Broadening the Range of Incentives to Combat Corruption in South Africa

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ABSTRACT

Corruption is arguably one of the most significant challenges facing South Africa today. This article argues that in order to increase exposure of corruption, foster public ownership of the process, and bolster normative sentiment that corruption is 'wrong', more is needed than the current criminal law approach. The article points to some of the flaws in the existing system and suggests that private enforcement in the form of a *qui tam* action together with enhanced damages may assist in bringing down levels of corruption. The impact of poor anti-corruption enforcement on the rule of law is considered, together with ways in which private enforcement may bolster sentiment about this important political ideal.

I. Introduction

South Africa's Corruption Perception Index dropped from a ranking of 38/100 in 2001, to 72 in 2013.[1] In October of 2013, the country's Public Protector described the position as follows "[a]ll that I can say to this nation and this committee is: corruption in this country has reached crisis proportions, there is no two ways about it."[2] This paper examines South Africa's primary response to the scourge of corruption facing the nation, focusing specifically on public-private transactions. The government's response relies heavily on criminal law, in particular the Prevention and Combating of Corrupt Activities Act 12 of 2004 (the 'Corruption Act'). Low levels of enforcement, resource constraints, and scandals surrounding the independence of the police and prosecuting authority indicate the need to review the current strategy.

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[1] "Corruption Perceptions Index 2001," *Corruption Watch*, http://www.transparency.org/research/cpi/cpi_2001. For the Economist's almost annual coverage of the problem see: "Nkandla in the Wind," April 12, 201;"Called to Lead," February 18, 2013;"Something Very Rotten," June 23, 2012;"A Can of Worms," October 29, 2011;"Stop That Virus," February 4, 2010.

[2] Public Protector Thuli Madonsela, October 2013

The United States' government has recouped billions of dollars and arguably deterred significant fraud by enlisting the aid of private individuals in both exposing and suing wrongdoers. The legislation permitting this private enforcement mechanism is not uncontroversial and has undergone numerous amendments and fine tunings by the courts. Nonetheless, it stands as a success in the battle against fraud and corruption. Relying on the False Claims Act ('FCA'),[3] in 2013 the federal government recovered $3.8bn, and $17bn over the last five years.[4] This track-record has led the United Kingdom and Australia to investigate adopting a similar mechanism. [5] Acknowledging the impact of globalization on levels of corruption in developing nations, one author has even argued that international laws prohibiting corruption could be enforced privately by something like the FCA in the context of international fora,[6] or that the US could take steps to extend the use of its own FCA *in the US* to protect foreign plaintiffs – including foreign governments.[7]

High levels of corruption in South Africa should be acknowledged for what they represent – extraordinary cost to the people of South Africa. That cost, and the failure to curb it, manifests in both brick and mortar - with shoddy and slowed service delivery, and also in the attrition of the public's faith in the system of laws that govern and protect them. This paper suggests that the current criminal-law driven approach could use some assistance and that a complement of private or civic involvement would likely serve to boost enforcement, and have the benefit of increasing the public's participation (and confidence) in the rule of law. The approach adopted by the United States represents one good option which should be seriously considered.

[3] 31 U.S.C. §§ 3729 – 3733.
[4] "Justice Department Recovers $3.8 Billion from False Claims Act Cases in Fiscal Year 2013," accessed October 12, 2014, http://www.justice.gov/opa/pr/justice-department-recovers-38-billion-false-claims-act-cases-fiscal-year-2013.
[5] See Secretary of State for the Home Department, *Serious and Organised Crime Strategy* (London: Secretary of State for the Home Department, October 2013), 61. And see "Pay the Piper, and We May End Public Fraud," *The Sydney Morning Herald*, accessed October 16, 2014, http://www.smh.com.au/national/public-service/pay-the-piper-and-we-may-end-public-fraud-20130503-2iz0o.html.
[6] Paul Carrington, "Qui Tam: Is False Claims Law a Model for International Law?," *University of Chicago Legal Forum*, 2012, 40.
[7] Paul Carrington, "Law and Transnational Corruption: The Need for Lincoln's Law Abroad," *Law and Contemporary Problems* 70, no. 4 (2007): 133.

II. Constraints of a purely criminal law approach to combatting corruption

In South Africa, a number of different criminal laws could be used to address corruption occurring between government and the private sector, including the common law crime of fraud.[8] A more directed approach has, however, been adopted in the form of the Corruption Act. This legislation was adopted to serve as the country's core response to the scourge of corruption, and also to comply with South Africa's international law obligations under a number of instruments, including the African Union Convention on Preventing and Combating Corruption, the United Nations Convention against Corruption, and the Southern African Development Community Protocol against Corruption.[9]

Important features of the Act include the creation of multiple highly specified offenses of corruption, provision for lengthy imprisonment, and the creation of a Register for Tender Defaulters. In its broadest terms, the Act criminalizes the acceptance or giving of any gratification for the purposes of achieving an unjust or unlawful result and which act (or omission), giving rise to the prohibited result, amounts to an abuse of the recipient or grantor's legal obligations.[10] The Act also 'unbundles' the general crime of corruption to create multiple specific offences for corrupt activity where the organizing principle for the different corruption offenses is either (i) the nature of the office held (i.e. separate offenses for public officials, members of the judiciary, foreign public officers etc)[11] or (ii) particular types of events or proceedings (e.g. the giving of evidence, procurement proceedings, auctions, contractual performance).[12] The Act puts would-be offenders on terms by expressly spelling out offenses in this way. Deterrence and punishment are advanced by hefty fines and periods of imprisonment.[13] However, the actual impact of this approach is dependent on appropriately educating officials and the private sector regarding targeted activities, target office-bearers, and penalties.

[8] The common law crime of fraud in South Africa is defined as "the unlawful and intentional making of a misrepresentation which causes actual prejudice or which is potentially prejudicial to another" LAWSA Vol 6, 306. This crime may cover a number of activities that overlap with corruption, broadly understood. According to section 269 of the Criminal Procedure Act 51 of 1977, fraud, theft and extortion are all competent verdicts for corruption as defined in the Prevention and Combating of Corrupt Activities Act 12 of 2004 (the 'Corruption Act').
[9] See the Preamble to the Corruption Act and Sope Williams and Geo Quinot, "Public Procurement and Corruption: The South African Response," *The South African Law Journal* 124, (2007): 341.
[10] Chapter 3 *Prevention and Combating of Corrupt Activities Act 12 of 2004*, 2004.
[11] Ibid., sec. 4–10.
[12] Ibid., sec. 11–19.
[13] Ibid., sec. 26.

At the heart of the Act's deterrence and punishment power is the creation of a register of individuals and business entities convicted under the Act. This "Register of Tender Defaulters" applies over and above fines and periods of imprisonment, and serves both to exclude those registered from future government contracts for a period, and entitles the government to cancel existing contracts with the offender.[14] The Register, and regulations relating to it, are not uncontroversial. For example, Williams and Quinot argue that the effectiveness of the Register is compromised by virtue of its narrow scope of application – endorsement in the Register occurs for procurement-related corruption only and not for the wide range of corruption that can occur between government and the private sector.[15] According to these authors corrupt activities that would not result in endorsement of the Register include, "fraudulently obtaining licenses or documents, corruption intended to secure waivers of fees, for tax avoidance purposes or to induce the lax enforcement of government regulations"[16] The scope for endorsement in the Register may also be considered narrow insofar as the Act does not regulate the position of subcontractors who may be utilized to circumvent exclusion from procurement processes.[17] Endorsements for these types of offenses, and provision for subcontractors, would cast a broader net for likely offenders and would go a long way to showing that corruption is not accepted as 'a normal part of doing business' in the country.

These 'on-paper' problems with the Act are unfortunately likely to remain theoretical, and they might be considered minor compared with the broader challenge of overall enforcement of the Statute. Since its enactment in 2004, only two entries have been entries made in the Register.[18] This low number is incongruous with very high levels of corruption reported in the country. Corruption Watch, as *amicus* in a recent case before the Constitutional Court, indicated that it received 287 reports of corruption and irregularities in public procurement processes in a fifteen month period.[19] Low levels of enforcement are especially disappointing since the Act contains a wide-reaching duty to report corruption, which is unusual for South African criminal law which typically places no obligation on private parties to report

[14] Ibid., sec. 28.
[15] Williams and Quinot, "Public Procurement and Corruption: The South African Response," 348–349.
[16] Ibid., 349.
[17] Ibid.
[18] http://www.treasury.gov.za/ …
[19] Corruption Watch's written submissions in *AllPay Consolidated Investment Holdings (Pty) Ltd and others v Chief Executive Officer of the South African Social Security Agency and others*, 2014 (6) BCLR 641 (CC).

criminal activity.[20] The duty to report is extensive: it creates positive obligations on government officials and individuals with management and control of private corporate entities to report the commission of an offense under the Statute.[21] Actual knowledge is not required and an individual will herself have committed an offense where she fails to report that which she ought reasonably to have known or suspected of occurring.[22]

The sparseness of the Register is an indication of a broader enforcement issue surrounding corruption. Is the Register so empty because officials and private individuals are failing in their duty to report, and if so why is this case? Are many reports in fact being made but police failing to gather the evidence to bring cases because of resource constraints?[23] Or is independence at the level of the police and/or the prosecuting authority lacking? It is likely a complex of all of these factors that is at play as regards the Register and the response to corruption in the country more broadly.

Although complete information is not available, convincing indicators of problems at all levels of South Africa's criminal justice system abound. In a study of police corruption the ISS found that "there is evidence that the problem is a widespread and systemic one."[24] The ISS comes to the conclusion that, "the prevalence of the problem is such that it substantially hinders the extent to which to the South African Police Services is able to achieve its constitutional objectives and build public trust."[25] In the context of prosecutorial performance, the ISS found that only 14% of general criminal dockets resulted in prosecutions in 2005/06 (the most recent year for which data is available)[26] and in the 2013/2014 period the National Prosecuting Authority ('NPA') achieved less than half of its target of 50 corruption-related prosecutions.[27] The low level of prosecutions is taken to be attributable to three factors: (i) problematic use by the NPA of wide discretionary powers, and little transparency regarding whom to

[20] "Civil Procedure," *Law of South Africa*, 25.
[21] *The Corruption Act*, sec. 34(1),(2) and (4).
[22] Ibid., sec. 34(1).
[23] In the context of anti-corruption efforts, the NPA itself reported that, "due to financial constraints and other challenges, there has been little increase in the specialist resources required by the NDP and this remains a serious challenge." National Prosecuting Authority, *Annual Report: 2013/2014* (South Africa: National Prosecuting Authority of South Africa, May 30, 2014), 40, http://www.npa.gov.za/UploadedFiles/NPA%20Annual%20Report%20-%202014%20-%204th%20Draft.pdf.
[24] Garreth Newham and Andrew Faull, *Protector or Predator? Tackling Police Corruption in South Africa*, ISS Monographs 182 (Institute For Security Studies, 2011), v.
[25] Ibid.
[26] Martin Schönteich, "Strengthening Prosecutorial Accountability in South Africa," *Institute for Security Studies*, no. 255 (April 2014): 17.
[27] National Prosecuting Authority, *Annual Report: 2013/2014*, 43.

prosecute; (ii) selection of easily winnable cases and avoidance of complex or difficult cases; and (iii) shielding of law enforcement officials who are under enquiry for wrongdoing.[28] This 'shielding' extends also to political officials and is the subject of a hard-fought and ongoing (six-years to date) court battle to ensure adequate protection from political interference of the country's priority crimes and corruption unit.[29]

Using private prosecutions as a means to circumnavigate some of the institutional challenges identified above is an option – but a limited one. The Criminal Procedure Act[30] allows private persons to institute prosecutions in only two instances, (i) under the provisions of s8, where they can show a statutory grant to do so, or (ii) in terms of s7, where they are able to meet a three part test that (1) they have a substantial and peculiar interest in the issue (2) some injury has been individually suffered by the person wishing to prosecute, and (3) they have obtained from the NPA a certificate indicating that the NPA has declined to prosecute (a 'certificate *nolle prosequi*'). A victim of corruption would have to meet the three part test under s7, since the Corruption Act does not create a statutory grant for private prosecutions. The requirements of s7 present a high bar for bringing private prosecutions, and consequently they are rare. Corruption Watch bemoans the fact that the Corruption Act could have, but did not, make specific provision for private prosecutions where cases could have been brought in the public interest, rather than on the narrow basis of a purely private interest or injury.[31] As noted by Corruption Watch, precedent for such a statutory right can be found in s33 of the New Environmental Management Act which allows private persons to bring prosecutions for environmental crimes notwithstanding a lack of direct personal injury or interest.[32] Aside from the narrow interests or direct injury requirements, the scope for private prosecutions to serve as a helpful supplement to the other ailing criminal law efforts is further undermined by the fact that only *natural* persons can bring cases under section 7.[33] This significantly reduces the pool of potential prosecutors, particularly in the context of corruption between big business and the government: corporations losing out on tenders due to corruption do not have standing under the Criminal Procedure Act.

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[28] Schönteich, "Strengthening Prosecutorial Accountability in South Africa," 18.
[29] See *Hugh Glenister v President of the Republic of South Africa & Others*, 2011 (7) BCLR 651 (CC).
[30] *Criminal Procedure Act 51 of 1977 (as amended)*.
[31] Corruption Watch, "You Can Mount Private Prosecution," March 10, 2013, http://www.corruptionwatch.org.za/content/you-can-mount-private-prosecution.
[32] *National Environmental Management Act No. 107 of 1998*.
[33] "Criminal Procedure," *Law of South Africa*, 185.

Private individuals can contribute to the fight against corruption in another way, though. As noted above, the Corruption Act places a duty on some individuals to report corruption. We may, I think, safely assume, that private individuals (and indeed government officials), are generally failing in this obligation to report corruption. Where individuals themselves may be implicated in the corruption the disincentives are clear.[34] Low levels of confidence in the police and prosecuting authorities may also act as a disincentive to reporting. Sadly, the more corruption becomes a part of everyday business, the less likely people will feel the moral compunction to report it.

III. Adding an enhanced civil claim together with the *qui tam*

Section II examined some of the challenges facing the criminal-law approach to dealing with corruption. At the level of government, these challenges included structural problems in criminal justice institutions that leave those very institutions open to corruption. Limited resources were also identified as a factor in cracking down on corruption. At the non-government level, private prosecutions side-step some of these issues but they are too limited to constitute a serious corruption-busting force, at least as currently provided for in South African law. There are few incentives—and significant disincentives—for individuals to report corruption to the authorities. In the face of these challenges it is worthwhile considering what tools outside of the criminal justice system may be available to boost anti-corruption efforts. [35]

Allowing for privately initiated civil corruption suits together with enhanced damages is one method of improving the prospects for corruption reduction. The introduction of a *qui tam* action and damages framework akin to that in the US False Claims Act[36] is intended to be complementary to the criminal justice approach. It does not signal a complete lack of confidence in that system, and it's implausible that privately initiated suits could replace the work of the government in its entirety anyhow.

[34] Whistleblower protections for private and government employees are, however, available under the *Protected Disclosures Act 26 of 2000*.

[35] This paper does not canvass all possible tools to combat corruption that may be available in South African law. Additional mechanisms that are not covered here include the role of the Public Protector provided for in s 189 of the Constitution and *ex ante* regulation efforts like those provided for in section 43 of the Regulations to the Companies Act 71 of 2008. This regulation requires companies to comply with the OCED recommendations regarding corruption (see Regulation 43(5)(a)(i)(bb) to the Regulations 2011).

[36] 31 U.S.C. §§ 3729 – 3733.

At present, under South African law, any party that incurs loss or damages as a consequence of corruption, and who can meet the elements for a delict (tort), may bring a civil claim for restoration.[37] In the type of corruption scenarios envisaged here, this would mean that the government, when defrauded as a consequence of corruption, could bring a civil suit against the offending party. Those losing out on tenders or other government business as a consequence of corruption may also have a claim (though they may find it harder to show direct loss or causation if there is some contingency attached to whether they would indeed otherwise have garnered the government's business).[38] It is also a good question whether the party would sue the government and/or the corrupt contractor where the government was complicit in the unlawfulness. These kinds of civil suits have occurred infrequently in South Africa; [39] corrupt government officials are not in the habit of holding themselves to account, and corrupt activity is by its nature clandestine and hard to get at from the outside. Furthermore, corporations which feel slighted by unfair and corrupt bidding processes are repeat players in these kinds of transactions and may not want to make an enemy out of the state (a potential future customer).[40] The role played by suits initiated by private victims of corruption should, however, not be discounted. Although only a small number of victims would have the wherewithal to bring a court case, the *opportunity* to do so is important in including the public in the fight against corruption, putting offenders on notice, and of course, providing a remedy for those injured. [41]

[37] The requirements for a claim in delict are a showing by the plaintiff, on a balance of probabilities, of harm which was wrongfully and culpably caused by the defendant. See "Delict," *Law of South Africa*, 2005, 23.

[38] See the discussion in: *Minister of Finance & others v Gore NO*, [2006] JOL 18264 (SCA), 81–90 where the SCA concluded that where the tender process was vitiated by corruption , an unsuccessful tenderer could claim loss of profits on the basis of vicarious liability if causation could be established. Relied on in *Steenkamp NO v Provincial Tender Board, Eastern Cape*, 2007 (3) BCLR 300 (CC).

[39] A cursory review of reported cases between 1947 and 2014 reveals only five civil cases alleging corruption and claiming damages in delict in that period. The review included cases alleging corruption specifically and did not include cases where fraud or misrepresentation only was alleged. This review should not be considered exhaustive.

[40] An exception is the *Allpay* case recently decided by the Constitutional Court. While this case did not involve an allegation of corruption, a private entity sued the South African Social Security Agency for highly irregular actions in the course of tender proceedings. See *AllPay Consolidated Investment Holdings (Pty) Ltd and others v Chief Executive Officer of the South African Social Security Agency and others*, 2014 (6) BCLR 641 (CC).

[41] For information on the international law obligation to provide a civil remedy for victims of corruption, and for a discussion of the broader impact of this type of suit on anti-corruption efforts see William Loris, "Private Actions: A Tool for a Citizen-Led Battle against Corruption," in *Fostering Development through Opportunity, Inclusion, and Equity*, Volume 5, The World Bank Legal Review (Washington DC: The World Bank, 2014), 447.

a. *What is a qui tam action?*

In the broadest terms, the *qui tam* is an action which allows a person to bring a case on behalf of the government and also for himself. The action was inherited by the United States from English Law and the term is a shortening of the Latin phrase, *qui tam pro domino rege quam pro seipso in hac parte sequitur*.[42] Roughly translated this means, "he who prosecutes for himself as well as for the King."[43] While the phrase uses the word 'prosecute,' the action is one in *civil law* and is now sourced in the US False Claims Act. The FCA creates civil liability for knowingly presenting, or causing to be presented, "a false or fraudulent claim for payment or approval" by the government.[44] The defendant remains subject to criminal prosecution for any unlawful conduct.[45] The standard of proof for liability is the usual for civil matters: proof on a preponderance of the evidence. Naturally, the Government has standing to bring a claim under the Act. But what is striking, is that in terms of s3730(b), a private party[46] may bring the claim in the name of the government, and may participate in any recoveries from the case notwithstanding that the party has not suffered any direct personal injury.[47] Where a *qui tam* action is brought, the private plaintiff is called the 'relator' in the action.

The *qui tam* does not oust the Government from its civil claim. According to s3730(b)(2), the relator must advise the Government of the complaint before serving notice on the defendant. The Government then has sixty days within which to intervene (taking over the action) or to decline to take part in the proceedings (leaving the relator to proceed independently). Where the Government intervenes, the relator still participates in the action but the Government has "primary responsibility for prosecuting the action" and may, in some circumstances, impose procedural limitations on the actions of the relator.[48] The relator in turn may approach the court to contest any settlement or dismissal of the action by the Government, where the Attorney General has chosen to run the matter.[49] Even where the

[42] Charles Doyle, *Qui Tam: The False Claims Act and Related Federal Statutes*, Congressional Research Service, CRS Report for Congress, (August 6, 2009), 5, http://fas.org/sgp/crs/misc/R40785.pdf.
[43] Ibid.
[44] 31 U.S.C. §§ 3729(a)(1)(A)
[45] Boese explains that, "[t]here is a 'three-ring circus' nature to the proceedings: the defendant may simultaneously have to deal with a criminal investigation, a civil False Claims Act action, and the administrative threat of suspension or exclusion from government programs." John Boese, *Civil False Claims and Qui Tam Actions*, 4th ed., vol. 1 (New York: Wolters Kluwer, 2014), 1:1–6.
[46] Qui Tam suits can be brought by both natural persons and corporate entities. According to Boese, "Congress clearly intended that qui tam cases be brought by a wide variety of people and entities." And further that, "Under 31 U.S.C. § 3730(b), virtually anyone can be a qui tam relator." Ibid., 4:4–13.
[47] Ibid., 1:1–6.
[48] 31 U.S.C. § 3730(c)(2)(C)
[49] 31 U.S.C. § 3730(c)(2)(A) and (B)

Government has initially declined to intervene, it may later seek the permission of the court to participate.[50] The Government's decision to take part is important as it determines the level of the relator's participation in any recovery that is made. Where acting alone, a successful claim entitles the relator to between 25% and 30% of the damages. Where the Government intervenes this figure is reduced to between 15% and 25%.[51]

The amount of damages is an important factor when considering the *qui tam* aspect of the FCA legislation; a finding of liability under s3729(a)(1)(A) provides for the imposition of treble damages, as well as heavy civil penalties, and costs. The levying of the penalty and the damages multiplier raises the question of whether this is properly characterized as a *civil* action, and there are related constitutional concerns. Setting those concerns aside for now, however, it is clear that the relator is highly incentivized to bring a successful action. From a policy perspective, the damages multiplier alleviates the impact of the relator's participation on the overall recovery by the Government. The multiplier ensures that the relator is rewarded without eating into the Government's compensation. Furthermore, the enhanced damages likely serves to elevate any deterrent effect of such legislation.

Persons who can utilize the FCA include the Government (acting at its own instance, or with a relator) and any private individuals or entities with evidence of fraudulent claims against the Government.[52] There are however, a few sensible barriers to eligibility as a relator. A primary requirement is that the basis for the relator's claim cannot have been information which is publically available, unless the relator qualifies as an "original source". An original source will be a person who either made the disclosures to the Government prior to their becoming public, or "has knowledge that is independent of and materially adds to the publicly disclosed allegations or transaction."[53] A first-to-file bar also exists so that those with information are encouraged to come forward early and so that recoveries are not split further.[54] The most common relator plaintiffs are current employees of the defendant, followed by former employees.[55] In some cases even current or former government

[50] 31 U.S.C. § 3730(c)(3)
[51] 31 U.S.C. § 3730(d)
[52] See note 46 above.
[53] 31 U.S.C 3730(e)(4)(A)
[54] 31 U.S.C 3730(b)(5). See also Doyle, *Qui Tam: The False Claims Act and Related Federal Statutes*, 10 citing In re Natural Gas Royalties Qui Tam Litigation (CO2 Appeals), 566 F.3d 956, 961 (10th Cir. 2009). But see Boese, *Civil False Claims and Qui Tam Actions*,4:4–17.
[55] Boese, *Civil False Claims and Qui Tam Actions*, 4:4–13 –15. For a discussion of qui tam suits brought by special-interest groups like Taxpayers Against Fraud, see Ibid., 4:20 – 23.Boese at 4-20-23.

employees may act as relators.[56] Though controversial,[57] this is a particularly important allowance especially in circumstances where the Government is acquiescent or complicit in the fraud or corruption.

b. *What kinds of cases arise under the False Claims Act?*

The general subject of a case under the FCA is a claim made to the government for payment where that claim is false or fraudulent. It's a good question as to whether false claims as envisaged under the FCA are a direct and complete match for the problem of corruption at the interface between government and the private sector that discussed thus far. The answer is possibly not, but there is almost certainly significant overlap in the types of conduct that is corrupt and the types of conduct that amount to false claims presented to the government. [58] In any even there is, I believe, sufficient value in the use and interpretation of the FCA in the US to make its study by South African legal scholars worthwhile—not necessarily for wholesale adoption, but for some of the attractive private enforcement options that it offers.

In 1863, the US government enacted the FCA to address high levels of fraud against the Government, and related corruption within the Government. [59] Carrington explains some of the history around the adoption of the Act and its early application: "The Civil War appeared to bring an epidemic of public scandals rising to the cabinet level. Secretary of War Simon Cameron was dismissed by President Lincoln for paying his friends twice the going rate for 1000 cavalry horses that turned out to be afflicted with 'every disease horse flesh is heir to.'" After the enactment of the FCA, "numerous relators came forward to pursue claims against contractors who were proven to have sold the army rifles without triggers, gunpowder diluted with sand, or uniforms that could not endure a single rainfall."[60]

[56] Boese, *Civil False Claims and Qui Tam Actions*, 4:4–26–36.
[57] Ibid., 4:4–8.
[58] See note 8 above.
[59] "Fraud practiced upon the Federal Government continues to be a major source of concern to Government agencies and inspector generals, with the only change being the perpetrator. Originally the major perpetrators were Government insiders, whether by proactive participation or passive acquiescence, through the procurement of the necessities of war. Currently, corporations are the major offenders… No matter who is perpetrating the fraud, the FCA remains the Government's most effective weapon to recover billions of dollars pilfered every year from the coffers of the Federal treasury." See "History of the False Claims Act," *Federal False Claims Act and Qui Tam Litigation* (Law Journal Press, 2014).
[60] Carrington, "Law and Transnational Corruption: The Need for Lincoln's Law Abroad," 123.

The FCA has since undergone multiple amendments and judicial interpretations which have at times served to expand, and at times contract, the nature of claims as well as scope for private relators to bring cases. Regardless of these changes, the impact of the FCA is undeniable. Filings and recoveries under the Act are believed to now rival those in other prolific enforcement areas like securities and antitrust.[61] One prominent FCA practitioner has observed that the Act "now reaches virtually every aspect of American economic life, with federal and state laws expanding its scope and importance." [62]

A number of common types or categories of cases under the FCA have arisen. I rely here on the extensive work of Boese in cataloguing and characterizing these cases to give the reader a flavor of the kinds of activities that count as false or fraudulent claims under the Act. The first is the '*mischarge*' case where the defendant presents for payment a bill or invoice where either the goods or services have not been delivered or, where the price charged is higher than for the good or service actually provided. Boese explains that this is the most common FCA case and that many procurement fraud cases fall within this category. [63] The second category identified by Boese is "*fraud-in-the-inducement*" or "*false negotiation*" cases, here the defendant makes false statements about the quality or capacity of a product or service such that the government would have paid a lower price but for the contractor's false statements.[64] Cases involving kickback payments to colluding (and corrupt) government officials or agents fall within this category.[65] In the third category, "*false certification*," the defendant falsifies compliance of some eligibility criteria to gain access to a benefit such as a government loan or subsidy, or to qualify as a government approved provider. [66] (In the South African context, scandals surrounding BEE credentials come to mind here).[67] The "*substandard product or service*" makes up the fourth category of cases arising under the FCA; essentially the supplier provides an inferior good or service than that contracted for (there is room for some overlap with the mischarge cases here).[68] In the fifth category, liability is incurred "where one acts improperly – not to get money from the government, but

[61] David Engstrom, "Harnessing the Private Attorney General: Evidence from Qui Tam Litigation," *Columbia Law Review* 112 (2012): 1271.
[62] Preafce to Boese, *Civil False Claims and Qui Tam Actions*.
[63] Ibid., 1:1–47.
[64] Ibid.
[65] Ibid., 1:1–47, 48.
[66] Ibid., 1:1–48.
[67] For an example of the practice of 'fronting' black economic empowerment credentials see "Hamon Bust for Fronting," *City Press*, accessed October 15, 2014, http://www.citypress.co.za/business/hamon-bust-for-fronting-20121124/. For the government's response see "BEE Fronting Is Fraud, Says Zuma," *The M&G Online*, accessed October 15, 2014, http://mg.co.za/article/2013-10-03-bbe-fronting-is-fraud-says-zuma/.
[68] Boese, *Civil False Claims and Qui Tam Actions*, 1:1–48.

to avoid having to pay money to the government." [69] This is called the "*reverse false claim*" and is captured in s3729(a)(1)(G) of the Act.

A number of industries also make frequent appearances in FCA *qui tam* suits. Engstom summarizes these as follows:

> The most common claim types assert fraud in connection with defense procurement and federally funded healthcare services under Medicare and Medicaid. Other common claims target underpayment of oil and gas royalties for extraction of natural resources from federal lands, as well as myriad frauds in connection with federally insured education and housing loans, federal research grants, federally funded construction projects, Hurricane Katrina relief, and the Troubled Asset Relief Program. [70]

Boese observes that, "[f]or the most part, the FCA is not solely a 'fraud' statute in the pure sense and may be applicable in cases where there is no common law fraud." [71] This is evident from the wide and creative uses to which the Act has been put.[72] It is also a pertinent observation in the context of the corrupt activities that this paper targets. If South Africa were to adopt a *qui tam*-type action (with public-private corruption in mind), it would naturally have relative carte blanche in defining the types of activities (fraud or otherwise) that would give rise to liability. However, as SA law currently stands, and even if one were to adopt a fraud-centric understanding of the FCA, one would be hard-pressed to argue that corruption, as envisaged in the Corruption Act, does not already engage fraud as understood in SA common law.[73]

c. *What are the possible benefits of a qui tam action and enhanced civil claim*

Typically, corruption occurring between government and the private sector will take the form of unlawful activity at the point of a transaction between the government and private business. Given that the common categories of cases identified above indicate that collusion with the government is not a necessary component of liability, or even the bulk of cases attracting liability, under the FCA today, one might ask why something like the FCA is raised as an option to address public-private corruption. The answer is that the scenarios occurring in common FCA cases are easily recognizable as instances ripe for

[69] U.S. Department of Justice, "The False Claims Act: A Primer" (U.S. DOJ, 2014), 1, http://www.justice.gov/civil/docs_forms/C-FRAUDS_FCA_Primer.pdf.
[70] Engstrom, "Harnessing the Private Attorney General: Evidence from Qui Tam Litigation," 1281.
[71] Boese, *Civil False Claims and Qui Tam Actions*, 1:1–5.
[72] Ibid.
[73] See note 8 above.

government corruption.[74] Even where the *qui tam* action is used to target purely private corruption against the government, civil enforcement by members of the public may address some of the corruption concerns raised in the context of police and prosecutorial independence. This latter benefit of the *qui tam* is acknowledged even in the US context: Carrington suggests that a primary reason for the law is mistrust of prosecutors, "[p]rosecutors and other government lawyers do still commence proceedings against businessmen who offend the law and cheat the government, but they are inevitably constrained from doing so by political realities and their limited office budgets."[75] We may therefore conclude that an FCA-type law with a *qui tam* action is, at least, of application to the problem of corruption that we hope to tackle. But what about this type of enforcement mechanism makes it a good addition to existing anti-corruption efforts?

Setting aside *qui tam* standing for the moment, enhanced civil damages on their own constitute an attractive anti-corruption measure. Bringing a civil claim means that the government need not meet the higher standards of proof and intention required more typically under a criminal law approach. A multiplier affect applied to any damages recovered may also serve as a further deterrent over and above any criminal law fine, (though deterrent effect is, admittedly, not easily measured).[76] Under the Corruption Act a fine may attach only to the natural person or entity directly involved in offering (or accepting) the unlawful gratuity, [77] whereas in the civil context the unlawful act of the agent/employee of the contractor may be attributed to his principle – drawing into the recovery process much deeper pockets than may be available in the criminal context. Pure government-led civil suits may, however, suffer from the same problems discussed in the context of the criminal law efforts targeting corruption –

[74] Indeed some of these scenarios are playing out in South Africa right now. For example, a commission of enquiry has been appointed to investigate R1.5bn in alleged bribes paid to South African officials in the context of military procurement contracts. Sadly, the commission itself is now the subject of a scandal relating to its independence from those implicated in the enquiry. For background on the Seriti Arms Deal Commission see "Arms Deal – Constitutionally Speaking," accessed October 11, 2014, http://constitutionallyspeaking.co.za/category/arms-deal/. And "Quitting Seriti Commission: Arms Deal 'Letter Bomb,'" *The M&G Online*, accessed October 11, 2014, http://mg.co.za/article/2014-08-07-arms-deal-letter-bomb/.

[75] Carrington, "Law and Transnational Corruption: The Need for Lincoln's Law Abroad," 128.

[76] Ibid., 127. And Christina Broderick, "Qui Tam Provisions and the Public Interest: An Empirical Analysis," *Columbia Law Review* 107, no. 4 (May 2007): 980.

[77] Vicarious liability in criminal law is unknown to South African common law though it is provided for in some statutes. It is not certain that such liability (imposed in the criminal law context) would be pass Constitutional muster. For a discussion of the point see the decision of Kentridge AJ in *S V Coetzee and Others* 1997 (1) SACR 379 (CC) at paras 85-86. Vicarious liability in the civil context is provided for South African law in certain circumstances, including in the context of the employer-employee relationship.

namely, limited reporting of corrupt activity, resource constraints, and even corruption within the plaintiff's governmental division.

Allowing private parties to bring civil claims on behalf of the government significantly adds to the reach and power of anti-corruption efforts. Given the clandestine nature of corruption, providing incentives for parties with knowledge of corruption to come forward is important for increasing exposure of this unlawful activity and is likely to increase levels of civil and follow-on criminal litigation. In circumstances like those in South Africa, where the public has lost confidence in many aspects of the criminal justice system, the *qui tam* provides an important opportunity for individuals to participate in enforcement and rebuild confidence in the rule of law. Even if higher damages don't serve to act as a deterrent, the heightened prospect of being caught, by an incentivized whistleblower, may give government officials and corporates pause.

d. *Attributes of the US legal system that support the qui tam, and some challenges in the South African Context*

A number of aspects of the US legal system and environment are particularly conducive to the use of a *qui tam* action. These attributes may be lacking or less developed in South Africa and may detract from the usefulness or plausibility of this kind of action in South Africa. For example, in the US the 'American Rule' generally applies to the apportionment of litigation costs. In terms of this rule, unless otherwise provided for by statute, each party is responsible for his own legal costs notwithstanding the outcome of the matter.[78] A relator under the FCA is even further buffered against the risk of costs since s3730(d) provides that he may claim reasonable expenses and attorneys fees from the defendant where his case is successful. By contrast, in South Africa, in the ordinary course an unsuccessful party is likely to be saddled with both his and the winning party's legal fees. This position will act as a disincentive for relators to *qui tam* suits.

The contingency fee environment in South Africa is likely to compound the impact of cost risks for relators in this jurisdiction. While in the US success fees have long shared the risk of litigation costs between attorneys and their clients, in South Africa the tradition is undeveloped and, in some circles, somewhat frowned upon. While contingency fees are allowed in South African law, they are limited by

[78] Carrington, "Qui Tam: Is False Claims Law a Model for International Law?," 31.

the Contingency Fees Act to 25% of the total recoveries.[79] In the US the lawful extent of attorneys' participation in winnings varies by state but most contingency fee agreements will surpass 25%, usually around 33%,[80] and many states set no limit at all. [81]

South Africa's law relating to the apportionment of costs is, however, not static and recent developments may be pointed to, to show that some flexibility may be tolerated for a *qui tam* targeting corruption. In a recent statement of its approach the Constitutional Court indicated as follows:

> It is trite that costs are a matter within the discretion of the court and that the discretion must be exercised judicially, having regard to all the relevant considerations depending on the circumstances of each case. Such considerations as discussed by this Court include: the conduct of the parties; the conduct of the legal representatives; whether a party has had only technical success; the nature of the litigants; the nature of the proceedings; the nature and complexity of the issues and whether litigation is considered vexatious or frivolous. A further consideration in constitutional litigation must be the way in which a costs order will hinder or advance constitutional justice. Ultimately, the court has to decide what is a just and equitable order to grant in the circumstances of this case. [82]

The context-sensitive approach adopted by the South African Constitutional Court is highly amenable to the *qui tam,* especially since the relator's representation of the government is a novel feature, and given the scope for frivolous or vexatious suits.[83]

A further aspect of the US legal system that buoys the use of *qui tam* actions is extensive provision for access to information. For example, the Government is afforded enhanced fact-finding powers in the form of administrative subpoenas called 'civil investigative demands', but which may only be used prior to the commencement of proceedings. [84] A relator may be allowed access to the findings of such a demand where it is deemed by the Attorney General to be a necessary part of the investigation.[85] In addition relators (and the defendant) may make use of the US Freedom of

[79] Contingency Fees Act 66 of 1997
[80] American Bar Association, "When You Need a Lawyer: Legal Fees and Expenses," *American Bar Association - Division for Public Education*, http://www.americanbar.org/groups/public_education/resources/law_issues_for_consumers/lawyerfees_contingent.html.
[81] See the Appendix (Contingency Fee Limits by State) in "Courthouse Cornerstone: Contingency Fees and Their Importance for Everyday Americans," *Center for Justice & Democracy*, White Paper, 126 (January 2013).
[82] *Chonco v President of the Republic of South Africa* 2010 (6) BCLR 511 (CC) at para 6.
[83] See the discussion of these concerns at page 19 below.
[84] 31. U.S.C. S 3733(a)(1) and Boese, *Civil False Claims and Qui Tam Actions*, 1:5–158.1.
[85] 31. U.S.C. S 3733(a)(1) and Ibid., 1:5–163.

Information Act ('FOIA') in terms of which a wide variety of documents can be requested from the Government, and which the Government is obliged to produce irrespective of burden or relevancy.[86] South Africa has strong access to information statutes[87] and rules of discovery[88] but their use in the context of the *qui tam* would be novel and would test the scope and application of these kinds of laws as well as the *bona fides* of the government to hand over potentially damning material.

e. *Substantive law concerns around the qui tam and enhanced damages*

Beyond concerns around different legal cultures and systems, substantive constitutional objections to the *qui tam* and enhanced damages must be acknowledged and, hopefully, solutions identified. In the US cases have been brought challenging both the *qui tam* aspect of the law - as a violation of the separation of powers doctrine - and the imposition of treble damages - for breaching rights in criminal law. For now, these challenges have been unsuccessful, though not all of them have been before the US Supreme Court. While there are differences between the US and South African conception of these rights and doctrines, it is helpful to consider how they have been addressed in the US.

i. *The scope for a damages multiplier in South African law*

One of the keys to the workings of the *qui tam* under the FCA has been the damages multiplier, but the introduction of treble, or 'enhanced' damages, as I have called them, may raise the ire of some delict scholars. One prominent academic, quoted by the Constitutional Court, explains that,

> The aim of discouraging evil and high-handed conduct is foreign to the basic purposes of the law of delict. It is for criminal law to punish and thereby discourage such conduct. The policy of awarding punitive damages unduly enriches the plaintiff who is entitled only to compensation for loss suffered. This policy has the added disadvantage of putting a wrongdoer in jeopardy of being punished twice. [89]

This statement captures a number of objections against damages multipliers. The first objection is against the incoherency that a non-compensatory purpose would create in delictual law. The historical purpose of damages in delict has been to restore a person to the position he would have been in had

[86] 5 U.S.C. s552. See Ibid., 1:5–176–178.
[87] Promotion of Access to Information Act 2 of 2000.
[88] See for example Rule 35, 'Discovery, Inspection and Production of Documents' of the Rules Regulating the Conduct of the Proceedings of the Several Provincial and Local Divisions of the Supreme Court of South Africa (Govt. Notice R48 of 1965)
[89] *Fose v Minister of Safety and Security*, 1997 (7) BCLR 851 (CC), 63, quoting Van Der Walt.

the harm not occurred.[90] The intellectual integrity of this body of law would be compromised by inserting into it other policy-driven objectives—like those of the criminal justice system. The Constitutional Court addressed this concern (in the context of damages for violations of fundamental rights - which might have involved a multiplier or punitive sum) by establishing, "a specific and separate public law constitutional damages remedy."[91] It is conceivable that any statute introducing enhanced damages could do so for the limited purposes of the legislation and could expressly leave untouched common law damages.[92] While clear legislative intention may put an end to this objection it could be argued that there is scope within the law as it stands to allow for enhanced damages. It's important to explore this possibility for some of the assistance it offers when thinking about other objections to a multiplier.

An argument that works from within the framework of the common law relies on a distinction made by the Constitutional Court between aggravated damages and punitive damages: "It must of course be borne in mind that it is not always easy to draw the line between an award of aggravated, but still basically compensatory damages where the particular circumstances of or surrounding the infliction of the *injuria* have justified a substantial award, and the award of punitive damages in the strict and narrow sense of the word."[93] The court goes on to explain that aggravated damages are still compensatory in nature or count at least as "non-punitive damages." [94] The court's remarks here suggest a spectrum in the characterization of damages which is flexible and context sensitive. If this is an acceptable reading of the common law then enhanced damages in a civil corruption suit may very well fall within the permissive range of damages that are beyond pure compensation but still non-punitive. In the US a similar tussle has occurred over the true nature of the FCA's damages provisions. While the US Supreme Court's jurisprudence on the point may have seesawed, its most recent pronouncement suggests an analysis fairly similar to the spectrum argument above, "it is important to realize that treble damages have a compensatory side, serving remedial purposes in addition to punitive objectives. The tipping point at which a statute moves from remedial to punitive defies general formulation, and depends on both the course of particular litigation and the workings of a particular statute." [95] It's also worth noting that the ultimate formulation of the enhanced damages plays a role in their

[90] "Delict," 143.
[91] *Fose v Minister of Safety and Security*, 1997 (7) BCLR 851 (CC), 17.
[92] See decision of Didcott J in *Fose v Minister of Safety and Security*, 1997 (7) BCLR 851 (CC), 87.
[93] Ibid., 62.
[94] Ibid.
[95] Boese, *Civil False Claims and Qui Tam Actions*, 1:3–64 internal quotations omitted.

characterization: when the FCA applied only a X2 multiplier courts tended less to worry about there being a punitive aspect to the FCA. Since the increase to treble damages, characterization as a criminal sanction has become much more common. [96]

ii. *Civil or criminal law? Adequate protections for the defendant*

The characterization of the damages and penalties provisions as either criminal or civil is critical for determining the appropriate procedural protections that will apply in a suit, as well as the substantive right not to be criminally tried twice for the same act. [97] In the US, in cases where the aggregate of damages and civil penalties have been wildly disproportionate to the losses actually suffered, sums imposed have been held to be unconstitutional not for reasons of double jeopardy but rather as violations of the Excessive Fines or Due Process Clause of the US Constitution. [98] The analysis rejecting claims of double jeopardy relies on congressional intent and does not exclude the possibility that a civil fine could be so severe as to amount to criminal punishment (notwithstanding Congressional intent). The analysis in the South African context could potentially take a similar route relying on the right not to be treated or punished in a cruel way[99] and, likewise, it would be open for defendant to claim that an extraordinarily severe civil penalty has the effect of criminal punishment.

Regarding procedural protections, South African case law relating to administrative penalties offers some insights. In *Federal Mogul* a defendant in anti-trust proceedings claimed the protections in s35 of the Constitution (proof beyond a reasonable doubt, the right to remain silent etc.) because, so it argued, the administrative penalty imposed on it amounted to criminal punishment. The court rejected this argument on the basis that the defendant was not an "accused person" as envisaged by s35, and furthermore, there was no alternative sentence of imprisonment attached to the administrative penalty. The court explained that "there is a clear distinction in the nature of the sanction which is imposed" and that "it is the threat of imprisonment which triggers off the rights set out in section 35(3)." [100] Relying on *Federal Mogul*, a South African tax court has upheld the imposition of an administrative penalty imposing two times the tax on a late filer,[101] even where the failure to file timeously *is* an offence but

[96] Ibid., 1:3–59–60 (see especially fn 216).
[97] *Constitution of the Republic of South Africa, 1996*, 1996, section 35(3)(m).
[98] Boese, *Civil False Claims and Qui Tam Actions*, 1:3–112 and 129.
[99] *Constitution of the Republic of South Africa, 1996*, section 12(1)(e).
[100] *Federal Mogul v Competition Commission*, 2005 (6) BCLR 613 (CAC) 613, 631–632 (Competition Appeal Court 2004).
[101] *Tax Case No. 11641* [2007] JLL 19881 (ITC)

carries no prospect of imprisonment. The civil *qui tam* suit together with enhanced damages does not contemplate imprisonment and could benefit from the same approach adopted by courts towards administrative penalties.

f. *Private Enforcement – Public Policy Considerations*

Public policy concerns relating to under-enforcement were raised in Section II, which examined challenges of a purely criminal law approach to fighting corruption. Using private enforcement as a regulatory tool raises some concerns too. One author preparing a report for Congress on the *qui tam* explained some attitudes towards the action as follows,

> Reviled at various times throughout the ages as a breeding ground for 'viperous vermin' and parasites, legislative bodies have authorized it when they consider the enforcement of some law beyond the unaided capacity or interest of authorized law enforcement officials. [102]

The *qui tam* and FCA regime are generally understood to benefit the public interest by increasing detection and deterrence of fraud. It has also served significantly to increase recoveries by the Government where it has been defrauded. [103] I have suggested that the *qui tam*, together with enhanced damages, would likely serve the public interest in similar ways in South Africa; perhaps especially so where there are questions around the independence of the police and prosecuting authorities, and no question about the resource constraints on these entities. What are the public policy concerns that have arisen in the US, and may arise in the South African context, if such an enforcement tool were to be successfully adopted?

One potential drawback of an active *qui tam* regime is over-enforcement. In this scenario the incentives created for relators result in a multitude of frivolous law suits. These kinds of suits are bad for society for a number of reasons. In the first instance the government must expend some resources investigating the suits when they are first brought to determine whether or not to intervene, secondly the judicial system is burdened by such suits. And finally, companies must expend resources defending against meritless claims.

[102] Doyle, *Qui Tam: The False Claims Act and Related Federal Statutes*, 2.
[103] Broderick, "Qui Tam Provisions and the Public Interest: An Empirical Analysis," 951–955.

Even where claims have merit, the interposition of a private party may introduce incentives that increase the overall cost of corruption or give rise to other undesirable behavior. For example, a relator with knowledge of actual corruption may stall in bringing a claim to, "to let the meter run on damages before bringing suit." [104] The *qui tam* could also be used by businesses nefariously (and at a cost to society) to smear competitors and obtain a competitive edge. [105] One concern raised is that the *qui tam* will undermine companies' internal corruption detection and reporting mechanisms – diminishing the impact of *ex ante* regulatory efforts. [106] It's unclear whether this concern is justified – detractors of the argument suggest that the *qui tam* acts instead to improve the design and effectiveness of such internal mechanisms. [107]

A number of these criticisms can be traced to the unwieldiness of placing in private hands powers of public enforcement. Engstrom explains that "profit-driven enforcers will act whenever it pays to do so, even where the social cost of enforcement—e.g., the transaction costs incurred, including judicial resources consumed, or the economic and social costs imposed on affected communities—exceeds any benefit. Put another way, private enforcers do not exercise prosecutorial discretion." [108] Furthermore, from a legislative drafting position, it is hard to guess the direction in which cumulative individual cases will lead over time, and it is difficult to shape or guide that direction as it develops – if relators are expected to take some risks they will demand some certainty about pay-offs.[109] These issues are not insurmountable; South Africa could learn from the experience of the US in crafting a sensible statute, and amending it in a sensitive fashion. Notwithstanding these concerns, the empirical research done in the US indicates that *qui tam* actions result in significant fraud detection and recoveries, which would otherwise not occur. So far, the recoveries outweigh the costs of investigating frivolous suits, and there is likely some deterrent effect. [110]

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[104] Engstrom, "Harnessing the Private Attorney General: Evidence from Qui Tam Litigation," 2012, 1277.
[105] Ibid., 1277. and Boese, *Civil False Claims and Qui Tam Actions*, 1:4–17.
[106] Ben Allen, "UK Now Considering a False Claims Act: Is Australia Next?," October 2013, http://www.nortonrosefulbright.com/knowledge/publications/106954/uk-now-considering-a-false-claims-act-is-australia-next. For a statement of this position and more general discussion of the economics of qui tam claims see Ben Depoorter and Jeff De Mot, "Whistle Blowing: An Economic Analysis of the False Claims Act," *Supreme Court Economic Review* 14 (2006): 154.
[107] Allen, "UK Now Considering a False Claims Act."
[108] Engstrom, "Harnessing the Private Attorney General: Evidence from Qui Tam Litigation," 1254.
[109] Ibid., 1323, 1324.
[110] Broderick, "Qui Tam Provisions and the Public Interest: An Empirical Analysis," 1000.

IV. A special kind of law-breaking: The impact of failing enforcement on the rule of law

Earlier parts of this paper focused on the financial and economic costs of corruption and how an FCA-like law can help recover more of those costs more of the time. However, there are some costs which are hard to quantify. Furthermore, these costs can attach as much to the problems we face as to the tools we use to solve them. I have in mind here the impact of corruption, and laws chosen to address it, on principles like the rule of law[111] and separation of powers.

That corruption erodes the rule of law seems axiomatic. When the state is, for whatever reason, failing to enforce and obey its laws, it also seems plainly manifest that there is a cost to the rule of law. What does that cost actually look like? In order to get some sense, it's helpful to have a conception of what the rule of law is – it turns out this is quite a big ask.[112] A rough conception of the idea is that the rule of law is a system of governance characterized by particular formal and procedural principles, [113] and where the primary mode or method to which those principles apply is law (common law, statutes etc).[114] Formal principles would include things like the law be published and accessible, and not retroactive. Procedural principles require that the institutions which administer the laws do so in a way that is transparent, independent, and includes various other safeguards like the right to representation and to receive reasons for a decision.[115] Why is choosing to be governed by such a system a good idea? Waldron explains that, "the lead idea of the Rule of Law is that somehow respect for law can take the edge off human political power, making it less objectionable, less dangerous, more benign and more respectful."[116] Understood in this way, one aspect of the rule of law is that it operates as a constraint on the power of the state. This conception can be built on in a number of ways. For example, a related notion is that rule of law operates as a causeway: that, at the same time as constraining the state, it provides individuals and organizations with a path of certainty about what activities they can pursue

[111] While the rule of law has a particular meaning in South African constitutional law, I address it here in more general legal theory terms. For a discussion of the concept as developed by the Constitutional Court see Iain Currie and Johan De Waal, *The Bill of Rights Handbook*, 6th ed. (Cape Town: Juta & Company, 2013), 10–14.
[112] For a discussion about the difficulty defining the concept see Jeremy Waldron, "Is the Rule of Law an Essentially Contested Concept (In Florida)?," *Law and Philosophy* 21, no. 2 (March 2002): 159.
[113] Jeremy Waldron, "The Rule of Law and the Importance of Procedure," *New York University Public Law and Legal Theory Working Papers*, October 1, 2010.
[114] There is some question about properly distinguishing between law and the rule of law; circulatory definitions and confusion within definitions are a real risk. I ask for the reader's tolerance of my rough account of the concept here.
[115] Waldron, "The Rule of Law and the Importance of Procedure," 4.
[116] Waldron, "Is the Rule of Law an Essentially Contested Concept (In Florida)?," 159.

that will be secure from interference by the state or others.[117] In this way the rule of law allows us to develop expectations about our environment, which in turn allows us to plan our own lives. With these ideas about the rule of law in hand, let's return to a discussion of the cost of corruption to this political ideal.

When an ordinary crime occurs (a crime that does not involve government corruption) we understand that 'a law', or 'the law' has been broken. The state has a monopoly on the use of force and uses its powers to hold the perpetrator to account using the criminal justice system. When corruption involving the state occurs and the state is unable or unwilling to enforce its laws then we think that more than just 'a law' or the corruption law in question has been broken – we think that the system itself is compromised. The state is behaving in a way that suggests that it, and its favored subjects are not subject to governance under the system of law which is applicable to everyone else. Earlier it was established that a system that exhibits certain formal and procedural characteristics may qualify as meeting rule of law standard standards, but it must also be a requirement, if implicit, that the system is in fact active or enforced. It's not the case that a few instances of public-private corruption and a failure to prosecute means that South Africa lacks the rule of law altogether; a complex of institutions and interactions make up the rule of law. However we may plausibly feel that there has been some damage to the system and perhaps even some diminishment of the benefits of that system. Individuals and organizations now interact with certain state apparatus with a lesser degree of certainty around how they should behave or will be treated – this is a profound cost.

We needn't assume that failures in anti-corruption enforcement are all, or necessarily, nefarious for there still to be a cost to the rule of law. Flaws in institutional independence and enforcement problems are a common feature of fledgling democracies in developing countries. Understanding more about the contexts in which corruption can flourish is helpful in identifying the tools that may be used to combat it. One theory suggests that increases in corruption often accompany transitions from autocratic to democratic rule not because there was no corruption under autocratic rulership, but rather because new underdeveloped institutions or weak state machinery cannot contain or direct corruption as efficiently as the autocracy could.[118] If we agree with the idea that weak state machinery lets in more

[117] Jeffrey Kahn, "The Search for the Rule of Law in Russia," *Georgetown Journal of International Law* 37, no. 2 (2006): 353.
[118] A. Shleifer and R. W. Vishny, "Corruption," *The Quarterly Journal of Economics* 108, no. 3 (August 1, 1993): 609, 610, doi:10.2307/2118402.

corruption then it makes sense to leverage those parts of a community which are well developed.[119] In the case of South Africa, I would argue that the sophisticated and largely independent judiciary, and the strong legal services industry, could step in as at least a partial bulwark against some of the effects of other underdeveloped institutions.[120] Bolstering the rule of law in this way also has the advantage engaging the public in governance efforts – and this participation has a certain democratic flavor – something not often associated with the rule of law.[121]

Proposing that private entities step in to assist in enforcing anti-corruption measures may not be neutral with regard to other important political ideals, however. In the US the *qui tam* was challenged as a violation of the separation of powers doctrine. Allowing a private party to litigate on behalf of the government was thought to violate (a) the President's responsibility to ensure that the laws of the country are faithfully executed, (b) the President's powers to appoint officers of the government, and (c) the 'cases and controversies' clause of the US Constitution which empowers the judicial arm of government to rule on matters where, among other things, the party claiming relief can show injury. To date none of these challenges to the constitutionality of the law has been successful.[122] The appointments power argument ((b) above) was resolved by concluding that relators were not officers.[123] In South Africa, *locus standi* or 'standing' would correlate with the objection raised in (c) above. *Locus standi* is not tied to the power or authority of the courts as determined by the South African constitution -- the separation of powers issue does not arise.[124]

For our purposes, the more pertinent analysis concerns the location of the responsibility to ensure faithful execution of the laws. There are two strains of argument here. First, it is an

[119] John Braithwaite, "Responsive Regulation and Developing Economies," *World Development* 34, no. 5 (2006): 889. Susan Rose-Ackerman, "Establishing the Rule of Law," in *When States Fail: Causes and Consequences* (Princeton, N.J.: Princeton University Press, 2004), 196.

[120] "Developing states might therefore cope with their capacity problem for making responsive regulation work by escalating less in terms of state intervention and more in terms of escalating state networking with non-state regulators." Braithwaite, "Responsive Regulation and Developing Economies," 890. and "In general, in the face of state weakness, liability suits that can fill in the gaps in the statutory law and its implementation ought to be permitted." Rose-Ackerman, "Establishing the Rule of Law," 196.

[121] For discussion on the relationship between the rule of law and democracy see Jeremy Waldron, "Legislation and the Rule of Law," *Legisprudence* 1, no. 1 (January 1, 2007): 91–124.

[122] Doyle, *Qui Tam: The False Claims Act and Related Federal Statutes*, 26–32.

[123] Ibid., 26–30.

[124] In any event, South African law allows for statutory exceptions to the 'proper plaintiff rule' in the form of the derivative action, and has quite flexible standing requirements where a right in the Bill of Rights is implicated.

encroachment of the executive's powers by the relator insofar as the private party can initiate suit in the name of the government.[125] And second, that the judiciary itself usurps the powers of the executive when it must rule on the government's intention to settle or dismiss a relators claim under s3730(c)(2A) and (2B). Neither of these arguments has met with success in the US. The courts have reasoned that while there is some limit on the discretion of the executive, in the case of the relator – the Government retains sufficient control over the proceedings to satisfy constitutional allocations of power. And as regards judicial involvement - the courts' role does not amount to problematic supervision of the Attorney General.[126]

The allocation of powers under the South African Constitution is fairly similar to that in the US. In South Africa, the President, in his executive capacity, is tasked with: "implementing national legislation except where the Constitution or an Act of Parliament provides otherwise."[127] The provision explicitly provides for some flexibility, by allowing for statutory allocation of powers of implementation outside of the Presidency. Notwithstanding this, similar kinds of separation of powers concerns might be raised and would have to be answered with reference to the particular provisions of the empowering statute. It may bode well for any potential *qui tam* action that the Constitutional Court has committed itself to forming a context sensitive approach to the separation of powers doctrine: "a distinctly South African model of separation of powers should be developed."[128] It is suggested here that a model that is sensitive to the nascent nature of the country's democratic institutions, significant resource constraints, and growing corruption, may well favor more public involvement in enforcement.

V. Conclusion

The Constitutional Court has stated that, "[i]t is incontestable that corruption undermines the rights in the Bill of Rights, and imperils democracy. To combat it requires an integrated and comprehensive response. The state's obligation to "respect, protect, promote and fulfil" the rights in the Bill of Rights thus inevitably, in the modern state, creates a duty to create efficient anti-corruption mechanisms."[129] Current 'crisis' levels of corruption in South Africa suggest that something more is

[125] As Boese explains the litigation can run in the name of the Government "regardless of the executive branch's interpretation of statutory or contractual provisions involved in the suit, and regardless of national security or other policy concerns the executive branch might consider in determining whether to bring a particular suit." Boese, *Civil False Claims and Qui Tam Actions*, vol. 1, pt. 4–393.
[126] Ibid.
[127] *Constitution of the Republic of South Africa, 1996*, sec. 85(2)(a).
[128] Currie and De Waal, *The Bill of Rights Handbook*, 19 citing *S v Dodo* 2001 (3) SA 382 (CC),paras 14 -17.
[129] *Hugh Glenister v President of the Republic of South Africa & Others*, 2011 (7) BCLR 651 (CC), 176.

required to meet the constitutional standard of an integrated, comprehensive and, ultimately, effective response. As explained in this paper, the current anti-corruption regime in South Africa is largely criminal law driven and consequently handled almost exclusively by the government. Where there is a healthy divide between a country's prosecuting authority and other government officials, as well as competent policing and investigative units, we might feel comfortable with the government essentially holding itself to account. Even then, resource scarcity presents challenges to the successful routing of corruption. While more research is required into the specific causes of public-private corruption in South Africa, and into the appropriateness of enhanced damages and a *qui tam* action, harnessing private enforcement is one attractive mechanism to supplement the work of the criminal justice system, and to revive confidence in the rule of law.