United States v Lazarenko: The Trial and Conviction of Two Former Prime Ministers of Ukraine

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Recommended Citation
Available at: http://chicagounbound.uchicago.edu/uclf/vol2012/iss1/6

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INTRODUCTION

In August of 2006, Pavlo Ivanovych Lazarenko, the former Prime Minister of Ukraine, stood before a district court judge in the United States to receive sentence. Lazarenko stood convicted of corrupt acts, including money laundering, wire fraud, and transportation of stolen property. Lazarenko certainly does not stand alone as a convicted corrupt politician. Lazarenko's conviction, however, was based in part on violations of the laws of his home country, which makes his conviction unique; his was the first conviction by a US court of a foreign leader not based entirely on violation of US law.

In October of 2011, Yuliya Volodymyrvina Tymoshenko, Lazarenko's one-time colleague and also a former Prime Minister of Ukraine, sat before a judge in Ukraine. She too awaited sentence, having been convicted of criminal abuse of power. Tymoshenko was not the first political figure convicted of corruption in Ukraine, but the blatantly political nature of her trial renders her conviction of special interest.

The particulars of these cases are provocative. These leaders inflicted a tremendous amount of damage on Ukraine and the Ukrainian people. They subverted the transition of a nation.
emerging from years of occupation as part of the Soviet Union. Lazarenko, in particular, manipulated banks and financial institutions in a number of countries. His conviction constitutes justice.

Even more interesting than the particulars of their actions, although not as sensational, are the insights that their trials provide into the nature of corruption. These insights into the nature of corruption, in turn, provide insight into the administration of laws intended to control corruption.

This Article begins with a typology of understandings of public sector corruption. While most scholarly papers begin with a particular definition of corruption, this Article eschews that approach in an attempt to include a wider set of perspectives on the phenomenon. As another important means of understanding corruption, this Article also examines research on the effects of corruption. This Article then discusses the actions of Pavlo Lazarenko and Yuliya Tymoshenko, and the trials that followed. Finally, this Article returns to the observation made at the beginning: that there are different conceptual understandings of the phenomenon of corruption. Recognizing the tensions that exist between some of these understandings—tensions highlighted by the trials of Lazarenko and Tymoshenko—is critical to the study of corruption.

I. CORRUPTION

A. Themes in Understanding Corruption

Legal scholarship tends toward a definition of public sector corruption adapted from Joseph Nye's definition of fifty years ago: corruption is the abuse or misuse of public office or trust for personal benefit, rather than the purpose for which the office or trust was conferred.4 This definition is generalizable over different legal systems and statutes, while at the same time defining the objective behavior with enough precision to allow for meaningful discussion and analysis. Nye's definition lends itself to legal analysis: both the purpose of a public office or trust and the

acts that constitute abuse or misuse could be determined by the laws creating and regulating bureaucratic systems.⁵

The widespread usage of Nye's definition within legal scholarship, however, does not bestow upon it the status of the authoritative definition. Indeed, the search for a precise definition of public-sector corruption has evoked widespread debate within political science and other social sciences. Arnold Heidenheimer suggests three broad categories of attempts to define public-sector corruption: market-based, public interest-centered, and public office-centered types of definitions.⁶ As discrete attempts at definition, each category merits criticism. Attempts to define corruption through its effect on markets or market interactions, for example, have contributed little to the actual delineation of corruption. As Mark Philp notes, market-based definitions "are certainly one way of understanding corruption, they may also provide a fruitful model for the explanation of the incidence of corruption, but they are not a way of defining it."⁷ Similarly, definitions based on corruption's effect on the public interest, such as those offered by Philp or Maryvonne Génaux, do much to elucidate the philosophical implications of corruption but do little to delineate the boundaries of what does and what does not constitute corruption.⁸ Public office definitions, such as that offered by Nye, suffer by failing to encompass broader social and cultural aspects of corruption, some of which are discussed later in this section.

Ulrich von Alemann attempts a more constrained undertaking than that aspired to by Heidenheimer. Rather than attempting to synthesize a single, universal definition from the many theories of corruption, von Alemann suggests that "perhaps it is wrong to search for one true and correct universal definition. Maybe such a definition is like the Holy Grail, i.e. something unattainable that can only be a kind of guiding star."⁹ Instead of

⁹ Ulrich von Alemann, The Unknown Depths of Political Theory: The Case for a
seeking a definition, von Alemann parses theories of corruption for conceptions and understandings of corruption. Von Alemann’s modest grasp for understanding may provide greater insights into corruption than Heidenheimer’s bold reach for a universal definition.

Within the literature on corruption, von Alemann finds five thematic strands, which he describes as:

1. Corruption as social decline;
2. Corruption as deviant behavior;
3. Corruption as logic of exchange;
4. Corruption as a system of measurable perceptions; and
5. Corruption as shadow politics.10

None of these themes are exclusive, although each is discussed separately in the following subsections. In addition, throughout his explication of these themes, von Alemann describes an aspect of corruption, which he calls “polymorphism.” Polymorphism is also discussed separately below.

1. Social decline.

Von Alemann offers as “the classical understanding of corruption” the decline in social or moral values of a state or a leader of a state.11 This understanding perceives corruption as a change in the overall condition, rather than as a discrete act (or aggregation of acts) by specific actors. Von Alemann finds the roots of this understanding in the writings of Aristotle and its embodiment in the political theories of Machiavelli;12 its best-known use, however, is as a description of the collapse of empires, particularly the collapse of Rome.13 Indeed, the iconic historian of Rome—Edward Gibbon—arguably attributes much of the eventual collapse of the Roman Empire to a general moral decline.14

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10 Id.
11 Id.
12 Id at 26–27.
13 See, for example, Ramsay MacMullen, Corruption and the Decline of Rome (Yale 1988); A.W. Lintott, Imperial Expansion and Moral Decline in the Roman Empire, 21 Historia 626 (1972).
Some historical treatments of the context from which modern Ukraine springs also reflect an understanding of corruption as a general condition. Moral decline probably played a role in the collapse of the Soviet empire, of which Ukraine was a part.\footnote{See Stephen Kotkin, \textit{Armageddon Averted: The Soviet Collapse, 1970–2000} 115–17 (Oxford 2001); Victor Sebestyen, \textit{Revolution 1989: The Fall of the Soviet Empire} 17–18 (Pantheon 2009).} Following that collapse, the remnant states entered a condition that Stephen Kotkin terms “pre-corruption”:

[A] condition whereby everyone to varying degrees was a violator, but only the weak were targeted. Imagine Wall Street—corrupt as it is already—if regulation were non-existent. Or American business if regulations functioned merely as a pretext for the petty to extract “fines” and the powerful to crush competitors and those without connections.\footnote{Kotkin, \textit{Armageddon Averted} at 128–29 (cited in note 15).}

An understanding of corruption as a general moral decline has made few, if any, inroads in legal scholarship. John Noonan is one of the few legal scholars to directly address the relationship between corruption and morality. He justifies a moral understanding of bribery with four arguments. In their simplest form, these arguments are that bribery is universally shameful and therefore must violate some universally shared moral precept, that bribery privileges the wealthy and therefore violates general norms of equity and fairness, that the damage inflicted on society through bribery exceeds material measurement and thus must include some normative component, and that corruption violates teleological proscriptions.\footnote{John T. Noonan Jr, \textit{Bribes} 702–06 (Macmillan 1984).} Even Noonan, however, does not understand corruption as a general moral decline. Indeed, Noonan embraces a legalistic definition of corruption but says that legal definitions can only be understood through a moral lens.\footnote{Id at xi–xii.}

2. Deviant behavior.

Von Alemann also refers to theories of corruption that perceive corruption as a deviation from expected standards of conduct.\footnote{Von Alemann, \textit{42 Crime, L & Soc Change} at 28 (cited in note 9).} These theories examine the relationship between particu-
lar actors and the society with which they interact. Robert Klitgaard, for example, posits a Principal-Agent-Client model of corruption, in which the government is the Principal, an individual bureaucrat is the Agent, and society as a whole or an individual member of society is the Client.²⁰ As mentioned, this strand of understanding has considerable purchase in legal scholarship.²¹ Nonetheless, it is subject to criticism: its breadth encompasses virtually all negative behaviors, which renders focused discussion and examination of specific behaviors difficult.²²

Thomas Lancaster and Gabriella Montinola attempt to bring some discipline to this understanding by synthesizing six different “ideal state[s] or natural condition[s]” from which political scientists perceive corruption as deviating.²³ Those six conditions relate to the public interest, legal norms, norms or moral standards sanctioned by the public, rational-legal administration, rational markets, and the agency relationship that underpins democracy.²⁴ They conclude that none of these ideal states or conditions has primacy over another and that deviation from each constitutes a viable means of understanding corruption.²⁵

3. Logic of exchange.

Von Alemann’s use of the phrase “logic of exchange” suggests an understanding of corruption as a transaction or a means of accomplishing an economic task.²⁶ Von Alemann does recognize that “corruption is always an exchange process between two or more persons (or groups organized into two or more parties)” and suggests that in a corrupt transaction one party seeks to obtain something over which the other party has control.²⁷ Von Alemann, however, focuses much of his “exchange” discussion on the parties’ awareness of their wrongdoing, as defined by law.²⁸ Von

²¹ See note 4 and accompanying text.
²⁴ Id at 188–90.
²⁵ Id at 191.
²⁷ Id at 29–30. Von Alemann suggests, for example, that one party might have control over a “contract, concession, license, [or] position,” for which another party might be willing to pay a bribe. Id at 30.
²⁸ Id at 29–30.
Alemann thus introduces, albeit indirectly, the relevance of precise legal definition to an understanding of corruption. Certainly within legal scholarship, precise legal definitions are relevant. For example, only when corruption is understood at the level of precise statutory definition can scholars engage in comparative legal examination. The criminalization of corrupt payments in transnational settings illustrates this point. More than fifty countries have enacted laws criminalizing transnational bribery, and the criminalization of transnational bribery can be discussed as a general phenomenon. Differences exist, however, among the precise laws that give effect to that general phenomenon. For example, the laws of the United States that criminalize the payment of bribes to foreign government officials create an exception for facilitating payments—bribes paid to secure routine non-discretionary acts—while the laws of Mexico do not. Among the more than fifty countries with such laws, other differences abound. In a technical but real sense, corruption may be understood differently in each of these countries because of the differences in these laws. Thus, although the phrase “logic of exchange” might not intuitively include legal rules, von Alemann’s inclusion of precise legal language as a means of understanding corruption has real value.

The notion of corruption as an economic transaction, however, also deserves scrutiny. Noonan long ago foresaw, but resisted, a shift in the treatment of corruption from a moral issue to an economic issue. Noonan’s concerns aside, the tenor of the scholarly discussion of corruption has shifted from normative to economic, and many legal scholars believe that this shift has allowed the international community to address corruption issues

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29 See, for example, Margaret Ryznar and Samer Korkor, Anti-Bribery Legislation in the United States and United Kingdom: A Comparative Analysis of Scope and Sentencing, 76 Mo L Rev 415 (2011).
31 See 15 USC §§ 78dd-1(b), -2(b).
33 See Nichols, 49 Am Bus L J at 363–65 (cited in note 30) (discussing some of the differences).
34 Noonan, Bribes at 702–06 (cited in note 17).
35 Among other things, Noonan did not think that the arguments for a nonmoral understanding of corruption adequately justified a transition from the moral understanding. Id at 685–702. Conversely, he argued that a moral basis continues to offer a superior understanding. Id at 702–06.
without incurring obduracy or resistance from members who felt themselves singled out for moral disapprobation.\textsuperscript{36} Understanding corruption as an economic exchange also encompasses a distinct line of scholarship that (erroneously) identified corruption as a means of expediting or facilitating economic relationships.\textsuperscript{37} Samuel Huntington and Nathaniel Leff, for example, claimed that corruption created a means by which an economic actor could bypass bureaucracy and hasten the effectuation of discrete economic transactions.\textsuperscript{38} This theory sometimes finds expression in legal scholarship.\textsuperscript{39} Recent economic theory and empirical research, however, thoroughly repudiate the idea that corruption confers benefits on an individual economic actor.\textsuperscript{40}


Von Alemann characterizes one line of research as focusing on corruption as “a system of measurable perceptions.”\textsuperscript{41} Von Alemann provides little explanation of the meaning he intends with this label, but he does note the difficulty in accurately measuring corruption.\textsuperscript{42} He also observes that the public may be affected by factors other than the actual amount or degree of cor-


\textsuperscript{39} Amy Chua, for example, describes corruption as “speed money.” Amy L. Chua, The Paradox of Free Market Democracy: Rethinking Development Policy, 41 Harv Intl L J 287, 310 (2000).

\textsuperscript{40} Both theory and empirical research are discussed in Nichols, 49 Am Bus L J at 335–39 (cited in note 30).

\textsuperscript{41} Von Alemann, 42 Crime, L & Soc Change at 31 (cited in note 9).

\textsuperscript{42} Id.
ruption, and that scholars such as Heidenheimer have observed that the public has different degrees of tolerance for different types of corruption.43

Corruption by its very nature occurs hidden from public view, and accountings of corruption often use indirect measures, such as the number of prosecutions for corruption,44 or the difference between the monies paid on a government construction project and the value of the materials actually used by the contractor.45 Ethnographies of corruption abound, and the author of this Article has consistently been surprised at the willingness of people in the field to discuss corruption. Nonetheless, von Alemann's underlying point is critical to a rigorous discussion of corruption: obtaining viable first-person evidence of corruption can be problematic.

5. Shadow politics.

Von Alemann also portrays a role for corruption in what he describes as "shadow politics."46 "Shadow politics" is the systemic analogy to a "shadow economy." Von Alemann assigns political relationships to one of three groups; a "white" group consists of those relationships considered both legal and socially acceptable, while those that are both illegal and socially unacceptable are consigned to darkness. A third group, however, exists in the shadows: relationships or transactions "considered to be legitimate but not legal according to the law, or, conversely, considered to be not legitimate although still within the bounds of the law."47

The term "shadow politics" barely appears in legal scholarship.48 The concept, however, should appeal to those who study

43 Id at 31–32.
45 See Miriam A. Golden and Lucio Picci, Proposal for a New Measure of Corruption, Illustrated With Italian Data, 17 Econ & Polit 37, 37 (2005) (proposing that corruption be measured by systematically subtracting the value of government capital stock from the amounts of monies allocated to pay for those stocks, but recognizing that the resulting number is an indirect measurement).
47 Id.
48 John Davidson and Thomas Geu use both the term and the concept in describing the legal regulation and management of the Missouri River, cautioning that shadow politics may dampen creative adaptations envisioned by the competitive legal structure.
“the gray area [of] campaign finance restrictions.” Scott Noveck amply describes the shadows:

[L]aws against bribery are often very narrow and under-inclusive. Bribery laws “deal only with the most blatant and specific” instances of corruption. Even in cases where a clearly unlawful quid pro quo exists, it may be extremely difficult to prove that such a transaction took place without testimony from a cooperating witness. Moreover, beyond these few easy cases lies a substantial gray area, in which courts applying doctrines such as the rule of leniency must give defendants the benefit of the doubt in any prosecution for bribery.

Clearly, the concept of shadow politics helps to explain the fraught relationship among actors such as lobbyists, campaign donors, and politicians—relationships difficult to describe with precision but often thought of as corrupt.

6. Polymorphism.

Throughout his discussion of each of these strands of understanding, von Alemann observes that corruption manifests itself differently in different polities and countries. He describes corruption, therefore, as “polymorphic.” The observation that corruption manifests itself differently in different places is neither new nor novel. Legal scholars have made such an observation for years. Moreover, von Alemann overstates the ramifications of this observation by suggesting that corruption is acceptable in


50 Id at 86-87 (citations omitted), quoting *Buckley v Valeo*, 424 US 1, 27-28 (1976) (per curiam).


53 Id at 28.

some places. The idea that corruption is acceptable in some places is reviled by scholars from emerging and developing countries. Different manifestations do not imply acceptance. The fact that corruption may manifest itself differently in Kazakhstan than in Mongolia does not mean that persons in each country do not despise corruption. The fact that persons in each country experience corruption differently than a person in Illinois does not mean that any of them despises corruption to a lesser degree than the others. Corruption may be widely engaged in in some microcommunities, but even in those communities there is no evidence that corruption is normatively accepted. Nonetheless, von Alemann’s underlying observation—that corruption manifests itself differently in different polities and countries—is important in developing a fulsome understanding of corruption.

B. The Effects of Corruption

Corruption affects any polity in a negative manner, but its effects are particularly acute in emerging economies. As a country only recently emerging from an authoritarian period, in the nascent stages of its commercial and social relationships with Europe and the rest of the world, Ukraine fits both the technical definition and the real-world experience of an emerging economy.

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55 Von Alemann, 42 Crime, L & Soc Change at 28 (cited in note 9) (“During some historical phases bribery, the purchase of office and votes is a normal phenomenon known to the population but not condemned by it.”).
56 See, for example, Daniel Y. Jun, Bribery Among the Korean Elite: Putting an End to a Cultural Ritual and Restoring Honor, 29 Vand J Transnatl L 1071, 1084 (1996). See also Noonan, Bribes at 703 (cited in note 17) (“It is often the Westerner with ethnocentric prejudice who supposes that a modern Asian or African society does not regard the act of bribery as shameful in the way Westerners regard it.”).
58 Seven Illinois governors have been indicted for corruption, “a level of corruption unheard of in other parts of the country.” Sarah Klaper, The Sun Peeking Around the Corner: Illinois’ New Freedom of Information Act as a National Model, 10 Conn Pub Int L J 63, 63 (2010).
Selçuk Akçay succinctly and chillingly summarizes empirical research on the effects of corruption:

[Corruption] reduces economic growth, retards long-term domestic and foreign investments, enhances inflation, depreciates national currency, reduces expenditures for education and health, increases military expenditures, misallocates talent to rent-seeking activities, pushes firms underground, distorts markets and the allocation of resources, increases income inequality and poverty, reduces tax revenues, increases child and infant mortality rates, distorts the fundamental role of the government (on enforcement of contracts and protection of property rights), and undermines the legitimacy of government and of the market economy.\(^6\)

Of these effects, four deserve special attention with respect to emerging economies such as Ukraine: the decrease in economic growth and investment, the distortion of public decisions, the undermining of support for government and reforms, and the creation of parallel institutions. To put the matter as succinctly as does Akçay, the global community has much reason for concern about corruption.


Empirical studies find that corruption negatively affects economic growth and performance in numerous ways.\(^6\) In general, empirical economists find a negative correlation between corruption and economic growth.\(^6\) Indeed, Pak Hung Mo finds that Ukraine is considered a developing country by international organizations).

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that a 1 percent increase in levels of corruption decreases growth in gross domestic product by almost 3/4 percent.  

Corruption also decreases foreign investment. Paolo Mauro conducted the most well-known empirical research demonstrating this effect, finding a “negative association between corruption and investment, as well as growth, [that] is significant in both a statistical and an economic sense.”  

Scholars following Mauro, using different data sets, also find that corruption decreases foreign investment. Corruption is not, of course, a monolithic phenomenon; it occurs in a variety of forms. Research suggests that all forms are harmful. Edgardo Campos and others find, for example, that while “predictable” government corruption yields less of a negative effect, it still yields a negative effect. Corruption has also been found to have a negative relationship with domestic investment.

Other indicators suggest that corruption negatively affects economic performance. There is a positive relationship between corruption and inflation. Corruption depreciates national currency as measured by real exchange rates. Dilip Mookherjee and Ivan Png start with an assumption of no social costs and ig-
nore all transfer costs, and are still able to prove that, "[f]or every outcome when bribery is profitable, there exists another in which bribery is not profitable, that yields higher welfare."72 In other words, in the aggregate, corruption always imposes economic costs.

The economic costs imposed on emerging and developing economies in particular can be quite high. Hrishikesh Vinod finds that "in developing countries a dollar's worth of corruption causes a $1.67 worth of a burden on the economy."73 Countries such as Ukraine have legitimate concerns about the effects of corruption on their economic well-being.74

2. Corruption distorts decision making by public officials.

Corruption distorts decision making in two profound ways: by distorting the parameters within which decisions are made, and by distorting the pool of decision makers. The consequences of a distorted decision-making process are severe. As Josef Zieleniec, former Foreign Minister of the Czech Republic, observes:

[C]orruption usurps and replaces other standard selection mechanisms—and thus puts the economy in a dangerously irreversible position—one in which reducing corruption might actually destabilise the economy. If a large number of public servants are corrupt, a closed system is created, which prevents the country from progressing normally. Suddenly, alternative, honest forms of decisionmaking are threatened with extinction.75

Corruption distorts the parameters within which economic decisions are made. Corruption, and especially bribery, often is aimed at economic decisions by bureaucrats.76 In a rational mar-

74 See, for example, Yuriy Gorodnichenko and Klara Sabirianova Peter, Public Sector Pay and Corruption: Measuring Bribery from Micro Data, 91 J Pub Econ 963, 988 (2007) (finding that bribes paid to public officials in Ukraine equal 0.9 to 1.2 percent of Ukraine’s GDP).
76 A striking example particularly pertinent to many emerging economies is the process of privatization. See Kjetil Bjorvatn and Tina Søreide, Corruption and Privatization,
ket system, decisions about which good or service to purchase are made on the basis of price and quality. A corrupt decision maker, on the other hand, does not consider the price or quality of goods or services but instead makes a decision based on the size and quality of a bribe. At best, the product of such decision making is lower quality goods and services. At worst, the product is a large-scale misallocation of the limited resources of the polity.

Empirical studies bear out this prediction: studies find a link between corruption and disproportionate military spending, as well as between corruption and the percentage of paved roads in good condition, and between levels of corruption and the ratio of both public education spending and public health spending to gross domestic product.

Corruption also affects the decision-making process by creating an incentive for public officials to delay, obfuscate, or hide information. This effect encompasses both poor decision outcomes and an inefficient decision-making process. A study of the issuance of driving licenses in Delhi, India found both effects of corruption. In an endemically corrupt setting, the investigators found that 70 percent of those who were issued driving licenses did not even take a driving examination and that 62 percent of


78 Id.


81 Tanzi and Davoodi, Corruption, Public Investment, and Growth at 3 (cited in note 63). In a brilliant study in which engineers physically examined samples of roads constructed in Indonesia, Benjamin Olken found a direct correlation between corruption and low quality roads. Benjamin A. Olken, Monitoring Corruption: Evidence from a Field Experiment in Indonesia, 115 J Polit Econ 200 (2007).


those given licenses could not drive. At the same time, the investigators found that bureaucrats created artificial barriers and delays, probably for the purpose of extracting illegal payments from applicants.

Corruption not only causes bad decisions to be made, but it also degrades the pool of public officials who make decisions. The "pervasiveness of corruption contributes to its persistence in a significant way" by causing capable and honest persons to avoid employment within corrupt bureaucracies. At the same time, corrupt systems tend to attract corrupt bureaucrats, and the "corruption field" of social interaction is constantly replenished as new 'members of the cast' are added to it. Honest people tend to leave, dishonest people tend to join, and the bureaucracy suffers.

3. Corruption degrades the quality of life and corrodes support for reform.

As should be expected of a process that misallocates public and private resources, corruption degrades the quality of life for persons living in endemically corrupt polities. Scholars have measured several of the ways in which corruption degrades life. For example, corruption has been found to increase child mortality rates, lower birth weight, and increase the dropout rate of children from primary school. Similarly, a strong negative rela-

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85 Id at 1640.
86 Id at 1642.
89 E.N. Kofanova and V.V. Petunkhav, Public Opinion of Corruption in Russia, 47 Russ Soc Sci Rev 23, 23 (2006). While studying the Irrigation Department of a state in southern India, Robert Wade found that corrupt senior officials sold government posts to junior officials who desired such positions in order to extract bribes. This perpetuated the entry into bureaucratic service of dishonest and incapable persons to the exclusion of honest decision makers. Robert Wade, The Market for Public Office: Why the Indian State Is Not Better at Development, 13 World Dev 467, 474–80 (1985) (describing the sale of offices in a southern Indian state).
tionship exists between corruption and the performance and viability of healthcare systems.\textsuperscript{91} Corruption negatively affects environmental policy and the quality of the environment.\textsuperscript{92} A relationship has even been found between corruption and increases in traffic fatalities.\textsuperscript{93}

Bad government and degradation of the quality of life breed cynicism and corrode support for government and economic reforms.\textsuperscript{94} Indeed, some social scientists consider corruption the single greatest threat to the development of democracy in emerging economies.\textsuperscript{95} Corruption vitiates support for market and economic reform,\textsuperscript{96} and—when it accompanies democratic reform—perversely legitimizes the previous authoritarian regimes and even creates a nostalgic longing for those regimes.\textsuperscript{97}


\textsuperscript{93} Nejat Anbarci, Monica Escaleras, and Charles Register, *Traffic Fatalities and Public Sector Corruption*, 59 KYKLOS 327 (2006). See also notes 84–86 and accompanying text (discussing the issuance of driving licenses to unqualified drivers by corrupt public officials).

\textsuperscript{94} Nancy Zucker Boswell, *Combating Corruption: Focus on Latin America*, 3 Sw J L & Trade Am 179, 184 (1996) ("Perhaps the greatest casualty of . . . corruption has been the erosion of public trust in public institutions and leaders, the foundation of democracy."); A.W. Cragg, *Business, Globalization, and the Logic and Ethics of Corruption*, 53 Intl J 643, 654 (1998) (noting that a lack of respect for law and legal institutions is a "casualty" of bribery).

\textsuperscript{95} See, for example, Larry Diamond, *Developing Democracy: Toward Consolidation* \textsuperscript{92} (Johns Hopkins 1999) (stating that corruption poses a serious threat to the consolidation of democracy); Alexandru Grigorescu, *The Corruption Eruption in East-Central Europe: The Increased Salience of Corruption and the Role of Intergovernmental Organizations*, 20 E Eur Polit & Soc 516, 519 (2006) (stating that corruption "is now seen as one of the greatest threats to the survival of new democracies around the world"); Mitchell A. Seligson, *The Measurement and Impact of Corruption Victimization: Survey Evidence from Latin America*, 34 World Dev 381, 381 (2005) ("Widespread corruption is increasingly seen as one of the most significant threats to deepening democratization in Latin America (and indeed much of the democratizing Third World.)").


\textsuperscript{97} See Grigorescu, 20 E Eur Polit & Soc at 519–20 (cited in note 95) (discussing corruption's role in the corruption of support for democracy and engendering nostalgia for authoritarian regimes); Seligson, 34 World Dev at 382 (cited in note 95) (discussing the erosion of support for democratic reforms and the exploitation of public disgust with democracy by authoritarian leaders). Several studies empirically measure the decrease in support for democracy that accompanies increases in corruption in emerging economies.
Susan Rose-Ackerman summarizes scholarly research on the social effects of corruption:

[C]orruption undermines the legitimacy of governments, especially democracies. Citizens may come to believe that the government is simply for sale to the highest bidder. Corruption undermines claims that the government is substituting democratic values for decisions based on ability to pay. It can lead to coups by undemocratic leaders. 98

Yaroslav Romanchuk, an economist and opposition politician in Belarus, states this more starkly and more personally: “When people saw that under the banner of freedom we have moral degradation, huge inequality, outrageous examples of property being stolen by a few self-nominated politicians and bureaucrats, of course they said: ‘If this is democracy and capitalism, we don’t want it.’” 99

4. Parallel institutions.

Corruption leads to the creation of parallel institutions. Parallel institutions are institutions created informally to perform the same functions as “official” or existing institutions. 100 In lay terms, parallel institutions include institutions such as “black markets” and “loan sharking.” 101 Parallel institutions often come into existence as a reaction to failures in state sanctioned institutions, as people attempt to concoct means of getting done that which the state cannot or will not do for them. 102


98 Rose-Ackerman, The Political Economy of Corruption at 45 (cited in note 83).
Corruption fuels the creation of parallel institutions because corrupt institutions are dysfunctional. Corrupt institutions often do not work, or work in ways counter to their stated purpose; people do not trust corrupt institutions and will not use them if not doing so is at all possible. The creation of parallel institutions provides an escape mechanism from corrupt institutions.

"[I]f legal systems are dysfunctional . . ., we may expect all forms of the private order to emerge: relational contracts, arbitration, business networks, trade associations, and social networks." The extent to which the creation of parallel institutions inflicts costs on societies has received scant attention in the literature on corruption or on legal systems. In some ways, parallel institutions provide a service by allowing people to do that which the state will not let them do. Institutions, however, are not cost-free; their creation and maintenance imposes costs that

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Austin describes the creation of a market for loan sharks when needy persons do not have access to formal sources of credit. Regina Austin, Of Predatory Lending and the Democratization of Credit: Preserving the Social Safety Net of Informality in Small-Loan Transactions, 53 Am U L Rev 1217, 1238-39 (2004). Polities that experience extensive failure of state institutions, such as the rump states of the former Yugoslavia, provide fertile ground for the creation of parallel institutions. See Adam Raviv, Jigsaw Sovereignty: The Economic Consequences of Decentralization in Post-Dayton Bosnia, 37 Geo Wash Intl L Rev 109, 113–16 (2005) (describing the creation of "pseudo-governmental structures," "para-state[s]," and "ghost municipalities" in Croatia and Herzegovina and noting that "[t]he continuing existence of parallel institutions, and the accompanying corruption that is endemic to them, can serve as a barrier to foreign investment"); Hansjör Ig Strohmeyer, Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor, 95 Am J Intl L 46, 56 n 44 (2001) (describing the creation of parallel institutions among ethnic Albanians in Kosovo, including the creation of an underground school of law).

Bernard Black and Reinier Kraakman, A Self-Enforcing Model of Corporate Law, 109 Harv L Rev 1911, 1915 (1996). See Ángel Ricardo Oquendo, Corruption and Legitimation Crises in Latin America, 14 Conn J Intl L 475, 488 (1999) ("Moreover, it is precisely the culture of corruption that, to a significant extent, renders them dysfunctional and illegitimate.").

Rose-Ackerman, The Political Economy of Corruption at 45 (cited in note 83) (discussing the disengagement of people from state institutions because they mistrust corrupt institutions).


See Priest, 103 Yale L J at 2288 (cited in note 102).
must be borne by some entity. Parallel institutions “do not have the capacity to generate as much efficiency-enhancing economies of scale in the provision of a public good as the state does.” It is very likely, therefore, that the creation of parallel institutions as a reaction to corruption does impose inefficiency costs on emerging economies. Parallel institutions also raise issues of fragmentation and segmentation of society. None of these costs or effects has been explored by empiricists; nonetheless, the creation of parallel institutions as a reaction to corruption must be recognized by those who wish to understand corruption.

II. PAVLO LAZARENKO AND YULIYA TYMOSHENKO

In 1991, Ukraine reclaimed its independence from the Soviet Union, with Leonid Kravchuk as its first president. In 1994, Ukraine elected Leonid Kuchma as its second president. Regionally based networks played and still play a powerful role in Ukrainian politics; Kuchma came from the powerful Dnipropetrovsk region, the heartland of Ukrainian industry. Kuchma brought with him to power a phalanx of political actors from Dnipropetrovsk. Among those was Pavlo Lazarenko, who Kuchma appointed to the position of Deputy Prime Minister in charge of energy and eventually Prime Minister of Ukraine.

While Ukraine was a republic within the Soviet Union and immediately after independence, Lazarenko served in a number of positions, including head of an agricultural collective, bureaucrat in various ministries, and eventually governor of the

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108 See Marina Ottaway and Theresa Chung, Toward a New Paradigm, 10 J Democracy 99, 99 (1999) (stating that institutions are expensive and questioning whether some developing countries can afford the institutions that support democracy).
114 Id.
Dnipropetrovsk region. Lazarenko amassed a fortune in these positions. The conduct of business in Dnipropetrovsk required Lazarenko’s personal consent, and the price of that consent was a 50 percent share in control and in profits.

Tymoshenko also came of age in Dnipropetrovsk but was born into a family without political connection. In her first year at Dnipropetrovsk State University, however, she met and married Oleksandr Tymoshenko, whose father was a well-connected Soviet official in the region. With her husband and father-in-law, Tymoshenko put together the capital and the permissions to run a small service business. There can be little doubt that Tymoshenko’s father-in-law and Lazarenko knew one another, or that Tymoshenko’s father-in-law’s connections played a critical role in enabling the creation of the family cooperative. In 1991, when Ukraine reclaimed independence, Tymoshenko’s cooperative shifted its core focus to the provision of petroleum products to farmers in the Dnipropetrovsk region. Given Lazarenko’s personal interest in all energy-related projects in Dnipropetrovsk, it is almost certain that by the time she moved into the energy sector, Lazarenko and Tymoshenko had established social and business relationships.

Yuliya Tymoshenko was not the only businessperson with connections to Lazarenko. Peter Nikolayavich Kiritchenko also wished to conduct business in Dnipropetrovsk. Lazarenko de-

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116 Id.
117 Id at 58–59.
118 United States v Lazarenko, 564 F3d 1026, 1030 (9th Cir 2009).
119 Andrew Wilson, Ukraine’s Orange Revolution 18 (Yale 2005).
120 Id.
122 See Wilson, Ukraine’s Orange Revolution at 19 (cited in note 119) (suggesting that Tymoshenko’s business could not have existed without connections to Lazarenko).
123 Id.
124 See Anders Åslund, The Ancien Régime: Kuchma and the Oligarchs, in Anders Åslund and Michael McPaul, eds, Revolution in Orange: The Origins of Ukraine’s Democratic Breakthrough 9, 12 (Carnegie 2006) (stating that Lazarenko and Tymoshenko were by then close business partners). The nature of that relationship is captured in Wall Street Journal reporter Matthew Brzezinski’s depiction of his first meeting with Tymoshenko: “In a place of honor, over her high-backed chair, Timoshenko had hung a gilded photograph of that great patriot and patron, the worthy Pavlo Lazarenko.” Matthew Brzezinski, Casino Moscow: A Tale of Greed and Adventure on Capitalism’s Wildest Frontier 142 (Free Press 2001).
manded the usual 50 percent of control and 50 percent of profits, to which Kiritchenko agreed.\textsuperscript{126} Their relationship, however, extended beyond the initial extortion. Kiritchenko acted as a conduit through which Lazarenko could hide money and could get money out of Ukraine.\textsuperscript{127} Eventually, Lazarenko used Kiritchenko to purchase a bank in Antigua and to establish correspondent accounts for that bank in the United States.\textsuperscript{128}

Kuchma elevated Lazarenko to national politics, first as Deputy Prime Minister in charge of energy and then in 1996 as Prime Minister.\textsuperscript{129} Although his supporters argue that Lazarenko brought law and order to the energy sector, his reforms had loopholes through which certain individuals could and did profit.\textsuperscript{130} Most notable among these individuals was Lazarenko himself. During his tenure as Deputy Prime Minister in charge of energy, Lazarenko accrued a substantial fortune by purchasing and selling state energy contracts.\textsuperscript{131} Lazarenko used his control of state petroleum firms to buy natural gas at a subsidized rate, which he then sold to foreign purchasers at world market prices.\textsuperscript{132} Domestically, Lazarenko laundered his gains using Ukraine's barter-based economy.\textsuperscript{133} Natural gas is the most vital commodity to Ukrainian industry and is often procured through bartering.\textsuperscript{134} Lazarenko therefore was able to exchange illegally procured gas for virtually any commodity through unregistered barter transactions. In turn, he could then trade the commodities

\begin{itemize}
\item \textsuperscript{126} Id.
\item \textsuperscript{127} Id. The relationship between Kiritchenko and Lazarenko, which the court notes is "somewhat complex," is also described in \textit{United States v Lazarenko}, 624 F3d 1247, 1250 (9th Cir 2010).
\item \textsuperscript{128} Felch, \textit{To Catch an Oligarch} (cited in note 125).
\item \textsuperscript{129} Kubicek, \textit{Unbroken Ties} at 58 (cited in note 115).
\item \textsuperscript{130} James Kostiw, \textit{Paul Lazarenko: Is the Former Ukrainian Prime Minister a Political Refugee or a Financial Criminal?}, 2 Organized Crime and Corruption Watch 1 (Summer 2000). See also Paul D'Anieri, Robert Kravchuk, and Taras Kuzio, \textit{Politics and Society in Ukraine} 200 (Westview 1999) (discussing some of Lazarenko's economic reform proposals).
\item \textsuperscript{132} Åslund, \textit{The Ancien Régime} at 11–12 (cited in note 124). Some reports claim that he accumulated more than $700 million through this scheme. Kostiw, 2 Organized Crime and Corruption Watch at 1 (cited in note 130).
\item \textsuperscript{133} Charles Clover, \textit{Swiss Investigate the Profits from Unaccountable Ukrainian Gas Trading: Charles Clover Reports on the Background to the Arrest of a Former Prime Minister in Geneva on Money Laundering}, Financial Times 2 (Dec 9, 1998).
\item \textsuperscript{134} Kostiw, 2 Organized Crime and Corruption Watch at 2 (cited in note 130).
\end{itemize}
on the open world market. Lazarenko also continued to use the
services of Kiritchenko and an elaborate network of international
bank accounts.

Energy companies with which he already had a relationship
benefited handsomely from their relationship with Lazarenko. This
especially included Tymoshenko’s company, now named United
Energy Systems of Ukraine. The ownership structure of
United Energy Systems was unclear, and included holding
companies outside of Ukraine that also acted as recipients of
contractual payments; but it is clear that Lazarenko had a close
relationship with the company. As Deputy Prime Minister in
charge of energy, Lazarenko awarded United Energy Systems a
contract to supply one-third of Ukraine’s natural gas needs.

In 1996, Lazarenko was appointed Prime Minister of
Ukraine and United Energy System’s fortunes expanded even
further. Lazarenko partitioned Ukraine’s energy market into
separate sectors, awarding individual energy firms monopoly
rights in specific regions. Lazarenko allegedly received pay-
ments from various energy companies in exchange for the award
of these monopolies. Lazarenko awarded United Energy Sys-
tems the most profitable contract rights, those of the industrial
oblasts. The business associated with United Energy System’s
monopolies earned revenues equal to between one-fifth and one-
quarter of the Ukrainian gross domestic product for that year.
During Lazarenko’s tenure as Prime Minister, President Kuchma awarded him medals for his service to the government. As foreign governments and the Ukrainian parliament voiced increasing concern over the level of corruption in the Ukrainian government, however, Kuchma’s support for Lazarenko waned. In the summer of 1997, President Kuchma finally forced Prime Minister Lazarenko from office.

Once out of office, Lazarenko became a Kuchma opponent and the leader of his own opposition party, named “Hromada,” with which Tymoshenko worked closely. The use of media illustrates the tenor of the political contest between Lazarenko and Kuchma. Hromada contracted to have an offshore company buy 500,000 subscriptions to Pravda, a Ukrainian paper with a 35,000-person subscription base, and entered into a similar deal with Vseukrainskiye Vedimosti. Not surprisingly, those publications portrayed Lazarenko quite favorably.

Kuchma responded fiercely. He had United Energy System’s trading licenses revoked and sent auditors to examine United Energy System’s financial records. Subsequently, the company’s bank accounts were frozen and both Pravda and Vseukrainskiye Vedimosti were shut down. The Office of the Prosecutor General of Ukraine made representations to Parliament about obtaining an agreement to institute criminal proceedings against Lazarenko for the commission of crimes involving cor-

145 Taras Kuzio, When Oligarchs Go into Opposition: The Case of Pavlo Lazarenko, 2 Russia and Eurasia Rev (May 27, 2003).
148 Kubicek, Unbroken Ties at 59 (cited in note 115). See also Wilson, Ukraine’s Orange Revolution at 21 (cited in note 119); Kuzio, 2 Russia and Eurasia Rev (cited in note 145). “Hromada” translates into English as “group” or “community.” Tymoshenko’s “Fatherland” party was considered the successor of the now-defunct Hromada. Taras Kuzio, Populism in Ukraine in a Comparative European Context, 57 Problems of Post-Communism 3, 18 n 18 (Nov/Dec 2010).
150 Id.
152 Koshiw, The Dogs of Ukraine’s Clan Wars (cited in note 149).
ruption. In response, Lazarenko left Ukraine and, at some point, entered Switzerland.

In Switzerland, Lazarenko was arrested for attempting to enter Switzerland using only a Panamanian identity card. The Swiss then charged him with money laundering and set his bail at $2.6 million. Lazarenko posted bail and promptly left the country. Shortly thereafter, the Ukrainian Parliament voted to strip Lazarenko of his government immunity, and the next day, prosecutors issued a warrant for his arrest on charges of corruption. The following day, Lazarenko arrived in the United States. Once again, Lazarenko was detained for using improper identification documents to enter a country. While in the custody of US authorities, Lazarenko requested asylum, claiming he suffered political persecution in Ukraine. The United States eventually denied this motion and instead, in May of 2000, filed its own charges against the former Prime Minister.

 Initially, Ukraine’s interest in prosecuting Lazarenko undoubtedly was driven in large part by Kuchma’s personal anger at the betrayal by a former political ally. Kuchma’s presidency, however, did not survive the political turbulence of Ukraine. Public revulsion engendered by the activities of Kuchma and his administration “threw the country into turmoil.” Kuchma’s designated successor, Viktor Yanukovych, won the subsequent election to the presidency, but outside monitors condemned the elections as rigged. Following those elections, hundreds of
thousands of people demonstrated in an “Orange Revolution” against Yanukovych’s election, corruption, and other undemocratic aspects of the Kuchma regime. In 2005, after a series of contested elections, demonstrations, and court rulings, Viktor Yuschenko—the leader of the party opposed to Kuchma—became the President of Ukraine. Yuschenko appointed Tymoshenko as Prime Minister. Ukraine’s politics have since been a series of contests between Yuliya Tymoshenko, Viktor Yuschenko, and Viktor Yanukovych.

Shortly after her appointment as Prime Minister, Yuschenko dismissed Tymoshenko along with her cabinet and senior presidential aides amidst charges of corruption and discordance. In 2006, Yuschenko was forced by Parliament to accept Yanukovych as the Prime Minister, and in 2007, after another round of Parliamentary elections, he was forced to accept Tymoshenko as Prime Minister.

During this second term as Prime Minister, Tymoshenko faced one of Ukraine’s most serious crises. Russia cut off supplies of natural gas to Ukraine, claiming that Ukraine had failed to pay. Tymoshenko signed an agreement that allowed the supply of gas to continue, but the terms favored Russia. Ukraine was required to pay for large units of natural gas, whether used or not, whereas the transshipment fee paid by Russia on natural gas shipped to Europe was based on the actual amount of gas transshipped.

165 Id at 125. Wilson notes that more than 800,000 residents of Kiev alone claimed to have participated in the protests. Id at 127.
170 Chunyang Shi, Perspective on Natural Gas Crisis between Russia and Ukraine, 1 Rev Eur Stud 56, 58 (2009). Because a large portion of Western Europe’s gas transships through Ukraine, Western Europe was thrown into crisis as well. Id at 58–59.
171 For an explanation of the agreement, as well as a discussion of the dispute between Russia and Ukraine, see Mert Bilgin, Geopolitics of European Natural Gas Demand: Supplies from Russia, Caspian and the Middle East, 37 Energy Pol 4482 (2009).
172 See id.
In 2010, Yanukovych narrowly beat Tymoshenko in the elections for the Presidency, and later that year, Tymoshenko stepped down as Prime Minister. Tymoshenko’s resignation from the prime ministership set the stage for her trial on a charge that she abused her power.

III. THE CRIMINAL TRIALS OF PAVLO LAZARENKO AND YULIYA TYMOSHENKO

A. Pavlo Lazarenko

Pavlo Lazarenko engaged in corrupt activity in Ukraine while serving as a government official and then transferred the proceeds of that corrupt activity to several places outside of Ukraine to hide and to launder them. A portion of Lazarenko’s activities occurred within the United States. Lazarenko allegedly transferred more than $100 million through various US banks. That this activity occurred within the United States gave US prosecutors an opening. The United States charged Lazarenko with money laundering, wire fraud, transportation of stolen property, and conspiracy.

The prosecution of Lazarenko is remarkable in a narrow sense because it was the first time the United States has prosecuted a foreign leader in part for crimes committed in that leader’s country. In a broader and more interesting sense, Lazarenko’s case is worth studying because the prosecution cobbled together two sets of local laws—in this instance US laws dealing with money laundering, wire fraud, and transportation of stolen property and Ukrainian laws dealing with property and the standards of behavior of government officials—to regulate transnational behavior. The process of cobbled together local laws to regulate transnational behaviors raises several questions, ranging from the role and administration of those local laws to the nature of corruption. Indeed, the trial of Lazarenko was delayed for several years, in part because a number of the

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175 United States v Lazarenko, 476 F3d 642, 645 (9th Cir 2007).
witnesses were abroad and not available, but also because of the complexity of the case. Many of these complexities were addressed by the court in two orders, one issued before the trial commenced and the other issued after the presentation of the prosecution’s case in chief.

1. The first order: the role of Ukrainian law.

In response to differing positions taken by the government and the defense, the court asked for briefs and issued an order on the role of Ukrainian law in the prosecution of Lazarenko. The government suggested that Ukrainian law should play only a limited role, whereas the defense argued that Ukrainian law played a central role. In issuing its order, the court adroitly addressed the relationship between the two sets of local laws with respect to money laundering and the transportation of stolen property, but displayed far less care with respect to the charge of wire fraud.

a) Money laundering. The indictment charged Lazarenko with eight counts of money laundering. Money laundering involves a downstream financial transaction intended to conceal the proceeds of a known unlawful activity. The unlawful activities alleged by the government consisted of foreign extortion, wire fraud, and receipt of stolen property. The charge of foreign extortion was supported by 18 USC § 1956(c)(7)(B)(ii), which lists as a predicate crime “an offense against a foreign nation involving . . . extortion.” The statute has since been amended to include offenses 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.” Many of Lazarenko’s activities would seem to fall within

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177 Wilson, Ukraine’s Orange Revolution at 40 (cited in note 119).
182 Id.
183 18 USC § 1956(c)(7)(B)(ii). The statute also lists offenses against a foreign nation involving murder, kidnapping, robbery, and the destruction of property by fire or explosion as predicate crimes. Id.
the expanded statute, but since those provisions were not contained in the statute at the time of the prosecution, the government was required to proceed under the provision involving extortion.

The phrase “offense against a foreign nation” could be read as meaning that the foreign state must be the immediate victim of the alleged act. In *United States v One 1997 E35 Ford Van,* however, the federal district court for the Northern District of Illinois specifically rejected such a reading, holding that it “would unduly limit the ability of the federal government to prosecute those who launder money for the purpose of promoting serious criminal activity in a foreign country.” The Northern District of Illinois’s interpretation of the phrase “offense against a foreign nation” clearly comports with the general understanding of crime as an offense against the state. However, it also imposes on the prosecution the requirement of demonstrating that the underlying activity of the defendant is in fact an offense against the state; that is, that the underlying activity violated the laws of the country in which it occurred. Indeed, in its order, the court wrote that the prosecution bore the burden of proving that Lazarenko’s alleged extortive acts violated Ukrainian law.

b) Wire fraud. The indictment of Lazarenko alleged twenty-two counts of wire fraud in violation of 18 USC § 1343 and § 1346. Successful prosecution of a wire fraud charge requires proof of “(1) a scheme to defraud, (2) use of the wires in furtherance of the scheme, and (3) a specific intent to deceive or defraud.” The wire fraud statute also makes clear that “the term ‘scheme or artifice to defraud’ includes a scheme or artifice to deprive another of the intangible right of honest services.” The government’s ability to bring charges for a deprivation of honest

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185 50 F Supp 2d 789 (ND Ill 1999).
186 Id at 802.
188 *Lazarenko,* 2003 US Dist LEXIS 25940 at *12.
189 Id at *19.
191 18 USC § 1346.
services, however, has been severely curtailed by the US Supreme Court’s decision in \textit{Skilling v United States}.\textsuperscript{192}

At the time that Lazarenko was charged, prosecutors routinely charged deprivation of honest services in cases of public corruption.\textsuperscript{193} The majority of courts evaluating a claim of deprivation of honest services by a public official have applied a fairly broad definition involving a violation of the relationship between that official and the public.\textsuperscript{194} Public officials bear an inherent responsibility to make decisions in the public’s best interest and to disclose any conflict of interest in doing so.\textsuperscript{195} Courts have held that this duty “need not be based upon the existence of some statute prescribing such a duty” because an official is a “trustee for the citizens and the State . . . and thus owes the normal fiduciary duties of a trustee, e.g., honesty and loyalty.”\textsuperscript{196} Therefore, any “undisclosed, biased decision making for personal gain, regardless of tangible loss to the public . . . constitutes a deprivation of honest services.”\textsuperscript{197} As John Coffee has noted,

\begin{quote}
The key idea in this now sizable body of law is that a public decision-maker must disclose any conflict of interest in a transaction or decision that could result in personal gain to the decision-maker. In addition, any receipt of a gratuity may also require disclosure, at least when the decision-maker possesses discretionary authority and the payor has an incentive to influence the public official.\textsuperscript{198}
\end{quote}

One thin but discernible strand of cases has held that deprivation of honest services occurs only when a specific law is violated. According to this interpretation, “a federal prosecutor must prove that conduct of a state official breached a duty respecting the provision of services owed to the official’s employer

\textsuperscript{192} 130 S Ct 2896 (2010). See Elizabeth R. Sheyn, \textit{Criminalizing the Denial of Honest Services after Skilling}, 2011 Wisc L Rev 27, 28 (describing the decision as “the latest in a series of blows” to the intangible right to honest services).


\textsuperscript{195} United States v Lopez-Lukis, 102 F3d 1164, 1169 (11th Cir 1997).

\textsuperscript{196} United States v Mandel, 591 F2d 1347, 1363 (4th Cir 1979), revd on other grounds on rehg en banc, 602 F2d 653 (4th Cir 1979) (per curiam).

\textsuperscript{197} United States v Sawyer, 85 F3d 713, 724 (1st Cir 1996).

under state law.” Coffee condemns this approach to honest services, pointing out that the requirement of a violation of a law “could have a devastating impact on the public fiduciary context” and would overturn the existing standards regarding honest services “because the common law has never developed a substantial body of precedents dealing with the disclosure obligations of the public official.”

The Lazarenko court recognized that misuse or abuse of a Ukrainian office must be determined on Ukrainian terms. By analogy to the vast majority of rulings on charges of public corruption in the United States, the court should have required the government to demonstrate that Lazarenko had breached the inherent duties that an official owes to the Ukrainian public, without reference to any particular law.

The court, however, acted contrary to the then-prevailing doctrine. Rather than requiring the government to prove a breach of a general duty, the court required the government to “establish that Lazarenko’s conduct violated the local, state or common law of Ukraine, or that he knew others were doing so on his behalf.” The court took an interesting journey to reach this conclusion. The court started by acknowledging that the “fiduciary duty to disclose information the public would want to know ... is often defined by state and local ethics laws.” The court then made reference to a case from another circuit, in which a court used a violation of local law to support the finding of a breach of the fiduciary duty. From this finding, the court concluded that the prosecution was required to prove a violation of Ukrainian law.

In using this approach, the court seemed to abandon the principle that “[n]o trustee has more sacred duties than a public official and any scheme to obtain an advantage by corrupting such an one must in the federal law be considered a scheme to defraud.”

The court’s ruling, however, proved somewhat prescient. Shortly after Lazarenko’s conviction, the Supreme Court of the United States v Brumley, 116 F3d 728, 734 (5th Cir 1997).


202 Id at *22.

203 Id at *20 (emphasis added).

204 Id at *20, citing United States v Antico, 275 F3d 245, 263 (3d Cir 2001).

205 Lazarenko, 2003 US Dist LEXIS 25940 at *22.

206 Shushan v United States, 117 F2d 110, 115 (5th Cir 1941).
United States vitiated the honest services charge in Skilling v United States. The Court held that, in order to avoid unconstitutional vagueness, “honest services” must be limited to cases involving bribes or kickbacks. The Court specifically rejected an interpretation of honest services that includes “undisclosed self-dealing by a public official or private employee – i.e., the taking of official action by the employee that furthers his own undisclosed financial interests while purporting to act in the interests of those to whom he owes a fiduciary duty.” The Supreme Court’s constriction of honest services may have a greater effect on future prosecutions of acts such as those engaged in by Lazarenko than did the narrow holding of the district court; nonetheless, the convoluted actions taken by the district court help to illustrate the complexities of this type of prosecution.

c) Transportation of stolen property. The indictment also charged Lazarenko with twenty-three counts of interstate transportation of stolen property. Successful prosecution of this charge requires proof of two elements: (a) that the property in question was stolen, converted, or taken by fraud, and (b) that the property in question was transported over a state line. Curiously, the word stolen “has no accepted common law meaning.” Courts instead look to the purpose and intent of a statute containing the word “stolen.” Within the context of a federal statute, therefore, the word “stolen” should be given the color of

207 130 S Ct 2896.
208 Id at 2931.
209 Id at 2932.
211 Lazarenko, 2003 US Dist LEXIS 25940 at *30. The criminalization of interstate transportation of stolen property has special relevance to the regulation and control of corrupt activities that cross national borders. The US Supreme Court observed that the purpose of such legislation is to reach malfeasors who might otherwise escape prosecution simply by crossing a border. United States v Sheridan, 329 US 379, 384 (1946).
212 18 USC § 2314. See Jorge C. Gonzalez, Note, Punishing the Causer as the Principal: Mens Rea and the Interstate Transportation Element of the National Stolen Property Act, 38 San Diego L Rev 629, 630 (2001) (discussing and defining the elements of the crime).
214 Turley, 352 US at 413 (directing courts to “give ‘stolen’ the meaning consistent with the context in which it appears”). The Court did note that “through the years, [‘stolen’] became the generic designation for dishonest acquisition” of property. Id at 412.
federal law. Indeed, the court hearing motions in Lazarenko's case ruled that "federal law controls the question of whether an item is 'stolen.'"215 The court also noted, however, that a determination of theft depended on a property interest.216

As Emmanuel Kant noted, "the origin of ownership is difficult to comprehend."217 Nonetheless, while philosophers may attempt to articulate the abstract nature of property and its relationship to people,218 it is the law that gives expression to the concrete right and ability to own property.219 Thus, the law determines what is owned and what is stolen.220 Because laws and legal systems differ, however, what a person can own and how ownership is perfected or violated varies from place to place.221 The Lazarenko court recognized the local nature of property. Thus, even while recognizing that US federal law governs the meaning of the term "stolen," the court ruled that Ukrainian law mattered with respect to property rights, adroitly joining together the two sets of laws.222

d) Finding fact and finding law. The consistent reference to Ukrainian law left another question in the proceeding. The court ruled that it, as the determiner of law, would rule on the content of Ukrainian law and that the jury, as the trier of fact, would pass verdict on whether Lazarenko had violated that law.223 It is difficult to gainsay that allocation of responsibilities.224 Moreover, it is unremarkable for US courts, or the domes-

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219 Byrd and Hruschka, 56 U Toronto L J at 220 (cited in note 217).
223 Id at *34.
224 See Jonathan T. Molot, An Old Judicial Role for a New Litigation Era, 113 Yale L
tic courts of any polity, to rule on the content of another country’s laws. Such determinations are frequently made as a matter of course. The fact that law may change rapidly and unpredictably in an emerging economy may make the interpretation of foreign law difficult, but as Judge Edwards noted, “[t]hat the task might be difficult should in no way lead to the conclusion that it should not be accomplished.”

2. The second order: dismissing charges.

Immediately following the prosecution’s presentation of its case in chief, the defense moved for dismissal of the charges on the (predictable) grounds that the prosecution had failed to produce evidence to support the charges. The court granted this motion in part and denied in part. While the granting of a motion to dismiss rarely elicits notice, this particular order highlights the difficulties attendant to cobbling together different local laws.

In its order delineating the role of Ukrainian law in the trial of Lazarenko for wire fraud, the court assigned to the prosecution the task of proving that Lazarenko had violated an actual provision of Ukrainian law. By the time the court reviewed the sufficiency of the prosecution’s case, the proceeding focused on one Ukrainian regulation, § 165 of the Commercial Code of Ukraine. Section 165 prohibits “an official act, taken for mer-

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J 27, 69, 80 (2003) (stressing the fundamental role of jury as fact-finder and judge as law finder).

225 See Jacob Dolinger, Application, Proof, and Interpretation of Foreign Law: A Comparative Study in Private International Law, 12 Ariz J Intl & Comp L 225, 225 (1995) (stating that “[a]pplication, proof, and interpretation of foreign law are interrelated subjects that sit at the core of international conflict of laws” but noting a debate over the role of foreign law); Larry Kramer, Rethinking Choice of Law, 90 Colum L Rev 277, 329 n 175 (1990) (stating that the use of foreign law is “uncontroversial”).

226 See Dolinger, 12 Ariz J Intl & Comp L at 230–32 (cited in note 225) (noting that France, for example, litigates extensive amounts of foreign law in its courts).

227 Tel-Oren v Libyan Arab Republic, 726 F2d 774, 797 (DC Cir 1984).


229 Id at *14–15.


cenary gain, contrary to the interest of service, causing material harm to the state or social interest.” The court dismissed several charges against Lazarenko because, in its mind, “[t]he government . . . utterly fail[ed] to establish material harm.” The court’s decision illustrates the problems that arise when officials are asked to comply with a statutory list rather than held to a general standard of honesty.

While the court’s conclusion that the government failed to show material harm arguably could make sense in the narrow context of § 165 of the Commercial Code of Ukraine, it appears bizarre juxtaposed against the mountain of empirical evidence condemning corruption as utterly harmful. Lazarenko diverted nearly $1 billion into his own pocket. He and his cronies savaged the energy market in Ukraine. His leadership perverted market reform. His corruption contributed to a sense of despair and futility throughout the country. In every sense of the

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232 Lazarenko, 2004 US Dist LEXIS 19660 at *8 (paraphrasing the Ukrainian law).
233 Id.
234 See United States v Lamoreaux, 422 F3d 750, 754–55 (8th Cir 2005) (holding that mere acts of bribery or kickbacks are sufficient to demonstrate deprivation of honest services).
235 See notes 60–110 and accompanying text.
238 Adi Schnyter and Tatiana Andreyeva found that not long after Lazarenko left office:

[T]he 1998 Ukraine economy behaved more as if they were still in a loosely reformed Soviet environment than as if they were operating in a market economy. More specifically, the firms behave as if the Soviet-type environment has been modified so that central planning has been removed and the informal elements of the old economy—essentially, exchange via interpersonal connections rather than the price mechanism—have become the dominant features of the new economy.

239 Paddock, Ukraine’s Abyss of Despair, LA Times at A1 (cited in note 135); Nicole Gallina, Challenging the East-West Divide: Insights From a Comparison of Ukraine and Italy, 6 CEU Polit Sci J 192, 204 (2011) (describing cynicism and gutting of democracy in Ukraine). Louise Shelley, reporting on surveys conducted shortly after Lazarenko left
phrase, Lazarenko deprived the citizens of Ukraine of honest services, a deprivation from which they materially suffered.

The court’s reliance on § 165, a specific, obscure statutory provision, is also troubling because it displayed both legal ignorance and cultural arrogance. First, the court ignored the fact that tribunals in civil law countries use principles just as much as tribunals in common law countries. Indeed, the principles of *honeste vivere*, *suum cuique tribuere*, and *alterum non laedere* are foundational in civil legal systems. To assume that a Ukrainian court faced with the question “did Pavlo Lazarenko deprive our citizens of honest services?” would rely on an obscure provision from the Ukrainian Commercial Code is patently ludicrous. Unfortunately, the court forced itself into that corner by misinterpreting “honest services,” a misinterpretation later perpetuated by the Supreme Court.

The court’s finding of no material harm also bordered on cultural arrogance. It implied the possibility that the relationship between the Ukrainian government and the Ukrainian people is somehow baser in nature than a similar relationship in a common law jurisdiction. This is not true. Ndiva Kofele-Kale artfully explains the existence of a general duty of care by public officials to the public:

\[ \text{[A]} \text{n important distinction can be drawn between leaders holding public office and the citizens they serve. Political} \]

office, found that:

Citizens surveyed in Ukraine reveal that their trust in governmental institutions is lower than in any other region of the world surveyed. Ukrainians believe that their country has a more severe problem with corruption than Russia and other successor states. . . . The percentage of firms in Ukraine in 1998 reporting high bureaucratic corruption was the greatest of any country surveyed, greater even than in notoriously corrupt Indonesia.


241 That is, “live honestly,” “give to each their due,” and “do not hurt others.” *Justinian’s Institutes* 1.1 (Cornell 1987) (Peter Birks and Grant McLeod, trans).

leaders hold greater power and, therefore, bear far greater moral responsibility than ordinary citizens. A state’s wealth and resources are passed down to the citizens and political leaders as the natural legacy from previous generations. Accordingly, a state’s wealth and resources are to be held in trust for the present generation of citizens and for those not yet born.\textsuperscript{243}

Kofele-Kale points out that the concept of trust has international recognition—regardless of the system of law—as evidenced, for example, by the language and doctrines surrounding the responsibilities allocated by the United Nations through its International Trusteeship System.\textsuperscript{244} It is true that in common law jurisdictions the trust relationship is often described using the specialized nomenclature of “fiduciary duties,” but the lack of the term “fiduciary” does not mean that civil law systems do not impose similar duties.\textsuperscript{245}

\textsuperscript{243} Ndiva Kofele-Kale, \textit{Patrimonicide: The International Economic Crime of Indigenous Spoliation}, 28 Vand J Transnat L 45, 97 (1995). In the case of Lazarenko, he could have been found to have violated the basic “public trust doctrine . . . that the state owes its citizens special duties of care, or stewardship, with respect to certain ‘common property’ public resources that comprise the wealth of the state.” Id at 96.

\textsuperscript{244} Id at 100–02. The International Trusteeship System was created by the United Nations to administer territories that previously had been administered by “enemy states” under a League of Nations mandate or that had been voluntarily committed to the system by an administrating state. Michael J. Matheson, \textit{United Nations Governance of Postconflict Societies}, 95 Am J Int L 76, 76 (2001). For example, the territories of Palau, the Marianas, the Marshall Islands, and Micronesia, which prior to the Second World War had been administered by Japan pursuant to a League of Nations mandate, were administered by the United States as the Trust Territory of the Pacific Islands under the International Trusteeship System until each became a fully independent nation or a commonwealth within the United States. Alex Tallchief Skibine, \textit{Reconciling Federal and State Power Inside Indian Reservations with the Right of Tribal Self-Government and the Process of Self-Determination}, 1995 Utah L Rev 1105, 1114 (1995). Article 73 of the United Nations Charter requires that:

Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories.

UN Charter Art 73. Kofele-Kale claims that “[t]he origins of an international fiduciary duty can be traced to the United Nations Trusteeship System.” Kofele-Kale, 28 Vand J Transnat L at 100 (cited in note 243). Whether or not his claim is true, Kofele-Kale’s argument illustrates the vitality of concepts such as trust and fiduciary responsibility in international law.

\textsuperscript{245} See Andrei A. Baev, \textit{Civil Law and the Transformation of State Property in Postsocialist Economies: Alternatives to Privatization}, 12 UCLA Pac Basin L J 131, 156–57
Indeed, Ukrainians consider the relationship between public officials and the public to impose duties and standards of care. The Constitution of Ukraine requires each incoming Deputy to swear an oath to “carry out my duties in the interests of all compatriots.”

Surveys conducted in Ukraine find that Ukrainians consider freedom from corruption an important aspect of democracy, and are critical of corrupt officials. The hundreds of thousands of persons who bore the privations of Ukraine’s winter of 2004 to protest Leonid Kuchma’s corruption bear witness to the fact that Ukrainian society, just as that of the United States, places a duty on public officials that includes honesty and fair dealing. To say that Lazarenko did not deprive the people of Ukraine of honest services is to engage in the most incapacious of reasoning.

3. The appeal, and more dismissals.

The jury heard the defense’s case on the fourteen charges that remained and convicted Lazarenko on all counts. Lazarenko was sentenced to incarceration for a period of nine years. Lazarenko, as a matter of course, appealed his conviction on these charges. The Ninth Circuit Court of Appeals affirmed eight of the remaining fourteen convictions, but reversed six of them and therefore remanded for resentencing.

In his appeal, Lazarenko first argued that the indictment under which he was charged should have been dismissed because it failed to specify the Ukrainian laws that his conduct violated. Due process requires that a defendant be informed with reasonable specificity of the charges against which she must defend herself. The appellate court, while acknowledging the dis-

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248 United States v Lazarenko, 564 F3d 1026, 1033 (9th Cir 2009).

249 Jesse McKinley, World Briefing Europe: Ukraine: 9 Years in U.S. Prison For Ex-Premier, NY Times A2 (Aug 26, 2006).

250 Lazarenko, 564 F3d at 1047.

251 Id at 1033.

strict court’s ruling requiring the government to allege and prove a violation of a specific Ukrainian law, held that the failure to specify that particular Ukrainian law in the indictment did not prejudice Lazarenko because the laws on which he was being tried in the United States were specified in detail.253

The appellate court did reverse Lazarenko’s conviction on several counts. The reversal and affirmation of specific charges had little to do with the transnational nature of Lazarenko’s crimes and more to do with the rigors of proving wire fraud, money laundering, and transportation of stolen property in general.254 The appellate court dismissed the wire fraud convictions because so much time had passed between the acts of extortion and the transfer of the money by wire that it was impossible to prove that the transfers had been “in furtherance” of those criminal acts.255 Similarly, because Lazarenko had so much money, it was impossible to prove that the particular money transferred in the transaction alleged to involve the transport of stolen property was actually the money that the government had proven to be stolen.256 Ironically, Lazarenko’s avarice undermined the government’s case against him.

Ultimately, eight of the convictions for conspiracy and for money laundering survived Lazarenko’s appeal.257 After nearly ten years of investigation, discovery, motions, trial, and appeal, Lazarenko was sentenced to serve ninety-seven months in a federal prison, pay a $9 million penalty, and forfeit $22,851,000 in assets.258

B. Yuliya Tymoshenko

Yuliya Tymoshenko lost to Viktor Yanukovych in elections for the Presidency in February of 2010, and was forced from her

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254 Indeed, the court noted that “Lazarenko’s challenge does not achieve novelty status simply because it involves foreign law.” Lazarenko, 564 F3d at 1033.

255 Id at 1037.

256 Id at 1042.

257 Id at 1029.

position as Prime Minister in March of that year.\textsuperscript{259} In May of 2011, Yanukovych’s government charged Tymoshenko with criminal abuse of power.\textsuperscript{260} The charge was specifically based on the natural gas agreements that Tymoshenko had negotiated with Russia in 2009.\textsuperscript{261} Ukrainian law requires that such agreements proceed only with the approval of the Ukrainian Cabinet. Ukraine’s self-interested cabinet had refused to approve the agreement—possibly due to disagreements over how to divide personal profits from the transaction—so Tymoshenko had personally signed the agreement on behalf of the state gas company. This unilateral act technically violated Ukraine law.\textsuperscript{262}

Tymoshenko’s arrest and trial were widely condemned in the global community as blatant use of selective prosecution to rid President Yanukovych of a political rival.\textsuperscript{263} Tymoshenko herself shared this perspective, and was jailed shortly after the trial began for her contemptuous behavior.\textsuperscript{264} Tymoshenko’s trial lasted less than two weeks and was replete with irregularities: unemployed men were paid by the government to spend the night waiting to get into the courtroom, thus denying seats to Tymoshenko supporters and impartial observers; the assigned judge was inexperienced and still on a probationary term, and thus was vulnerable to the government’s approval or disapproval; and protests broke out in and around the courtroom.\textsuperscript{265}

On October 22, 2011, the judge returned a guilty verdict against Tymoshenko and sentenced her to seven years in prison.\textsuperscript{266} Tymoshenko’s conviction evoked harsh criticism outside of Ukraine and chilled relationships between Ukraine and the Eu-

\footnotesize{\textsuperscript{259} Richard Boudreaux, Yanukovych Asks Russia for Tight Ties, Cheap Gas, Wall Street J A11 (Mar 6, 2010).


\textsuperscript{261} Id. See also notes 170–171 and accompanying text.

\textsuperscript{262} For a discussion of the facts and the charges, see Sergey Sydorenko, Tymoshenko Stars in Ukraine’s Summer Blockbuster, Transitions Online 3 (July 11, 2011).


\textsuperscript{264} Sydorenko, Tymoshenko Stars in Ukraine’s Summer Blockbuster (cited in note 262). Among other things, Tymoshenko denounced the court in public statements, refused to answer questions, refused to rise when required to do so, and refused to address the judge as “your honor” because, in her words, “you have no honor.” Id.

\textsuperscript{265} Id.

\textsuperscript{266} The full text of Judge Rodion Kireev’s finding and sentence can be found, in Ukrainian, online at http://zib.com.ua/print/5728.html (visited Sept 10, 2012).}
European Union.\textsuperscript{267} Within Ukraine, however, only a few thousand people protested—a sharp decline from the hundreds of thousands who cheered Tymoshenko during the Orange Revolution.\textsuperscript{268}

Tymoshenko's trial contrasts sharply with that of Lazarenko. The action against Lazarenko proceeded for almost a decade; that against Tymoshenko proceeded for slightly more than a year. The charges against Lazarenko were not politically motivated and were tried before a meticulously impartial judge;\textsuperscript{269} those against Tymoshenko were blatantly motivated by politics and were tried before the judge most susceptible to government pressure.\textsuperscript{270} Most of the charges against Lazarenko could not survive the burdens imposed on the prosecution; the prosecution faced few obstacles in convicting Tymoshenko.

Along with these profound differences, however, striking similarities exist. In both cases, prosecutors used charges indirectly related to the actual corruption engaged in by Lazarenko and Tymoshenko. And with both outcomes, persons who had engaged in corruption were held accountable.

IV. CORRUPTION THROUGH THE LENS OF LAZARENKO AND TYMOSHENKO

The acts and the prosecutions of Lazarenko and Tymoshenko richly illustrate the importance that broader understandings


\textsuperscript{269} Lazarenko was placed on a watch list following an investigation into money laundering in San Francisco banks. The agent in charge of that investigation colloquially stated that "we weren't out fishing; he came to us. And he brought his money, and he brought himself, and he bought a big house and tried to set up his hiding place in the United States." Felch, \textit{To Catch an Oligarch} (cited in note 125).

\textsuperscript{270} The leader of an observer mission to the trial raised serious concerns about objectivity in Tymoshenko's trial:

\begin{quote}
We have grave concerns that the prosecution and judicial system in Ukraine is so significantly flawed that the trials of Yulia Tymoshenko and other political defendants are likely to result in horrendous miscarriages of justice. ... There is compelling evidence that the judicial system itself is subject to improper influence from the Prosecutor's Office and incapable of being independent, or fair. Judges themselves are open to intimidation and even prosecution by the Prosecutor's Office when they exercise their objectivity on behalf of a defendant or appellant. This is abhorrent to standards of European justice.
\end{quote}

Open Trial, \textit{Ukraine: Cases: Trial of Yulia Tymoshenko} (cited in note 260).
of corruption have in the study of corruption. These understand-
ings include both the effects of corruption and the nature of cor-
ruption.

A. Behaviors of the Type Engaged in by Lazarenko and Tymo-
shenko Damaged Ukraine

Ukraine amply demonstrates the degradation caused by cor-
ruption. Corruption leads to the creation of parallel institu-
tions. Extensive corruption in their formal workplaces has

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driven many Ukrainian workers to create informal networks, in
which they often use tools and connections from their formal
workplaces to work more productively in the informal settings.
More than half of the economic activity in Ukraine occurs in the
informal sector. The startling growth in the size of the parallel
economy—from nearly 15 percent to more than 60 percent of the

total economy—was attributed by observers contemporary with
Lazarenko and Tymoshenko’s activities to government corrup-
tion. Lazarenko’s requirement that businesses turn over 50
percent of control and profits would have constituted a signifi-
cant barrier to those who would not or could not create such a
relationship, and could have driven many entrepreneurs into the
underground economy.

The connections between corrupt bureaucrats and informal
economic actors ran and continue to run deep and often contrary
to sound governance: “Officials in Ukraine aid their long-term
associates from the shadow economy with whom they are inextri-
cably linked in complex financial relationships. Sometimes this
assistance is not financial but protects them from the application
of the criminal law.” The relationships between Lazarenko and
Tymoshenko, and between Lazarenko and Kiritchenko, exempli-
fy this type of arrangement.

271 See notes 100–110.
272 John Round, Colin C. Williams, and Peter Rodgers, Corruption in the Post-Soviet
Workplace: The Experiences of Recent Graduates in Contemporary Ukraine, 22 Work,
273 Claire Wallace and Rossalina Latcheva, Economic Transformation Outside the
Law: Corruption, Trust in Public Institutions and the Informal Economy in Transition
274 Roman P. Zyla, Corruption in Ukraine: Between Perception and Reality, in Taras
Kuzio, Robert S. Kravchuk, and Paul D’Anieri, eds, State and Institution Building in
Ukraine 25, 259–60 (St Martin’s 1999).
275 Shelley, 6 Demokratizatsiya at 657 (cited in note 239).
Corruption drives away foreign investment and dampens economic growth. Corruption has clearly driven foreign investment away from Ukraine.\textsuperscript{276} In 1997, during the peak of Lazarenko’s abuse of power, US businesses alone withdrew more than $1 billion of planned investment due to concerns about corruption in Ukraine.\textsuperscript{277} Corruption shattered the energy sector and left Ukraine’s economy in shambles.\textsuperscript{278} Ukraine remains economically stunted, and corruption continues to be considered the single greatest obstacle to conducting business in Ukraine.\textsuperscript{279}

Corruption distorts decisions and decision making. Ukraine has become infamous for the ineptitude and low quality of its bureaucracies and political institutions.\textsuperscript{280} In a recent survey, more than half of all persons interviewed reported that they were asked to pay a bribe in order to obtain employment.\textsuperscript{281} The obstacle created by bribe demands results in the hiring of corruption-prone applicants rather than talented bureaucrats in Ukraine.\textsuperscript{282} The elevation of members of the Dnipropetrovsk clan to positions


\textsuperscript{277} Shelley, 6 Demokratizatsiya at 655 (cited in note 239); Elizabeth Pond, \textit{Letter from Kiev: Crisis 1997 Style}, 20 Wash Q 79, 79 (1997) (noting that corruption under Lazarenko drove out almost all of the foreign investment that Ukraine had accumulated). See also Jane Perlez, \textit{IMF Team Backs a $2.2 Billion Loan for Hard-Up Ukraine}, NY Times A5 (Aug 1, 1998) (reporting IMF statement that corruption had reduced to a trickle the amount of foreign investment into Ukraine).

\textsuperscript{278} Valerii Gert describes the economic “crisis” and specifically recognizes the influence of Lazarenko:

An unprecedented economic slump, macroeconomic instability, the financial debt crisis of 1998–99, mass unemployment and the flight of labor abroad; massive nonpayment of wages, pensions, grants, and benefits; the destruction of infrastructure, the emergence of a shadow economy, and also unlawful and largely immoral or illegitimate “privatization,” which enabled certain individuals, with the complicity of a bureaucratic state apparatus whose interests were intertwined with theirs, to accomplish the primitive capital accumulation and form an extremely wealthy stratum of the population that owns or controls assets worth many billions of dollars, much of which has been transferred abroad.


\textsuperscript{281} Round, Williams, and Rodgers, 22 Work, Empl & Soc at 157 (cited in note 272).

\textsuperscript{282} Id at 162.
of power serves as another example of corrupt crony politics interfering with the appointment of qualified bureaucrats.

Corruption clearly has degraded the quality of life in Ukraine. Corruption has diverted funds from basic social needs such as the payment of wages and pensions and the provision of health care.\textsuperscript{283} Corruption has diverted money from efforts to contain radiation and fallout from the Chernobyl nuclear reactor explosion.\textsuperscript{284} Corruption degrades life in Ukraine in more pernicious ways. Corruption facilitates the trafficking of hundreds of thousands of Ukrainian women enslaved and sold as prostitutes.\textsuperscript{285} It also facilitates the transit of large amounts of opium through Ukraine.\textsuperscript{286} While no one alleges that Lazarenko or Tymoshenko participated in those activities, they did participate in the creation and perpetuation of a corrupt system that eventually allowed those activities to occur.

Ultimately, corruption has left the Ukrainian people cynical and mistrustful of government and of democratic and market reforms. Only 10 percent of Ukrainians trust the Ukrainian Parliament, and only 7 percent trust the political parties vying for election to seats in that Parliament.\textsuperscript{287} Public support for reform has diminished, rendering meaningful change almost impossible.\textsuperscript{288} The cynicism of the Ukrainian electorate is perhaps best illustrated by the anemic gatherings that protested Tymoshenko's conviction in 2011, a shadow of the crowds who cheered her advocacy of democracy in 2004.\textsuperscript{289} Corruption has gutted democracy in Ukraine.\textsuperscript{290}

\textsuperscript{283} Shelley, 6 Demokratizatsiya at 649 (cited in note 239).
\textsuperscript{284} Alla Yaroshinskaya, Fission.—The Chernobyl Sarcophagus is Falling Prey to Bureaucratic License and Corruption, 58 Current Digest of the Post-Soviet Press 1 (May 24, 2006).
\textsuperscript{287} Stephen White and Ian McAllister, Dimensions of Disengagement in Post-Communist Russia, 20 J Communist Stud & Transition Polit 81, 84 (2004).
\textsuperscript{288} See Anna M. Kvzmik, Recent Development, Rule of Law and Legal Reform in Ukraine: A Review of the New Procuracy Law, 34 Harv Intl L J 611, 616 (1993) ("The public perception of corruption and the poor quality of the judiciary have made judicial reform in Ukraine difficult."); Zyla, Corruption in Ukraine at 259–60 (cited in note 274) (stating that corruption has reduced support for reform in Ukraine).
\textsuperscript{289} See Serei L. Loiko, Ukraine Ex-Premier Minister Convicted of Abuse of Power, LA Times A4 (Oct 12, 2011) (describing several hundred supporters chanting and throwing flowers following Tymoshenko's conviction).
\textsuperscript{290} Bohdan Harasymiw, Policing, Democratization and Political Leadership in Post-
Given the damage done to Ukraine by the corruption exemplified by Lazarenko and Tymoshenko, prosecution should be pursued by all responsible members of the global community. The difficulties in prosecution, however, may be illustrated by returning to von Alemann’s discussion of the many ways to understand corruption.

B. Understanding the Nature of Corruption

The courts prosecuting both Lazarenko and Tymoshenko relied on precise legal definitions of corruption: in Lazarenko’s case money laundering, wire fraud, and transportation of stolen property; and in Tymoshenko’s case, abuse of power. Von Alemann’s parsing of corruption theories suggests, however, other understandings of corruption.

Rather than as a violation of a specific legal rule, corruption can be perceived as a deviation from accepted norms or values, particularly with respect to the relationship between those entrusted with power and responsibility and those who conferred that trust. It is that understanding of corruption that phrases such as “honest services” attempt to capture.291

*Skilling v United States*292 is a product of the tension between an understanding of corruption as the violation of a precise rule and an understanding of corruption as a deviation from accepted norms. Government officials clearly owe a duty of loyalty to the public, and violations of that duty could be understood as corrupt.293 The specific acts whereby a government official could betray that trust are multifold and probably belie explicit description.294 Prior to *Skilling*, courts scrutinized each alleged instance from the perspective of the underlying duty. After *Skil-

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291 "Honest services" is not, of course, the only instance in which the legal vocabulary attempts to give expression to the deviation from generally accepted norms. The term *honest services* "is no more general than such terms as 'due process of law,' 'seaworthiness,' 'equal protection of the law,' 'good faith,' or 'restraint of trade,' which courts interpret every day." *Saipan v United States Department of Interior*, 502 F2d 90, 99 (9th Cir 1974), cert denied, 420 US 1003 (1975).

292 130 S Ct at 2896.

293 See note 196 and accompanying text.

ling, courts in the United States must instead scrutinize alleged acts of corruption from the perspective of a very specific rule.  

Lazarenko’s conduct illustrates the limitations of a specific rule meant to contain a behavior that encompasses deviation from social values. Lazarenko extorted control of companies and shares of profit from Kiritchenko. While initially costly to Kiritchenko, Lazarenko’s patronage eventually enabled Kiritchenko to amass his own fortune, and the two of them worked together to deny honest services to Ukraine. This unusual and “somewhat complex” relationship provided the basis for prosecution of both Lazarenko and Kiritchenko, but it is quite easy to conceive of similar relationships that do not begin with an act of extortion or bribery. If Lazarenko had acquired control of Kiritchenko’s business legally, if he had acquired his interest in United Energy Systems through normal means, then a court constrained by Skilling could not find the predicate crimes on which to proceed. Lazarenko’s self-interested misallocation of Ukraine’s economy, his systematic enrichment of himself and his affined network, and his utter disregard for the people of Ukraine would have escaped punishment, even though Lazarenko’s acts would have been considered corrupt by all. Von Ale- mann’s suggestion that corruption can be understood as a deviation from social values provides insight into a troubling legal construct.

Corruption can also be understood not as a specific act but rather as a system-wide state of moral decay. Conditions in Ukraine certainly support such an understanding. David Satter argues that the Soviet experiment, in its futile effort to transform self-centered perspectives to a collective outlook, destroyed the moral core of the Soviet Union. Satter further argues that the moral collapse of the Soviet Union fueled Ukrainians’ desire for independence. This very moral decay, however, left Ukraine rudderless when suddenly faced with independence. In such conditions, most people violate rules, if only as a matter of self-defense. Lazarenko’s attorneys argued to the press that Lazarenko may have engaged in actions that seem distasteful

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295 130 S Ct at 2931. See text accompanying notes 207–210.
296 United States v Lazarenko, 624 F3d 1247, 1250 (9th Cir 2010).
297 David Satter, Age of Delirium: The Decline and Fall of the Soviet Union xiv (Yale 2001).
298 Id at 354–55.
299 Kotkin, Armageddon Averted at 128 (cited in note 15).
but that constituted normal behavior in Ukraine at that time.\textsuperscript{300} This argument has found disturbing echoes in the United States: former Speaker of the House of Representatives Tom DeLay argued in his own trial on corruption charges that the activities for which he was prosecuted were in fact everyday occurrences in Washington.\textsuperscript{301}

Notwithstanding the disturbing nature of an argument predicated on systemic corruption, the condition of general moral decay does raise important questions regarding the prosecution of an individual. First, the selecting out of particular individuals raises the specter of instrumental prosecution for reasons that have little to do with deterring corruption. The prosecution of Tymoshenko amply illustrates this possibility. Virtually no person inside or outside of Ukraine believes that Yanukovych ordered Tymoshenko’s prosecution because he was concerned about the damage her allegedly corrupt activities had inflicted on the country. Tymoshenko was selected for prosecution either to settle old scores or, more likely, to prevent further political contestation. The irony of Yanukovych charging anyone with corruption has not been lost on the Ukrainian people; rather than affirming to the population that no leader is above the law, Tymoshenko’s prosecution seems only to have deepened the cynicism felt within Ukraine.\textsuperscript{302}

Von Alemann also suggests that corruption can be understood as an element of shadow politics. Corruption has certainly played a role in the overt politics of Ukraine: Lazarenko, Yanukovych, and Tymoshenko have each lost office on charges of corruption. Corruption also plays a role in creating and sustaining the networks through which Ukrainian politicians and bureaucrats operate. Indeed, Keith Darden describes Ukraine as a “blackmail state,” in which “corruption and illegality among the elite groups were accepted, condoned, and even encouraged by the top leadership, resulting in a general atmosphere of impunity”\textsuperscript{303} within that top leadership. At the same time, however, the

\textsuperscript{300} Paddock, Ukraine’s Abyss of Despair, LA Times at A1 (cited in note 135) (quoting Paul Gully-Hart).

\textsuperscript{301} R. Jeffrey Smith, DeLay Trial Offers a Window into Washington Fundraising and Influence-Peddling, Washington Post A2 (Dec 1, 2010).


president compiled files of the wrongdoing of those leaders, which allowed him to control other leaders through threats of exposure to the general public and criminal prosecution. The law and the formal trappings of democracy now serve merely as a façade behind which lies a more potent—and much more hierarchal—state command structure.

It was in these conditions that Tymoshenko arose as a political force. Her initial foray had little to do with a desire to create a better Ukraine; she entered politics at the request of her patron as part of an effort to protect their privileged position. As opined in the International Herald Tribune, “Yuliya Tymoshenko is not a symbol of Ukrainian democracy, nor of Ukraine’s European choice.” She has, however, served as exactly such an icon.

Blake Puckett raises an interesting, if esoteric point:

Yulia Tymoshenko, was a close partner of Lazarenko’s . . . . Allegations connecting her to Lazarenko’s dealings have been numerous . . . yet she later became a leading member of the Orange Coalition, has played a key role in post-Orange Revolution politics in favor of greater ties to the West, and was the leading western-oriented candidate in the recent elections for the next President of Ukraine. A decision to prosecute her along with Lazarenko . . . would have had profound effects on the political life of Ukraine, effects not necessarily in the best interests of either the United States or Ukraine.

It is impossible to gainsay whether or not Tymoshenko has come to embrace the democratic impulses that she so ably advocates. Tymoshenko has been credited with significantly decreasing the extraction of illicit rents by oligarchs by “enhancing transparency and eliminating barter.” Corrupt acts should not be excused on the inchoate grounds that the corrupt actor may

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304 Id.
305 Id at 71.
306 Alyona Getmanchuk, A Sentence Against Ukraine, International Herald Tribune 8 (Oct 12, 2011)
307 See Marian J. Rubchak, Goddess of the Orange Revolution, Transitions Online (Jan 31, 2005) (describing Tymoshenko as the “goddess of the revolution” and describing how Tymoshenko instrumentally invented the myth surrounding herself).
someday evolve into a force for positive change. Nonetheless, those who study corruption should be sensitive to the effects of legal rules on the activities that occur in the shadow zone.

V. CONCLUSION

Corruption constitutes a serious threat to the well-being of individual persons, to societies, and to the global community. “We delude ourselves if we think bribery to be purely economic conduct incapable of leading to fear, cruelty and humiliation.” Every member of civil society should have an interest in controlling corruption.

What constitutes corruption, however, raises interesting questions. A great temptation exists within legal thought to discuss corruption in terms of violations of specific rules. Corruption is better understood, however, though several perspectives. Not all of these perspectives lend themselves to convenient legal analysis, but each of them contributes to the harms that the law seeks to constrain. Legal scholarship, therefore, would be well served to scrutinize these understandings of corruption.

The actions of Pavlo Lazarenko and Yuliya Tymoshenko, and the subsequent trials based in part on those actions, serve as illustrative focal points for different understandings of corruption. Lazarenko and Tymoshenko operated in a system experiencing moral decline and replete with system-wide corruption. Their transgressions were not simply, nor even primarily, of specific rules but rather of the inherent duty that they owed to the Ukrainian people. Their ability to function as politicians in Ukraine, however, depended in part on corrupt networks. Pavlo Lazarenko and Yuliya Tymoshenko richly illustrate the complex and corrosive nature of corruption.

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