Franklin, *Historical Review of the Constitution and Government of Pennsylvania* (Griffiths 1759).

<sup>2</sup> See, for example, Adam Smith, *The Theory of Moral Sentiments* (Liberty 1976) (E.G. West, ed) (originally published 1759). Smith gave the example of an epic earthquake causing much of Asia to fall into the sea. He and his neighbors in Glasgow would “first of all express very strongly [their] sorrow for the misfortune,” then reflect on the chances of life, retire, and “snore with the most profound security over the ruin of a hundred million of [their] brethren.” See *id* at Chap III.1.46.

this lack of clarity.<sup>3</sup> Even our present Supreme Court Justices are grievously confused by that difference.<sup>4</sup>

Family interests, longstanding friendships, cultural or sub-cultural connections, and political alliances supply other sources of improprieties in government.<sup>5</sup> China, for an extreme example, faces a special problem because of the deep cultural tradition of *guanxi*.<sup>6</sup> In that tradition, if your great-uncle did a favor for my great-grandfather, I still owe you one. American government is spared that impediment, but encounters plenty of others. Thus, for example, a citizen or firm tempted to corrupt one public official is likely to be willing to bribe others who are responsible for enforcing laws against bribery, especially if they are politically aligned with the primary beneficiaries of their bribes. So infections can spread quickly.

## II. THE AMERICAN EXPERIENCE WITH FALSE CLAIMS LAW

Because new and enlarged military expenditures in time of war are especially vulnerable to corruption, the Civil War brought an epidemic of public corruption scandals rising to the cabinet level.<sup>7</sup> This led to the enactment of the law that became known as “Lincoln’s law.” Lincoln’s law was modeled on the English and colonial tradition known by its Latin name, *qui tam* law. It sought to deter fraud by providing generous rewards for the

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<sup>3</sup> See generally Andrew Stark, *Conflict of Interest in American Public Life* 152–77 (Harvard 2000). See also *Caperton v A.T. Massey Coal Co.*, 556 US 868 (2009) (holding that due process of law requires disqualification of a judge receiving from a litigant millions of dollars in campaign contributions).

<sup>4</sup> See generally *Citizens United v Federal Election Commission*, 130 S Ct 876 (2010) (reflecting the view of the Court that campaign contributions are free speech, not bribery, even when made by business firms to advance business interests).

<sup>5</sup> For an especially powerful example, see Alan Smart and Carolyn L. Hsu, *Corruption or Social Capital? Tact and the Performance of Guanxi in Market Socialist China*, in Monique Nuijten and Gerhard Anders, eds, *Corruption and the Secret of Law: A Legal Anthropological Perspective* 167 (Ashgate 2007).

<sup>6</sup> See Jun Lin and Steven X. Si, *Can Guanxi Be A Problem? Contexts, Ties, and Some Unfavorable Consequences of Social Capital in China*, 27 *Asia Pac J Mgmt* 561, 573–74 (2010) (arguing that the *guanxi* tradition, coupled with China’s particular economic conditions, lead to rent-seeking behavior in interactions with government and among government officials).

<sup>7</sup> See Henry Scammell, *Giantkillers: The Team and the Law that Help Whistle-Blowers Recover America’s Stolen Billions* 37–38 (Atlantic Monthly 2004). President Lincoln dismissed the Secretary of War in 1862 for paying his friends twice the market price for cavalry horses that turned out to be afflicted with “every disease horse flesh is heir to.” *Id.* at 38.

whistleblowing private citizen initiating a successful action against one who defrauded a Union official.<sup>8</sup>

Numerous citizens then came forward as relators to pursue claims on behalf of the United States against contractors who were proven to have sold the Union army rifles without triggers, gunpowder diluted with sand, or uniforms that could not endure a single rainfall.<sup>9</sup> The Union Army was thus in part funded by payments made by malefactors to satisfy judgments rendered in favor of the United States in proceedings brought by whistleblowers or to settle such claims.

After the Civil War, Lincoln's law fell into disuse. The law was not invoked during the War with Spain, World War I, or, with one exception, World War II.<sup>10</sup> The larcenous practices of government suppliers continued through wars in Korea and Vietnam. Many American soldiers in Vietnam were killed with munitions made by the Vietnamese from bombs that had failed to explode when dropped on them by American planes.<sup>11</sup> The Department of Defense of course had diverse officers tasked with resisting fraud by those from whom it was buying lousy weapons, but they were often outmanned by private weapon designers who sold them disappointing products at the highest possible price. Yet, for a century no claim was brought by or on behalf of the United States against a supplier of defective weapons. During the Cold War, ever more elaborate weaponry was sold to the United States at ever rising prices.

By the 1980s, many of the largest defense contractors were under investigation for defrauding the Department of Defense. Four defense contractors—General Electric, GTE (which was later assimilated into Verizon), Rockwell, and Gould were indicted and convicted of criminal fraud.<sup>12</sup> But the Department of Justice

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<sup>8</sup> See An Act to Prevent and Punish Frauds upon the Government of the United States of Mar 2, 1863, "Federal False Claims Act," 12 Stat 696–99, codified as amended at 31 USC §§ 3729–33 (2006).

<sup>9</sup> Scammell, *Giantkillers* at 36 (cited in note 7) (describing the "shoddy" equipment provided to the Union army).

<sup>10</sup> There was apparently an exception in 1943 leading to the enactment of an amendment to the statute to require that the relator be an "original source" of the information giving rise to the claim. See Act of December 23, 1943, 57 Stat 608–09 (1943), codified as amended at 31 USC § 3730(e)(4)(A) (2006).

<sup>11</sup> See, for instance, Scammell, *Giantkillers* at 45 (cited in note 7). A case involving the misfiring of a weapon in Cambodia reached the Supreme Court. *Day & Zimmerman, Inc v Challoner*, 423 US 3 (1975).

<sup>12</sup> See *False Claims Amendments Act of 1986, Dates of Consideration and Passage as Reported by the Senate Judiciary Committee*, S Rep No 99-345, 99th Cong, 2d Sess 2–3 (1986), reprinted in 1986 USCCAN 5266–303 (listing these transgressions as evidence for

(DOJ) had many more such cases than it could handle. Senator Charles Grassley, a Republican from Iowa, took a keen interest in the problem.<sup>13</sup> The result of his initiative was a revival and revision of Lincoln's law. The False Claims Act was redrafted by public-interest lawyers and the DOJ and signed by President Reagan on the eve of the 1986 congressional election, despite desperate protests by the defense-industry lobbyists.<sup>14</sup>

That 1986 version of the False Claims Act provided for the recovery of treble damages for defrauding the United States, with 15 to 25 percent of the recovery to be paid to the private citizen who filed the suit. As under the English law known to colonists, proceedings under the Act are not criminal proceedings. Hence proof "beyond a reasonable doubt" is not required; a "preponderance of proof" will, if credited, suffice to support a judgment against the defendant. And pursuant to the 1938 Federal Rules of Civil Procedure, full use may be made of the right in civil cases to compel disclosure by an adversary of possible evidence and to compel non-party witnesses to supply their evidence as well.<sup>15</sup> So the whistleblower can conduct an investigation much the same as that available to the government lawyers. Furthermore, most of the government's files are exposed to private investigation as a result of the 1966 Freedom of Information Act.<sup>16</sup> When a citizen-relator files a False Claims action, the DOJ is entitled to prompt notice and holds the right to intervene to take control of the proceeding.<sup>17</sup> But even if it does, the case continues as a civil action, and the relator remains a party.<sup>18</sup> And if the DOJ does not intervene, the relator is entitled to maintain the action in the name of the United States.<sup>19</sup>

Such an independent relator may of course be represented by a lawyer serving for a fee contingent on his or her success.<sup>20</sup> If

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the need for an amendment).

<sup>13</sup> *Id.* at 12.

<sup>14</sup> See False Claims Amendments Act of 1986, Pub L No 99-562, 100 Stat 3153, codified as amended at 31 USC § 3729 et seq (2006).

<sup>15</sup> See FRCP 16–37 (outlining rules for: litigation management, identifying parties, joinder of claims, joinder of parties, interpleader, class actions, intervention, party substitution, duties to disclose in discovery, depositions, and interrogatories).

<sup>16</sup> See Freedom of Information Act, Pub L No 89-554, 80 Stat 383 (1966), codified as amended at 5 USC § 552 (2000).

<sup>17</sup> See 31 USC § 3730(b)(2).

<sup>18</sup> See 31 USC § 3730(c)(1).

<sup>19</sup> See 31 USC § 3730(c)(3).

<sup>20</sup> For an explanation of the origins of this unusual tradition, see generally Maxwell Bloomfield, *American Lawyers in a Changing Society, 1776–1876* (Harvard 1976); F.B. MacKinnon, *Contingent Fees for Legal Services: A Study of Professional Economics and*

the relator and his or her counsel are successful in proving fraud on the government without the help of the DOJ, they are then entitled to receive at least 25 percent of the treble damages proceeds, plus reimbursement for costs including attorneys' fees.<sup>21</sup> And if the citizen and his or her lawyer are unsuccessful in proving the case, there is, pursuant to the familiar "American Rule" not observed in most other nations, ordinarily no liability for the legal expenses of the defense.<sup>22</sup>

While the law requires a relator to be an "original source,"<sup>23</sup> pursuant to a 2009 amendment of the Act,<sup>24</sup> a relator is not denied compensation when a case commenced by him or her is won by the government on proof other than evidence that he or she brought to the court.<sup>25</sup> Necessarily, most relators are employees or former employees of the defendants whose conduct as whistleblower is not appreciated by their employers. So the law also provides the relator with rights protecting him or her from retaliation by an employer.<sup>26</sup> But the federal law does not empower the relator to sue a corrupt public officer who received some or all of a bribe paid to secure a contract fraudulently obtained by the firm. The reasons for this limitation are obscure.

In 2006, the law rewarding whistleblowers was extended by the United States to reward private enforcement of the Internal Revenue Code.<sup>27</sup> No longer does the government rely solely on the beleaguered and understaffed Internal Revenue Service to collect federal taxes. In 2009, the 1986 Act was amended to fur-

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*Responsibilities* (Aldine 1964).

<sup>21</sup> See 31 USC § 3730(d)(2) (designating that an individual who proceeds with an FCA claim that the government does not pursue may receive "not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement").

<sup>22</sup> For an account of the origins of this distinctive "American Rule," see generally John Leubsdorf, *Toward A History of the American Rule on Attorney Fee Recovery*, 47 L & Contemp Probs 9 (1984).

<sup>23</sup> See 31 USC § 3730(e)(4)(A).

<sup>24</sup> Fraud Enforcement and Recovery Act of 2009, Pub L No 111-21, 123 Stat 1617 (2009), codified at 31 USC §§ 3729-33 (2010).

<sup>25</sup> This amendment reverses the holding in *Rockwell International Corp v United States*, 549 US 457, 476-77 (2007).

<sup>26</sup> See 31 USC § 3730(h) (2010) ("Any employee . . . shall be entitled to all relief necessary to make that employee . . . whole, if that employee . . . is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee . . . in furtherance of an action under this section.").

<sup>27</sup> See Tax Relief and Health Care Act of 2006, Div A, Title IV, § 406 ("Awards to Whistleblowers"), Pub L No 109-432, 120 Stat 2922, 2958 (2006), codified at 26 USC § 7623(b) (2006).

ther extend the role of the private law enforcer.<sup>28</sup> By 2011, over seven thousand False Claims cases had been filed qui tam pursuant to the 1986 statute, and the government has recovered billions.<sup>29</sup>

Although historically the bulk of False Claims actions had been targeted at those who provided goods or services to the military, other industries came to be targets for qui tam claims. In 2008, a drugmaker settled four similar qui tam claims for \$431 million; its liability arose from promotion of its drug for uses that were not medically approved. Its promotions led to its improvident purchase by many patients supported by the federal Medicaid program and thus costing the United States many dollars.<sup>30</sup> In 2009, the United States settled a claim against Pfizer for its fraudulent practices in selling medicines to government healthcare programs for a payment of \$2.1 billion. The primary whistleblower, a former officer of Pfizer, was rewarded with a fee of \$50 million.<sup>31</sup> In 2010, the DOJ recovered over \$3 billion in False Claims cases; of that sum, \$2.5 billion came from drug companies and other healthcare providers.<sup>32</sup> Most of those claims were brought to the DOJ by private whistleblowers, some of whom became rich citizens as a result of their efforts.

An illustrative recent case is one brought against the University of Phoenix, an institution seeking profit by providing higher education at diverse local campuses and on the internet. Established in 1976, the University currently serves over 300,000 students.<sup>33</sup> The two relators in a recent case were women hired by the University as part-time counselors to recruit stu-

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<sup>28</sup> See Fraud Enforcement and Recovery Act of 2009, Pub L No 111-21, 123 Stat 1617. For a brief description of the law's effects, see Jesse Lee, *Protecting Homeowners, Protecting the Economy*, White House Blog (May 20, 2009), online at <http://www.whitehouse.gov/blog/Protecting-Homeowners-Protecting-the-Economy> (visited Sept 10, 2012).

<sup>29</sup> See DOJ, *Fraud Statistics—Overview* (Dec 2011), online at [http://www.justice.gov/civil/docs\\_forms/C-FRAUDS\\_FCA\\_Statistics.pdf](http://www.justice.gov/civil/docs_forms/C-FRAUDS_FCA_Statistics.pdf) (visited Sept 10, 2012).

<sup>30</sup> See Shannon P. Duffy, *Cephalon to Pay \$431 Million to Settle Whistleblower Suits*, Legal Intelligencer (Sept 30, 2008); Ed Wallis, *Whistleblowers Receive Awards from Justice Settlement*, MidSouth Trial Lawyer (Oct 2, 2008), online at <http://www.midsouthtriallawyer.com/2008/10/02/whistleblowers-receive-awards-from-justice-settlement/> (visited Sept 10, 2012).

<sup>31</sup> See Chris Rizo, *Pfizer Agrees to \$2.3 Billion Settlement over Off-Label Marketing*, Legal Newsline (Sept 2, 2009), online at <http://www.legalnewsline.com/news/222684-pfizer-agrees-to-2.3-billion-settlement-over-off-label-marketing> (visited Sept 10, 2012).

<sup>32</sup> See Taxpayers Against Fraud, *False Claims Act Update and Alert*, (Oct 25, 2010), online at <http://www.taf.org/whistle295.htm> (visited Sept 10, 2012) (listing major False Claims cases and their estimated settlements for Fiscal Year 2010).

<sup>33</sup> Sam Dillon, *Troubles Grow for a University Built on Profits*, NY Times A1 (Feb 11, 2007).

dents to enroll in its diverse degree programs.<sup>34</sup> They were paid “per student” that each recruited, without regard for the enrollees’ academic qualifications or success in the Phoenix program.<sup>35</sup> It was alleged that few of those entering the University completed the first year of their program. Most of those who enrolled had borrowed from the Department of Education the money they used to pay tuition, and seldom were the loans repaid. The plaintiffs alleged that the University had misled the Department of Education to induce it to provide financial aid to students who were unlikely to repay their debts.<sup>36</sup> The DOJ took over the case and settled it in 2009 for \$78.5 million.<sup>37</sup> The government recovered \$67.5 million, and the remaining \$11 million was divided among the two employees and their counsel.<sup>38</sup>

Complaints are voiced by defendants and perhaps others about our reliance on, and our rewarding of, such employees. Necessarily, most private enforcers of public laws prohibiting corrupt practices are unfaithful employees. Complaints are also heard that regulating business decisions *ex post* is not economically efficient.<sup>39</sup> The costs of private enforcement are high, and inefficient conduct may only sometimes be deterred.<sup>40</sup> But private enforcement under the False Claims Act seems to be more effective than the theoretically more efficient alternatives aiming to prevent harm to government by regulating business with rules and regulations enforced by federal, state, or local officials who can tell executives in advance what risks they are forbidden to take. Among the limits of *ex ante* regulation of corrupt practices is the risk that the business regulators may themselves be corrupt.<sup>41</sup>

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<sup>34</sup> See *United States v University of Phoenix*, 461 F3d 1166, 1169 (9th Cir 2006), *affd* by *Hendow v University of Phoenix*, 296 Fed Appx 587 (9th Cir 2008).

<sup>35</sup> See *University of Phoenix*, 461 F3d at 1169.

<sup>36</sup> See *id.*

<sup>37</sup> See Doug Lederman, *\$78.5M Settles U. of Phoenix Case*, (Inside Higher Ed Dec 15, 2009), online at <http://www.insidehighered.com/news/2009/12/15/Apollo> (visited Sept 10, 2012).

<sup>38</sup> See *id.* For an account of the negotiation, see Dawn Gilbertson, *Recruiter Lawsuit May Get Closure*, *Ariz Republic B1* (Oct 4, 2009). Other citizen relators have now joined the cause. See, for example, *United States v University of Phoenix*, 2011 WL 4971979 (ED Ca 2011) (case pursued by new plaintiffs Hoggett and Good).

<sup>39</sup> See Steven Shavell, *Economic Analysis of Accident Law* 265 (Harvard 1987).

<sup>40</sup> See generally Steven L. Schwarcz, *The ‘Principles’ Paradox*, 10 *Eur Bus Org L Rev* 175 (2009); Shavell, *Accident Law* at 265–70 (cited in note 39).

<sup>41</sup> See Saul M. Froomkin, *Money Laundering and Crime Management: Money Laundering, Corruption and the Proceeds of Crime—An International Reality Check*, 4 *Asper Rev Intl Bus & Trade L* 155, 164 (2004).

The United States does, of course, have a competent DOJ responsible for the enforcement of federal law, and it can sometimes detect a fraud without the help of a whistleblower, and can assert many such claims as civil actions for breach of contract. And the notices of filings by whistleblowers must sometimes, and perhaps often, be a nuisance to the government lawyer assigned to consider its possible merit. But the prospects for detection of fraud are much less and the cost of investigation needed to make public enforcement effective is much greater when there is no whistleblower to initiate and assist in the presentation of the claim. And *ex ante* public law regulation to prevent corrupt practices requires public officials who are resistant to capture by those with money or power. It is also a consideration that the *ex post* method of private regulation to deter fraud on the government may allow corporate management a measure of freedom in making business decisions about dealing with bureaucracies.<sup>42</sup>

There are complaints that some or many False Claims cases are frivolous results of failed employment relationships. While many False Claims complaints are shown to lack merit, just as many private securities fraud claims are found to lack merit, there appears to be no evidence that the proportion is not exceptional. Of course, the DOJ, like the SEC in assessing cases,<sup>43</sup> tends to take over the strongest cases filed by the relators, and leaves only weaker ones to be pursued by the relator and his or her private contingent fee lawyer.<sup>44</sup> Still, some of those cases left to the relator and the contingent fee lawyer are won, and some are settled.<sup>45</sup> Even if it is not without diverse costs and is certainly not completely effective, private enforcement of bribery law by False Claims actions is indispensable in the United States.

On this premise, the federal Medicaid law now provides an incentive for states to enact similar False Claims laws; states

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<sup>42</sup> For a sober reflection on the issue, see generally Valerie P. Hans, *Business on Trial: The Civil Jury and Corporate Responsibility* (Yale 2000).

<sup>43</sup> See Amanda M. Rose, *The Multi-Enforcer Approach to Securities Fraud Deterrence*, 158 U Pa L Rev 2173, 2201 (2010).

<sup>44</sup> It is reported that the United States intervened in 809 cases and declined to do so in 2,858 cases filed between 1987 and 2005. Christina O. Broderick, Note, *Qui Tam Provisions and the Public Interest: An Empirical Analysis*, 107 Colum L Rev 949, 971 (2007). If the government intervened, 94 percent of the cases settled or the government won at judgment; if it did not, 6 percent settled or the relator won. *Id.* at 974.

<sup>45</sup> See generally David Kwok, *Does Private Enforcement Attract Excessive Litigation? Evidence from the False Claims Act* (unpublished working paper, University of California, Berkeley, 2011), online at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1832934](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1832934) (visited Sept 10, 2012) (finding evidence to suggest that private and government enforcement of False Claims Act suits work in “cooperative equilibrium”).

enacting laws meeting the federal requirements receive a larger federal subsidy for the cost of enforcement of laws enacted to deter fraud by drug companies and nursing facilities selling their services to Medicaid beneficiaries.<sup>46</sup> This author played a small role in persuading North Carolina to enact such a law. Taxpayers Against Fraud is a nonprofit organization in Washington that serves the public good by promoting such legislation and lending help to lawyers advising and representing relators.<sup>47</sup>

### III. INTERNATIONAL CORRUPT PRACTICES LAW

This American system of private enforcement to combat corruption should be adapted to the international marketplace. The World Bank could provide an international arbitral forum for the enforcement of the many international conventions binding the ratifying nations to prohibit corrupt practices in international trade. Such conventions have recently been ratified by almost every nation,<sup>48</sup> China being the one very important exception. These international conventions originated with a federal law enacted as a gesture in Cold War politics,<sup>49</sup> but its policy has since been vigorously promoted by the International Chamber of Commerce<sup>50</sup> and the Organisation for Economic Co-operation and

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<sup>46</sup> For a map of the states that have enacted false claims statutes, see the False Claims Act Resource Center website, authored by the law firm of Pietragallo, Gordon, Alfano, Bosick, and Raspanti, online at [http://www.falseclaimsact.com/sfca\\_overview.php](http://www.falseclaimsact.com/sfca_overview.php) (visited Sept 10, 2012).

<sup>47</sup> For more on Taxpayers Against Fraud in general, see the organization's website at <http://www.taf.org> (visited Sept 10, 2012). According to Taxpayers Against Fraud, § 6031 of the federal Deficit Reduction Act of 2005, Pub L No 109-171, 120 Stat 4, 72-73 (2005), codified at 42 USC § 1396h, incentivizes states to enact false claims statutes so that they may share in federal revenue recovered from instances of Medicaid fraud.

<sup>48</sup> See Paul D. Carrington, *Enforcing International Corrupt Practices Law*, 32 Mich J Intl L 129, 160 (2010).

<sup>49</sup> The SEC initiated the policy in 1976. See SEC, 94th Cong, *Report on Questionable and Illegal Corporate Payments and Practices submitted to the Senate Committee on Banking, Housing and Urban Affairs* at \*13 (Comm Print 1976). The law imposing criminal sanctions on American firms or foreign firms registered on an American stock exchange was enacted in 1977. See Foreign Corrupt Practices Act, Pub L No 95-213, 91 Stat 1495 (1977), codified at 15 USC §§ 78dd-1 et seq (2006). See also J. Ndunde Anyu, *The Foreign Corrupt Practices Act: A Catalyst for Global Corruption Reform* 50-75 (PublishAmerica 2006) (describing the background and enactment history of the FCPA).

<sup>50</sup> In 1978 the International Chamber of Commerce (ICC) promulgated its Rules of Conduct to Combat Extortion and Bribery. The Rules were amended in 1996 and again in 2005. On their current content, see ICC Commission on Corporate Responsibility and Anti-corruption, *Major Changes Brought by the 2005 Revision of the ICC Rules of Conduct and Recommendations to Combat Extortion and Bribery*, Doc No 194/51 (ICC 2005), online at <http://www.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2004/Major-changes-brought-by-the-2005-revision-of-the-ICC-Rules-of-Conduct-and-Recommendation-s-to-Combat-Extortion-and-Bribery> (visited Sept 10, 2012). For the history of the Rules,

Development (OECD), a group of nations providing economic aid to developing nations in hope of strengthening the global economy.<sup>51</sup> Grave as the problem of corruption is in the United States, it is surely more acute in developing nations whose officials are impecunious and less frequently committed to the morality of loyalty and public service.<sup>52</sup> Other institutions also promoting the ratification of such international conventions include the International Monetary Fund, the World Bank, the United Nations, the International Chamber of Commerce, the International Bar Association, and special non-governmental institutions such as Transparency International and Global Witness. Corrupt practices are a substantial impediment to the economic development of weakly governed nations.

By stages, the DOJ has become increasingly aggressive in enforcing the federal law prohibiting bribery of foreign officials.<sup>53</sup> The Halliburton Company disgorged \$559 million in 2009 to the federal Treasury as punishment for its corrupt practices in Nigeria.<sup>54</sup> In 2008, the German firm Siemens paid a fine of \$1.6 billion to settle prosecutions for paying bribes and kickbacks to win contracts (1) from Iraq's government in the United Nation's oil-for-food program, (2) with Venezuela to win projects including commuter rail construction, (3) with Bangladesh to erect mobile

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see Stuart H. Deming, *The Foreign Corrupt Practices Act and the New International Norms* 128–29 (ABA 2005).

<sup>51</sup> See OECD, *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and Related Documents* Art 1.1 at 7 (OECD 2011), online at <http://www.oecd.org/daf/briberyininternationalbusiness/anti-briberyconvention/38028044.pdf> (visited Sept 10, 2012). See also Deming, *New International Norms* at 95–100 (cited in note 50).

<sup>52</sup> Joseph Stiglitz, *Making Globalization Work: The Next Steps to Global Justice* 158–59 (Norton 2006); Samuel P. Huntington, *Political Order in Changing Societies* 59–71 (Yale 1969). See generally Leslie Holmes, *Rotten States: Corruption, Post-Communism and Neoliberalism* (Duke 2006); Susan Rose-Ackerman, ed, *International Handbook on the Economics of Corruption* (Elgar 2006). But a nation need not have vast natural resources to have a problem with the corruption of underpaid judges. See, for example, Jennifer A. Widner, *Building the Rule of Law* 273–90 (Norton 2001).

<sup>53</sup> See, for example, 26 USC § 162(c)(1) (making deductions for bribes paid to foreign officials illegal under the Foreign Corrupt Practices Act). For a chronicle of the legislative history, see Donald R. Cruver, *Complying with the Foreign Corrupt Practices Act* 1–12 (ABA 2d ed 1999).

<sup>54</sup> The company paid \$382 million to the DOJ and \$177 million to the SEC. See Halliburton Company, Press Release, *Halliburton Announces Settlement of Department of Justice and Securities and Exchange Commission Foreign Corrupt Practices Act Investigations* (Feb 11, 2009), online at [http://www.halliburton.com/public/news/pubsdata/press\\_release/2009/corpnws\\_021109.html](http://www.halliburton.com/public/news/pubsdata/press_release/2009/corpnws_021109.html) (visited Sept 10, 2012).

phone networks, (4) with Israel to build power plants, and (5) with Russia to construct traffic-control systems.<sup>55</sup>

The Foreign Corrupt Practices Act makes no provision for enforcement by private citizens serving as relators. But there are cases in which bribery of a foreign official has been perceived to violate the 1970 Racketeer Influenced and Corrupt Organization Act,<sup>56</sup> and thus entitles the victim who failed to win a contract to compensation for the lost profit.<sup>57</sup> And unlawful bribery is also a violation of the tort law of most states if it causes foreseeable harm to a business competitor or others.<sup>58</sup> As Judge Richard Posner observed, “commercial bribery is a deliberate tort, and one way to deter it is to make it worthless to the tortfeasor by stripping away all his gain, since if his gain exceeded the victim’s loss a damages remedy would leave the tortfeasor with a profit from his act.”<sup>59</sup> Punitive damages are also a possibility.

#### IV. THE NEED FOR PRIVATE ENFORCEMENT OF INTERNATIONAL LAW

But while the commitment to prevent and deter the corruption of foreign governments is almost universal, few governments have demonstrated a willingness and ability to enforce their laws enacted to protect foreign governments. The problem was dramatically illustrated in 2006 by the weakness of the British government’s effort to enforce its law against a domestic manufacturer of military aircraft for bribing officials of Saudi Arabia to

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<sup>55</sup> See SEC, Press Release, *SEC Charges Siemens AG for Engaging in Worldwide Bribery* (Dec 15, 2008), online at <http://www.sec.gov/news/press/2008/2008-294.htm> (visited Sept 10, 2012).

<sup>56</sup> See Racketeer Influenced and Corrupt Organization Act (RICO), 18 USC §§ 1961–68 (2006).

<sup>57</sup> See, for example, *W.S. Kirkpatrick & Co v Environmental Techtronics Corp*, 493 US 400, 409–10 (1990) (holding that the Act of State doctrine does not bar private claims under RICO). See also *Kensington International v Société Nationale des Pétroles du Congo*, 2006 WL 846351, \*9 (SDNY) (denying defendants’ motion to dismiss for failure to state a RICO claim).

<sup>58</sup> See, for example, *Korea Supply Co v Lockheed Martin Corp*, 63 P3d 937, 958–59 (Cal 2003) (holding that defendant competitor, who had bribed a foreign customer, could be liable for the tort of interference with prospective economic advantage).

<sup>59</sup> *Williams Electronics Games, Inc v Garrity*, 366 F3d 569, 576 (7th Cir 2004). But see Kevin E. Davis, *Civil Remedies for Corruption in Government Contracting: Zero Tolerance Versus Proportional Liability* (New York University School of Law Public Law and Legal Theory Research Paper Series Working Paper No 09-22, Apr 2009), online at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1393326](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1393326) (visited Sept 10, 2012) (advocating a proportional liability approach, rather than a zero-tolerance approach, to deal with bribery).

induce them to purchase its products.<sup>60</sup> Prime Minister Blair took responsibility for ordering the prosecution to drop the case in deference to the interests of British investors and workers who would benefit from the contract secured by bribery.<sup>61</sup> In 2010, the offending manufacturer was at last required to pay a modest fine.<sup>62</sup> As in Britain, few governments accountable to voters are aggressive enforcers of laws depriving their citizen-investors and workers of the benefits of contracts with foreign governments merely to prevent the bribery of foreign officials.

This political disability shared by most modern nations resembles the disabilities of American governments that gave rise to the system of private enforcement of public laws that emerged in this country in the nineteenth century. Indeed, *qui tam* laws would not work in the courts of most nations without substantial reforms of their civil procedure to empower private plaintiffs with discovery, the contingent fee, and the “American Rule.”<sup>63</sup>

American courts and the American legal profession became accustomed to private enforcement of many public laws in the nineteenth century. The custom was in place with “Lincoln’s law” and was entrenched by the 1895 enactment of antitrust law awarding treble damages to the private enforcer.<sup>64</sup> Accordingly, most laws regulating business in the United States are not entirely dependent on government prosecutors or other government attorneys.

Most critical to the development of private law enforcement is the “American Rule” shielding the losing plaintiff from liability for the legal expenses of a prevailing defendant.<sup>65</sup> In most nations, a successful defendant would be entitled to impose the costs of the defense on the unsuccessful plaintiff.<sup>66</sup> That rule

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<sup>60</sup> See *Barefaced: Corruption and the Law*, *Economist* 18 (Dec 23, 2006).

<sup>61</sup> See Heather Timmons and Eric Pfanner, *Blair Defends Ending of Graft Inquiry; Investigation of Saudi Arms Deal a National Security Risk, He Says*, *Intl Herald Trib* 3 (Dec 16, 2006).

<sup>62</sup> See Christopher Drew and Nicola Clark, *BAE Settles Allegations of Bribery*, *NY Times* B1 (Feb 6, 2010).

<sup>63</sup> For a general comparison of American civil procedure to that found in other legal regimes, see generally James R. Maxeiner, *Failures of American Civil Justice in International Perspective* (Cambridge 2011).

<sup>64</sup> See An Act To Protect Trade and Commerce Against Unlawful Restraints and Monopolies (“Sherman Act”), 26 Stat 209 (1890), codified as amended at 15 USC §§ 1–7 (2006).

<sup>65</sup> See Leubsdorf, 47 *L & Contemp Probs* at 9 (cited in note 22).

<sup>66</sup> See Martha Pacold, Comment, *Attorney’s Fees in Class Actions Governed by Fee-Shifting Statutes*, 68 *U Chi L Rev* 1007, 1009 (2001).

serves to deter weak and frivolous cases, but also deters private enforcement of public law.

Next is the contingent fee,<sup>67</sup> enabling the whistleblower to proceed without responsibility for paying a fee to his or her lawyer unless they win their case. Courts in few nations are open to lawyers serving for such fees contingent on their success. Again, this is so because few nations rely upon private enforcement of laws regulating business practices.

And third, the whistleblower needs access to evidence in addition to his or her own testimony. Discovery, as we know that procedure in the United States,<sup>68</sup> is indispensable to effective private enforcement of many laws, but especially anticorruption law. Corrupt practices are almost by definition secrets requiring effective investigation that public officials may be reluctant to pursue.

A fourth procedural device established in the United States is the class action enabling the private plaintiff to aggregate the claims of other victims of the same business malpractice.<sup>69</sup> That device, first conceived by Professor Harry Kalven of the University of Chicago Law School,<sup>70</sup> enables small frauds to be assembled in a mass of similar cases that can be resolved in a single proceeding. Variations on the class action have been adopted in the courts of numerous other nations.<sup>71</sup>

If False Claims proceedings brought by private whistleblowers are to be employed to enforce the international law established by the conventions ratified in the 1990s in courts outside the United States, three procedural devices are indispensable. They are the contingent fee, the American Rule, and discovery. To make such procedures available will require the establishment of a new forum with jurisdiction to hear whistleblowing

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<sup>67</sup> See Eleni Skordaki and Danielle Walker, *Regulating and Charging for Legal Services: An International Comparison* 15–17 (Law Society 1994). See also MacKinnon, *Contingent Fees for Legal Services* (cited in note 20).

<sup>68</sup> See FRCP 26–37, 45 (American procedural rules outlining discovery and subpoena process).

<sup>69</sup> See, for example, FRCP 23(b)(3) (describing the class action, wherein “questions of law or fact common to class members predominate over any questions affecting only individual members,” and for which “a class action is superior to other available methods”).

<sup>70</sup> See Vincent Blasi, *Harry Kalven Jr.*, 61 *J Legal Educ* 301, 304 (2011).

<sup>71</sup> See, for example, Otto Cornelis Kaligis, *Class Action Problems and Practical Solutions* (Asean Law Association 2006), online at <http://www.aseanlawassociation.org/9GA docs/Indonesia.pdf> (visited Sept 10, 2012) (describing adoption of class action mechanism in Indonesia); Lisa Rickard, *The Class Action Debate in Europe: Lessons from the U.S. Experience*, *The World Financial Review*, online at <http://www.worldfinancialreview.com/?p=289> (visited Sept 10, 2012).

claims and civil procedure empowering private plaintiffs to enforce public law.

The nearest model for such a forum is the International Centre for Settlement of Investment Disputes, an institution established and maintained by the World Bank.<sup>72</sup> As it happens, the World Bank has been much engaged in the political efforts leading to the drafting and ratification of the treaties obligating governments to deter their citizens from corrupting other governments. The treaties have not been without effect on business practices. The World Bank provides some enforcement of such laws through its debarment procedure that disqualifies firms found to have committed fraud on a government being aided by the World Bank to be debarred for some time from participation in future ventures funded by the World Bank.<sup>73</sup>

But the World Bank is involved in only a minor share of the public projects that foreign firms might seek to secure by bribery of responsible officials. The inevitable lack of enthusiasm of most government lawyers around the world for the task of prosecuting their local firms, managed by their fellow nationals, for bribing the officials of a developing nation in order to secure a deal that will return profits and employment opportunities to their fellow nationals—is the elephant in the room. The disincentives to government prosecutors explain why the international conventions ratified by so many nations in the 1990s must be seen as almost empty gestures. Perhaps if someone other than government lawyers were given an incentive to pursue claims to deter corrupt practices and a forum were provided to facilitate private enforcement of corruption laws, the international law might become a more realistic threat to those firms tempted to bribe foreign officials. That is the genius of the American system of private enforcement embodied in the False Claims Act. It might work on an international scale if the World Bank, the International Chamber of Commerce, and other organizations promoting law against corruption in transnational trade choose to make it so.

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<sup>72</sup> See generally Jeswald W. Salacuse, *The Law of Investment Treaties* 91 (Oxford 2010); Andreas F. Lowenfeld, *The ICSID Convention: Origins and Transformation*, 38 *Ga J Intl & Comp L* 47 (2009).

<sup>73</sup> See Pascale Dubois, *Domestic and International Administrative Tools to Combat Fraud & Corruption: A Comparison of US Suspension and Debarment with the World Bank's Sanctions System*, 2012 *U Chi Legal F* 195, 227–28 (2012).