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Global Corruption: International Law's Counterrevolution

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Global Corruption: International Law’s Counterrevolution¹

Sara A. Dillon[†]

I.	Forward.....	112
II.	International Law As We Have Known It: The “End of an Era”	112
	A. Elements of Global Decline: The Building Blocks	123
	B. Failures of Vigilance and the Rise of Oligarchy.	135
	C. The Failure of the “Rule of Law” Standard Bearer, the European Union	138
III.	Killing the Messenger: Suppressing Public Knowledge of Corruption	143
	A. The Age of Corporate Secrecy, Corporate Supremacy, and Their Consequences	145

¹ I started writing this Article before reading Tim Snyder’s amazing book, *The Road to Unfreedom*, published in 2018. As I began it, I was astonished at how many of the themes in this Article were accounted for by Professor Snyder’s brilliant analysis. Snyder highlights the lack of awareness in the West of Russia’s slow turn to hyper-nationalistic theories and outright fascism, explaining how Western delusions regarding Russian progress allowed Putin to export his brand of “eternity politics” to Europe and the U.S. Professor Snyder is especially remarkable in his ability to demonstrate the dangers of living without big ideas and without historical analysis, and relying on myths of progress to explain our world. I would argue that it is the failure of international law (IL) theory to contemplate the possibility of global oligarchy that has left us all vulnerable to its ambitions. The rise of global oligarchy is outside of the imagination of most IL experts. Snyder warns against assuming that history cannot make bad turns. He cautions that the “politics of inevitability” and notions of the “end of history” will blind us to the dangers of a resurgent fascism, and in this iteration, one with oligarchic aims. He writes that “[i]n the American capitalist version of the story, nature brought the market, which brought democracy, which brought happiness. In the European version, history brought the nation, which learned from war that peace was good, and hence chose integration and prosperity.” TIMOTHY SNYDER, *THE ROAD TO UNFREEDOM: RUSSIA, EUROPE, AMERICA* 7 (2018). I would like to thank Nermin Cosovic for his wonderful research assistance and many conversations in the early stages of this Article. I would also like to thank Anthea Yeung for her great help in finalizing it.

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- B. Feeble Efforts to Confront Unregulated Money . 154
- C. The Information Wars; Journalists as Substitute
Government and the Last Line of Defense 158

To experience its destruction is to see a world for the first time. Inheritors of an order we did not build, we are now witnesses to a decline we did not foresee.

Timothy Snyder, *The Road to Unfreedom*, Epilogue

Today marks one year since the brutal assassination of Daphne Caruana Galizia, Malta's leading investigative journalist and anti-corruption campaigner. At 3pm on 16 October 2017, as she drove away from her family home, a bomb placed under her car was detonated. She was 53 years old. The last words she wrote were: "There are crooks everywhere, the situation is desperate."

Margaret Atwood, writing on behalf of PEN, in *The Guardian*

I. Forward

The objective of this article is to connect what might otherwise appear to be a set of unrelated dots, unrelated in the sense of appearing to be discrete legal problems. In particular, the reader is encouraged to consider the link between the increasing global reach of dark money and the corresponding rise in repression, and even murder, of journalists. The argument will be made that if international lawyers continue to see the world according to the "progress is inevitable" theory so popular in the decades after World War II, there will be rude awakenings not unlike those of the 1930s, though with less chance of escaping the full consequences of global oligarchy than was the case in the past with transnational fascism.²

II. International Law As We Have Known It: The "End of an Era"

Democracy cannot co-exist with an unregulated international financial system that lends itself to the corruption of governments, including governments in heretofore democratic states. Because

² See TIMOTHY SNYDER, *THE ROAD TO UNFREEDOM: RUSSIA, EUROPE, AMERICA* 17 (2018) (explaining politics of inevitability).

such corruption inevitably cannibalizes democratic governance, the building blocks of international law are increasingly at risk. International law cannot exist separately and apart from the nation states taking part in its norms; national democracy reflects international human rights norms that until recently were believed to be the inevitable trend of the future. To the extent that the “free world” has ignored corruption in the form of tax avoidance and evasion, international money laundering and campaign financing, the very nations that had been the strongest supporters of the international rule of law have opened the door to its destruction. If these interrelated issues involving financial corruption are not adequately addressed, the entire edifice of World War II human rights is in serious danger. Legal scholarship must acknowledge this threat in clear, resounding terms. The assumptions on which international legal scholars have been working for decades have changed drastically, and whether the international system can be salvaged and repurposed is at this moment unclear.

There are many studies, both specialized and general, of the contemporary problems of tax evasion, money laundering, and public corruption.³ The techniques by which dark money⁴ is obtained and distributed globally for corrupt purposes are fairly well understood.⁵ What seems to be less well understood is that

³ See, e.g., RICHARD MURPHY, THE EUROPEAN TAX GAP: A REPORT FOR THE SOCIALISTS AND DEMOCRATS GROUP IN THE EUROPEAN PARLIAMENT 1–5 (2019) (studying the “European tax gap” that resulted from the 2008 economic crash); see generally Ansia Storm, *Establishing The Link Between Money Laundering And Tax Evasion*, 12 INT’L BUS. & ECON. RES. J. 1437 (2013) (connecting the relationship between money laundering and tax evasion through the case study of Greece).

⁴ While the common understanding of the term “dark money” is anonymously donated money that flows through entities set up to support favored politicians, the word has come to mean more than that. While Jane Mayer’s famous book (*infra* note 6) describes the enormous influence of campaign funders like the Koch Brothers and Sheldon Adelson, dark money also refers more broadly to support received by politicians (generally far right politicians) who are sponsored by national and international figures who are pushing an agenda of populist nationalism, white supremacy, or extreme libertarianism. Frequently, these ideologies are a cover for corrupt corporate interests and they mask the fusion of government and oligarchy, characteristic of global politics today. See Michael Beckel, *What is Political ‘Dark Money’—And is It Bad?*, THE CTR. FOR PUB. INTEGRITY (Jan. 20, 2016), <https://publicintegrity.org/federal-politics/what-is-political-dark-money-and-is-it-bad/> [<https://perma.cc/Y3E3-R625>].

⁵ See Thomas Curry, *Uncovering the Truth Behind the World’s ‘Dark Money,’* HUCK MAGAZINE (Aug. 7, 2018), <https://www.huckmag.com/perspectives/activism-2/uncovering-the-truth-behind-the-worlds-dark-money/> [<https://perma.cc/BRH5-3X8V>].

international law and international human rights are in danger of being *defeated* by this dark money.⁶ While it is hard to absorb the broad picture emerging from the mosaic of corporations with unknown beneficial ownership, bank secrecy, and vast sums laundered through otherwise ordinary-looking channels, the postwar system of international law is at serious risk if we remain in the dark.⁷

The modern era in international law has been built on a hybrid of state sovereignty and global institutions, designed to impose common principles on the exercise of state power.⁸ The postwar “basket of virtues” in anyone’s estimation must be seen as containing a commitment to human rights, territorial integrity, democracy, and the suppression of armed conflict. Even though the rules are not often honored, these ideals have guided most theory and practice in international law over the past seventy years.⁹ Nevertheless, the discipline of international law has recently awakened to a number of previously unimaginable facts, such as a man espousing neo-fascist and anti-democratic views being installed in the American White House.¹⁰ An increasing number of national governments openly flaunt the rule of law and sing the praises of such clearly unlawful practices as extrajudicial killings

(reporting on international and local government using “legalized bribery” to fund political campaigns).

⁶ See generally JANE MAYER, *DARK MONEY: THE HIDDEN HISTORY OF THE BILLIONAIRES BEHIND THE RISE OF THE RADICAL RIGHT* (2016).

⁷ See Francesco Guarascio, *EU Banks Face Money Laundering Action after Malta, Latvia Cases*, REUTERS (June 27, 2018), <https://www.reuters.com/article/us-eu-banks-moneylaundering/eu-banks-face-money-laundering-action-after-malta-latvia-cases-idUSKBN1JN10S> [<https://perma.cc/QW5R-GFEV>] (reporting on Latvian and Maltese banks involved in money laundering).

⁸ See Roman Kwiecień, *Does the State Still Matter? Sovereignty, Legitimacy and International Law*, 32 POLISH Y.B. INT’L L. 45, 53–56 (2012) (discussing the conflict between States’ interests in preserving sovereignty and identity over vesting international legal obligations); Oona A. Hathaway, *International Delegation and State Sovereignty*, 71 L. & CONTEMP. PROBS. 115, 120–26 (2008) (emphasizing sovereign consent through a state’s authorization of international law as a fundamental conflict between international and domestic law).

⁹ See Ted Piccone, *Why International Law Serves National Interests*, BROOKINGS (April 12, 2017), <https://www.brookings.edu/research/why-international-law-serves-u-s-national-interests/> [<https://perma.cc/JXK4-YRKU>].

¹⁰ See Harold Hongju Koh, *The Trump Administration and International Law*, 56 WASHBURN L.J. 413, 422–65 (2017) (noting various controversial actions the Trump Administration has taken that are against numerous international laws and treaties).

and the suppression of independent news outlets.¹¹ Many countries, including ostensibly democratic ones within the European Union, base their economic well-being on providing secretive financial services to the *uber* wealthy and to corporations, brazenly assisting in tax avoidance and evasion, as well as money laundering.¹² In an increasing number of countries, including those believed to be functioning democracies, election procedures are now suspect, if not outright fraudulent.¹³ Treaty commitments are being torn up at will, despite the fact that everything in treaty law aims at making the world more stable and predictable.¹⁴ By identifying how these phenomena are working together to suppress democratic success, democracy movements in different nation states might find common cause.

Despite the dramatic nature of these developments, in this new

¹¹ See, e.g., Inter-Am. Comm'n H.R., *Estados Unidos: Ejecuciones Extrajudiciales*, YOUTUBE (Dec. 7, 2017), <https://youtu.be/U5SvLoYX71M> [<https://perma.cc/N2TQ-BVQY>] (discussing the United States' violations of extrajudicial executions through police shootings); Jenna Johnson & Matea Gold, *Trump Calls the Media 'the Enemy of the American People'*, WASH. POST (Feb. 17, 2017), https://www.washingtonpost.com/news/post-politics/wp/2017/02/17/trump-calls-the-media-the-enemy-of-the-american-people/?noredirect=on&utm_term=.093f26f4a23f [<https://perma.cc/GCK6-D649>] (reporting on President Trump's attacks on various news medias by stating that they were "so dishonest").

¹² See Sara Dillon, *Tax Avoidance, Revenue Starvation and the Age of the Multinational Corporation*, 50 INT'L LAW. 275, 291–302 (2017) (explaining that Luxembourg alongside other countries, such as Ireland and the UK, advertised tax avoidance schemes via "sweetheart deals" with multinational corporations in order to maintain economic competitiveness); see also Rifat Azam, *Ruling the World: Generating International Tax Norms in the Era of Globalization and BEPS*, 50 SUFFOLK U. L. REV. 517, 531–36 (2017) (stressing that the establishment of various governance structures within individual nations can facilitate tax avoidance schemes).

¹³ See, e.g., *Venezuela Election: Maduro Wins Second Term Amid Claims of Vote Rigging*, BBC (May 21, 2018), <https://www.bbc.com/news/world-latin-america-44187838> [<https://perma.cc/NNT2-YSSE>] (reporting on the recent 2018 Venezuelan election, where the main opposition of President Maduro argued that he won because the polls were rigged); Sophie Morlin-Yron, *Why Nearly Half of Africans Don't Trust Elections*, CNN (Sept. 26, 2016), <https://www.cnn.com/2016/09/25/africa/africa-view-election-distrust/index.html> [<https://perma.cc/2YXN-NVFZ>] (highlighting ongoing issues prevalent across various African countries that have caused skepticism amongst citizens regarding official elections).

¹⁴ See, e.g., Philip Bump, *Where the US Has Considered Leaving or Left International Agreements Under Trump*, WASH. POST (June 29, 2018) https://www.washingtonpost.com/news/politics/wp/2018/06/29/where-the-u-s-has-considered-leaving-or-left-international-agreements-under-trump/?utm_term=.b18123477abe [<https://perma.cc/RFS5-2NPQ>].

international order, there is generally no identifiable ideological basis for the changes. Rationales provided, if they are provided at all, are often incoherent and crude.¹⁵ Former regimes are said to have been “disastrous” or “crime ridden,” while a crackdown on abuses is promised to lead to amazing riches and a return to some glorious national past.¹⁶ As independent institutions of government have appeared to melt away in such a diverse group of countries as the United States, Turkey, Hungary, Poland, the Philippines, and Brazil, to name but the most prominent, the role of defending enlightened global principles has been left largely to journalists—despite journalists being extremely vulnerable to attack in these new, anti-globalist regimes.¹⁷ It goes without saying that Russia is leading the charge in this trend. The canary in the coal mine, indicative of a broad breakdown in the postwar global order, is the rise in the number of journalists murdered for their work, including in the heart of Europe itself. The high-profile murder of Jamal Khashoggi while visiting the Saudi Arabian consulate in Istanbul is the most recent, and in many ways the most shocking, flaunting of international norms.¹⁸ There is no lack of indicators pointing to the

¹⁵ See Richard Haass, *How a World Order Ends*, FOREIGN AFFAIRS, (Feb. 2019), <https://www.foreignaffairs.com/articles/2018-12-11/how-world-order-ends> [<https://perma.cc/8QZ2-R59A>].

¹⁶ See *id.* (stating “if the end of every order is inevitable, the timing and the manner of its ending are not”).

¹⁷ See Katherine Viner, *A Mission for Journalism in a Time for Crisis*, THE GUARDIAN (Nov. 16, 2017), <https://www.theguardian.com/news/2017/nov/16/a-mission-for-journalism-in-a-time-of-crisis> [<https://perma.cc/2RVN-5CDP>] (overviewing newspaper’s history and the importance of journalism throughout historical moments in maintenance of liberal values). Viner states as follows:

If people long to create a better world, then we must use our platform to nurture imagination – hopeful ideas, fresh alternatives, belief that the way things are isn’t the way things need to be. We cannot merely criticise the status quo; we must also explore the new ideas that might displace it. We must build hope.

Id.

¹⁸ See Amanda Erickson, *Erdogan Says the Vienna Convention Hamstrung Turkey’s Search for Khashoggi. Here’s What That is.*, WASH. POST (Oct. 23, 2018), <https://www.washingtonpost.com/world/2018/10/12/law-that-explains-why-turkey-cant-search-saudi-consulate-khashoggi/> [<https://perma.cc/6L6D-8DSY>] (discussing the consequences that Jamal Khashoggi’s murder has on international law); see also *Jamal Khashoggi: All You Need to Know About Saudi Journalist’s Death*, BBC (Oct. 12, 2018), <https://www.bbc.com/news/world-europe-45812399> [<https://perma.cc/GV6H-VVQE>] (detailing events leading up to and following journalist Jamal Khashoggi’s murder).

destruction of the postwar international order, but there are strikingly few compelling ideas for how to save or revive it.¹⁹

Of course, international law scholars are generally aware that something has gone quickly and drastically wrong with the international order created after World War II.²⁰ However, what appears to be missing is a practical grasp of this dramatic phenomenon and what common themes connect the many dots involved.²¹ It is likely that in the months to come, there will be numerous articles decrying the erosion of human rights, the rise of militarism and hyper-nationalism, the demise of free trade, and many other topics relevant to the new world in which we find ourselves. What is urgently needed is a way to analyze this daunting subject with a meaningful degree of conceptual coherence. In other words, international lawyers who have occupied themselves with studying norms, now under direct threat, need a basis for understanding how this destruction has come about. Pretending that things are the same, or that the old doctrines are holding up, is beguiling, but clearly untenable.

One possible approach will be presented in this article, although it is far too fluid a situation to think of these recommendations as constituting a remedy *per se*. A starting point is the realization that the postwar order to which we became accustomed was neither inevitable nor necessarily enduring. As historian Tim Snyder has pointed out in a slightly different context, assumptions of inevitability are dangerous, as these induce complacency.²² The core assumption of the postwar order—incremental progress, the

¹⁹ See Ben Keith & Rhys Davies, *How International Law Could be Used to Prosecute Khashoggi's Killers*, INDEP. (Oct. 22, 2018), <https://www.independent.co.uk/voices/jamal-khashoggi-death-international-law-prosecute-istanbul-saudi-arabia-mohammed-bin-salman-a8596236.html> [<https://perma.cc/XS53-KHCE>] (discussing possible options of international laws, such as the Vienna Convention, that could be used to prosecute killers). *But see Why Turkey Can't Search Saudi Consulate for Missing Journalist Khashoggi*, STRAITS TIMES (Oct. 12, 2018), <https://www.straitstimes.com/world/middle-east/the-law-that-explains-why-turkey-cant-search-the-saudi-consulate-for-khashoggi> [<https://perma.cc/SB5Y-MKEV>] (noting restraints in international law that prohibit affirmative action against the journalist's death).

²⁰ See SUSI DENNISON, ULRIKE ESTHER FRANKE & PAWEL ZERKA, *THE NIGHTMARE OF THE DARK: THE SECURITY FEARS THAT KEEP EUROPEANS AWAKE AT NIGHT* 6 (Euro. Council on Foreign Rel. 2018) (noting the EU's growing concerns regarding the United States' "gradual withdrawal from the rules-based international order").

²¹ See SNYDER, *supra* note 1, at 16.

²² See, e.g., DENNISON, FRANKE & ZERKA, *supra* note 20, at 2.

inevitable spread of universal human rights and acceptance of restraints on official power—now appears profoundly naive, as international law scholars had mostly assumed that the legal order put in place in the late 1940s was immutable, but it has lately proven not to be.²³ This article makes the case that by failing to take slow-creeping political corruption and excessive corporate influence seriously, the governments of Western nations allowed the gradual undermining of global democracy's foundations. Failure to understand that the Cold War was neither won nor completed was another grave mistake.²⁴

For many decades, international lawyers have noted the gap between sophisticated and elaborate international norms, on the one hand, and the jarring lack of credible enforcement mechanisms to sustain these norms, on the other.²⁵ Most analysts appear to have resigned themselves to this discrepancy and have long exhorted governments to take international law seriously, despite its vexing lack of enforcement.²⁶ This article will argue that by over-reliance on unenforceable norms, the international legal system came to trust in the permanence of principles that were in fact highly vulnerable to attack and are now in danger of collapse. Once governments in influential countries repudiate accepted norms, it is all too obvious that the norms have no real power of their own, and the challenge is easily won by any hostile forces.²⁷ Too long kept distant from real life and national politics, international law has finally been revealed as weak and ineffective by aspiring autocrats willing to call its

²³ *See id.*

²⁴ *See* David Frum, *The Cold War Never Really Ended*, THE ATLANTIC (July 2015) <https://www.theatlantic.com/magazine/archive/2015/07/cold-war-never-ended/395243/> [<https://perma.cc/R22A-9W4Y>].

²⁵ *See* G.G. Fitzmaurice, *The Foundations of the Authority of International Law and the Problem of Enforcement*, 19 MOD. L. REV. 1, 8–13 (1956) (discussing challenges lawyers face when attempting to enforce international law as opposed to national law).

²⁶ *See* Jana Von Stein, *Compliance with International Law*, OXFORD RES. ENCYCLOPEDIA INT'L STUD. 1, 1 (2017), <http://www.janavonstein.org/uploads/4/6/1/9/46194525/isa-compendium-update.pdf> [<https://perma.cc/RF6Z-8UVW>] (introducing the debate of noncompliance in international law with respect to lacking enforcement).

²⁷ *See* Oona A. Hathaway & Scott J. Shapiro, *Outcasting: Enforcement in Domestic and International Law*, 121 YALE L. J. 252, 269 (2011) (noting that governments are a fundamental element when seeking enforcement of international treaties between independent nations).

bluff.²⁸ As autocracy is both appealing to would-be imitators and highly contagious, this phenomenon seems to be spreading across the globe at a rapid pace.²⁹

At best, the discipline of international law is due for some major updates. What had been optimistically called the postwar age of international institution-building is apparently dead, or at least dying.³⁰ Our international law textbooks are fundamentally outdated, no matter how “up to date” on case law and treaties.³¹ Conversations about treaty-based rights and United Nations (U.N.) processes that seemed relevant a few short years ago now sound archaic.³² In short, the assumptions that animated the development

²⁸ See Hathaway, *supra* note 8, at 127–33 (identifying the ease with which international law can become irrelevant merely by a shift in governmental power or regime).

²⁹ See DEMOCRACY INDEX 2017: FREE SPEECH UNDER ATTACK, THE ECONOMIST INTELLIGENCE UNIT 2, 5–9 (2018) (analyzing various democratic economies globally, noting a consistent decline in its global democracy average score since the 2010 financial crisis); see also David A. Andelman, *The Global Move From Democracy to Autocracy*, CNN (June 24, 2018), <https://www.cnn.com/2018/06/24/opinions/trump-end-to-democracy-opinion-andelman/index.html> [<https://perma.cc/89D4-BD2C>] (highlighting political societal patterns that have led to a declining democracy in the United States).

³⁰ See Lawrence L. Herman, *International Law in a Turbulent World*, 41 CAN.-U.S. L. J. 51, 65 (2017) (comparing the WTO’s 1986 Uruguay Round and the unsuccessful 2001 Doha Round in order to demonstrate a difference in global commitment to international law); see also Peter S. Goodman, *The Post-World War II Order is Under Assault From the Powers That Built It*, N.Y. TIMES (Mar. 26, 2018), <https://www.nytimes.com/2018/03/26/business/nato-european-union.html> [<https://perma.cc/7PZ2-UPEZ>] (describing how transnational institutions established after World War II have become increasingly fragile due to actions of the nations that created them).

³¹ See Harlan Grant Cohen, *Finding International Law: Rethinking The Doctrine of Sources*, 93 IOWA L. REV. 65, 69, 74–80 (2007) (explaining the typical sources of international law, “(1) treaties, (2) custom, and (3) general principles of law and equity[.]” and proposing a revision of these sources by “rethinking [] what the rules of international law actually are[.]”). Cohen argues the traditional sources of international law are “outdated and need[] to be revised[.]” since they were created in the nineteenth century, prior to more modern changes in the international legal system such as “the [] rapid inclusion of new states into system, the rise of human rights, the creation of international and transnational bodies, and the resultant changes in the nature and subject-matter of treaties[.]” *Id.* at 69–70.

³² See Akshaya Kumar, *A Midlife Crisis for the Treaty-Based Human Rights System?*, 53 UN CHRON. 38, 38–39 (2016), available at https://read.un-ilibrary.org/united-nations/a-midlife-crisis-for-the-treaty-based-human-rights-system_081a3a06-en#page1 [<https://perma.cc/EEY5-RCPU>] (noting that the treaty-based human rights system at 50 years old has failed to live up to expectations, especially in the realm of prohibiting torture), reprinted in Akshaya Kumar, *A Midlife Crisis for the Treaty-Based Human Rights*

of transnational legal structures from 1945 onward have been sharply devalued. International human rights advocacy itself seems increasingly like a distant and marginal chatter, bringing about no real changes and openly ignored by national governments.³³ Especially since international law is so heavily dependent on shared norms and practices, abrupt deviations from these core principles and rules has caused a shudder throughout the entire international law system.³⁴

With the postwar system of international institutions and advocacy encountering a dramatic decline, the simultaneous cause and successor is the spread of global corruption and the domination of governments by both global money and the political illusions global money is able to purchase.³⁵ Democratic structures that only recently gave hope of change, progress, and improvement have in many respects failed.³⁶ Major parts of the Western Alliance and the European Union have succumbed with remarkable ease to the rise of the deft and mobile international oligarch class.³⁷ Not content with carrying on their own business dealings, this class has determined that it will stop at nothing until the structures of democracy and human rights are themselves defeated.³⁸ Because

System?, HUM. RTS. WATCH (Feb. 2, 2017), <https://www.hrw.org/news/2017/02/02/midlife-crisis-treaty-based-human-rights-system> [https://perma.cc/V46P-Y6KW].

³³ See, e.g., Thomas Kellogg, *China Is Getting Better at Undermining Global Human Rights*, FOREIGN POL'Y (Oct. 18, 2017), <https://foreignpolicy.com/2017/10/18/china-is-getting-better-at-undermining-global-human-rights/> [https://perma.cc/UD4Y-3E5Y] (outlining China's reluctance to work with intergovernmental organizations to combat human rights violations as well as the U.S.'s unwillingness to push back on China at the U.N.).

³⁴ See Roozbeh B. Baker, *Customary International Law in the 21st Century: Old Challenges and New Debates*, 21 EUR. J. INT'L L. 173, 176–77 (2010) (discussing the development of customary international law).

³⁵ See *id.* at 203–04 (noting increasing disregard of customary international law and the institutions that have been established to enforce them).

³⁶ See, e.g., Samia Rahman & Syed Mahfujul Haque Marjan, *Fragile Democracy, Indications of Failed State and Lack of Good Governance: Perspective Bangladesh*, 4 J. MASS COMM. & JOURNALISM 1, 5 (2014) (critiquing Bangladesh's democratic failure despite the original hope of a positive outcome).

³⁷ See Jaba Devdariani, *Between Europe and Russia, Oligarchs Rule*, CARNEGIE EUR. (Dec. 1, 2016), <http://carnegieeurope.eu/strategieurope/66312> [https://perma.cc/2BHK-3JPT] (explaining how oligarchs have risen to power with support from the EU and Western States).

³⁸ See *id.* (“Oligarchs might not set the house on fire as populists do, but they may

unfettered democratic participation has the power to thwart access to corrupt money, the rise of corruption must inevitably be accompanied by a coordinated attack on the levers of democracy.³⁹ As of this writing, global anti-democratic forces have enjoyed remarkable success.⁴⁰ Simply put, global corruption is incompatible with global democracy.⁴¹ More simply put, democracy cannot be sustained without a commitment to strict and serious global financial regulation.⁴²

The postwar “Enlightenment” based legal order has rested on a set of basic assumptions. One was that most nations should, and likely would, find their way to genuine democracy.⁴³ Few in the West, at least from the supposed end of the Cold War, ever doubted that the trajectory of international law and policy would be in the direction of freedom and self-determination.⁴⁴ However, given the

just as surely bring it down by eroding its foundations.”).

³⁹ See Edward Lynch, *Latin American Democracy Is Crumbling Under Corruption*, THE HILL (Mar. 28, 2018), <http://thehill.com/opinion/international/380482-latin-american-democracy-is-crumbling-under-corruption> [<https://perma.cc/YEJ9-8LAB>] (noting the recent trouble for many Latin American countries, namely Venezuela, Bolivia, and Brazil; also positing that democracy’s “beleaguered status in Latin America cannot be attributed to a single cause, but its biggest enemy, by far, is corruption . . .”).

⁴⁰ See MICHAEL J. ABARMOWITZ, FREEDOM HOUSE, *DEMOCRACY IN CRISIS* 1–2 (2018), https://freedomhouse.org/sites/default/files/FH_FITW_Report_2018_Final_SinglePage.pdf [<https://perma.cc/B6Bk-QT73>] (reporting trends that have led to declining democratic values globally and providing “a summary of findings made for the 2018 edition of *Freedom in the World*”).

⁴¹ See Ina Kubbe & Annika Engelbert, *Corruption and the Impact of Democracy*, 70 CRIME L. SOC. CHANGE 175, 175 (2017) (investigating the impact of corruption on democracies). Corruption is a “misuse of public office for private gains,” which cannot exist in transparent governmental structures. *Id.*

⁴² See *id.* (stating that strict international regulations on financial practices of public officials would likely reduce the large loss of financial resources suffered by “every country” annually).

⁴³ See Steven D. Smith, *Recovering (from) Enlightenment?*, 41 SAN DIEGO L. REV. 1263, 1263–64 (2004) (distinguishing nineteenth century Enlightenment philosophies from historical Enlightenment theories that advocated for democracy, pluralism and secularism). “The modern Enlightenment orientation . . . is more accurately understood as an inversion than as an extension of the most essential ideals of the Enlightenment commitments to liberty, equality, freedom of conscience, and freedom of speech[.]” *Id.* at 1264.

⁴⁴ See Gregory H. Fox, *Self-Determination in the Post-Cold War Era: A New Internal Focus?*, 16 MICH. J. INT’L L. 733, 752–56 (1995) (noting that after the “end” of the Cold War, an internal conception of self-determination is slowly gaining acceptance); see also Thomas D. Barton, *Troublesome Connections: The Law and Post-Enlightenment Culture*,

proliferation of “fake elections” in a number of countries, what qualifies as democracy has recently become a highly contested notion.⁴⁵ At its core, valid democracy was meant to guarantee that a majority in each nation could express itself on a regular schedule and change government leadership as needed. Excessive intervention with this democratic process would be considered out of line with shared postwar understandings of political freedom.⁴⁶ Political succession had to be real.⁴⁷

In addition to the belief in participatory democracy, there were also built-in assumptions about the nature of wealth.⁴⁸ While many

47 EMORY L. J. 163, 170–71 (1998) (distinguishing post-Enlightenment legal philosophy through its emphasis on individual rights and liberties).

45 ABARMOWITZ, *supra* note 40, at 3 (comparing declining democracy in America with presidential fake news accusations and explaining despite the United States being “still firmly in the Free category[,]” its recent “unwillingness . . . to lead democracies in effectively confronting the growing threat[s]”); see Anthony J. Gaughan, *Illiberal Democracy: The Toxic Mix of Fake News, Hyperpolarization, and Partisan Election Administration*, 12 DUKE J. CONST. L. & PUB. POL’Y 57, 91–96 (2017) (discussing the 2016 American presidential election and its troubling effects on democracy, as well as how the false assertion of voter fraud undermines the integrity of democracy); see also SASKIA BRECHENMACHER, *COMPARING DEMOCRATIC DISTRESS IN THE UNITED STATES AND EUROPE*, 1–2 (Carnegie Endowment for Int’l Peace, 2018) (identifying issues both shared and unique among the United States and Europe that have led to citizens’ diminishing trust and confidence in their democratic governments). Voter “confidence in political institutions has plummeted to historically low levels on both sides of the Atlantic[:] the U.S. and Europe currently share certain challenges to their democratic governments, such as a growing distrust in the media; a growth in antiestablishment movements; and new concerns about the overreaching of executive power. *Id.* at 1. Also notable is the growing inequalities in the distribution of wealth. *See id.* at 2; see also, e.g., Devlin Barret & Matt Zapotosky, *Mueller Probe Indicts 12 Russians with Hacking of Democrats in 2016*, WASH. POST (July 13, 2018), https://www.washingtonpost.com/world/national-security/rod-rosenstein-expected-to-announce-new-indictment-by-mueller/2018/07/13/bc565582-86a9-11e8-8553-a3ce89036c78_story.html?utm_term=.416626269445 [<https://perma.cc/479M-CQW5>] (recounting indictment of twelve Russian military intelligence officers charged with hacking and publishing Democrat data to disrupt the 2016 United States election).

46 See Gaughan, *supra* note 45, at 67–71 (explaining the value of voter freedom as a pedestal to democracy and increasing concerns of fake news undermining the value of democracy particularly in the context of the 2016 United States presidential election); see also, e.g., ABARMOWITZ, *supra* note 40, at 3 (stressing the United States administration’s “unusual pattern of false statements” as reducing government transparency and one of the factors contributing to America’s declining democracy).

47 See SNYDER *supra* note 1, at 16–17.

48 See BRECHENMACHER, *supra* note 45, at 17–20. Although “[t]he effects of [socioeconomic] inequality on democracy are complex[,]” there has been a recurring narrative relying on “economic dislocation among working-class voters” as rationale for

countries suffered from poor governance and corruption, the stated hope was that these failures of transparency would evolve into the structures necessary to sustain well-regulated states with no political leader taking money he was not entitled to, and a separation of the private and public realms.⁴⁹ In addition, the distribution of wealth would not be grossly disproportionate, at least to the extent that ordinary people would have adequate resources to survive. While no one legal instrument demanded that modern nations should attain any particular formula for the distribution of wealth, it was assumed that extremes of wealth and poverty were inconsistent with democracy.⁵⁰ This set of assumptions and understandings has obviously broken down in recent years, and public corruption is gaining official adherents at an alarming rate.⁵¹

A. Elements of Global Decline: The Building Blocks

Despite the protestations of its defenders, international legal norms live mainly on paper, and they are unusually vulnerable to unexpected developments in the lived world.⁵² As described above, the international legal order has been undermined by an unregulated financial industry and the impunity enjoyed by those engaged in financial crimes and corruption.⁵³ More relevant is the fact that no

certain premises; however, its effect appears far more complex than that, implicating “economic status, social standing, racial attitudes, and spatial segmentation[.]” *Id.* at 18; see also David Held et al., *Globalization*, 5 *GLOB. GOVERNANCE* 483, 490–91 (1999) (describing the development of international trade and its transitioning to a unified global economy as opposed to maintaining domestic economies).

⁴⁹ See Kubbe & Engelbert, *supra* note 41. Although “democracy does not guarantee clean and transparent governance[.]” democratic institutions and values “support anti-corruption” and may nevertheless curb corruption in certain instances. *Id.*; see also David Held et al., *supra* note 48.

⁵⁰ See Branko Milanovic, *The Higher the Inequality, the More Likely We Are to Move Away from Democracy*, *THE GUARDIAN* (May 2, 2017), <https://www.theguardian.com/inequality/2017/may/02/higher-inequality-move-away-from-democracy-branko-milanovic-big-data> [<https://perma.cc/NJF6-PYNZ>] (analyzing data to exemplify how inequality breeds democratic failure).

⁵¹ See Devdariani, *supra* note 37; see also ABARMOWITZ, *supra* note 40, at 4–10.

⁵² See Hathaway, *supra* note 8, at 128–29 (explaining that the lack of continuity in international law is attributable to time-limited government authorities who cannot enforce international obligations through their successors).

⁵³ See ABARMOWITZ, *supra* note 40, at 5 (stressing that if China and Russia remain unchecked, corruption and impunity for abusers will continue and lead to a collapse of the current international order); see also Sue Konzelmann et al., *Governance, Regulation and Financial Market Instability: The Implications for Policy*, 34 *CAMBRIDGE J. ECON.* 929,

nation or set of nations has proven capable of confronting the elements of corruption.⁵⁴ There has of course been a great deal of writing on the problem of unregulated financial markets, allowing tax evasion and dark money acquisition by wealthy individuals, corporations, and government officials.⁵⁵ National statutes have been passed to deal with certain aspects of financial corruption.⁵⁶ Dedicated groups like Transparency International have alerted the public to the problem of tax evasion and avoidance and the ever-disappearing line between private wealth and public administration.⁵⁷ Nevertheless, the international legal response has been feeble and fragmented.⁵⁸

In the background, there have been persistent revelations about the ease with which the wealthy and multinational corporations can create offshore trusts and companies in order to hide ownership of assets and avoid taxes.⁵⁹ The Panama Papers and Paradise Papers

943 (2010) (explaining how the lack of global financial regulation has allowed for fraudulent and corruptive practices). International organizations and nations need to work collaboratively to establish a long-term governance system to regulate the financial market. *Id.*

⁵⁴ See William Magnuson, *Unilateral Corporate Regulation*, 17 CHI. J. INT'L L. 521, 537–41 (2016) (describing international law's failure in regulating multinational corporations). Multilateral agreements, such as treaties involving numerous states, "are difficult to negotiate, monitor, and enforce." *Id.* at 536. In an attempt to improve multilateral corporation, some states have attempted to establish broad international agreements; however, results have often failed. *Id.* at 537; see also Brian C. Harms, *Holding Public Officials Accountable in the International Realm: A New Multi-Layer Strategy to Combat Corruption*, 33 CORNELL INT'L L. J. 159, 165–69 (2000) (surveying existing domestic and international strategies to combat financial corruption).

⁵⁵ See, e.g., Sara Dillon, *supra* note 12, at 275–76 (noting the prevalence of wealthy individuals and large corporations looking to avoid paying national taxes); Rahul Kohli, *Foreign Corrupt Practices Act*, 55 AMERICAN CRIM. L. REV. 1269, 1270–73 (2018) (detailing the latest updates regarding Foreign Corrupt Practices Act (FCPA) violations in the United States and abroad).

⁵⁶ See Harms, *supra* note 54, at 168–73 (providing United States' initiatives in combating corruption). The enactment of the Foreign Corrupt Practices Act (FCPA) has increased financial regulations with multinational corporations. *Id.* at 170, 172–73.

⁵⁷ See Elena Gaita, *In 2018, Tax Avoidance Can be Tackled – But Not by Blacklisting*, TRANSPARENCY INT'L EU (Dec. 20, 2017), <http://transparency.eu/2018-tax-avoidance/> [<https://perma.cc/BGY5-8RQ9>] (noting that, a year after the Panama Papers were revealed, the Paradise Papers leak caused the world to begin truly seeing the effects of widespread global corruption).

⁵⁸ *Id.* (explaining that "a major lack of political will is slowing down the progress" in combatting the current system).

⁵⁹ See Spencer Woodman, *Inside the Secret World of Offshore Mega-Trusts*, INT'L

have provided reams of evidence on this phenomenon.⁶⁰ It is well known that the largest multinational corporations have sought out jurisdictions willing to assist them in parking assets offshore and have avoided the payment of all or most taxes in the process.⁶¹ When one jurisdiction is pressured into changing its ways, corporations simply move on to the next tax avoidance locale.⁶² The use of shell companies with anonymous ownership has become an integral part of the global economy, relied upon by the *uber* wealthy and those of more modest means to hide wealth and avoid taxes.⁶³ Yet, it is remarkable the extent to which such behavior has been

CONSORTIUM OF INVESTIGATIVE JOURNALISTS (Nov. 7, 2017), <https://www.icij.org/investigations/paradise-papers/secret-world-offshore-mega-trusts/> [<https://perma.cc/3RTL-43W5>] (investigating how wealthy families use offshore trusts to hide vast amounts of wealth, which came to light through the Paradise Papers leak); *see also* Kathrin Betz, *Driven out of Paradise: Illicit Financial Flows and Offshore Leaks*, 2 J. ANTI-CORRUPTION L. 71, 72–76 (2018) (discussing criminal economic consequences that offshore companies and accounts create).

⁶⁰ *See* Woodman, *supra* note 59; *see also* Brian D. Burton, *FATCA 2016 Update: The Panama Papers and Beyond*, TAXES THE TAX MAG., July 2016, at 29–30 (using the Panama Papers to analyze the international community’s response to tax avoidance schemes); Richard Eskow, *Why We Need to Confront the Billionaires’ Paradise*, OUR FUTURE (Nov. 13, 2017), <https://ourfuture.org/20171113/billionaires-paradise-why-we-need-to-strike-back-against-oligarchy> [<https://perma.cc/TZ4X-YZH3>] (revealing tax avoidance schemes billionaires used through the Paradise and Panama Papers).

⁶¹ *See* Nicholas Vail, *Cracking Shells: The Panama Papers & Looking to the European Union’s Anti-Money Laundering Directive as a Framework for Implementing a Multilateral Agreement to Combat the Harmful Effects of Shell Companies*, 5 TEX. A&M L. REV. 133, 138–40 (2017) (noting that multinational companies, such as Google and Amazon, have used shell companies in specific countries in order to legally avoid taxes).

⁶² *See* Gabriel Zucman, *How Corporations and the Wealthy Avoid Taxes (and How to Stop Them)*, N.Y. TIMES (Nov. 10, 2017), <https://www.nytimes.com/interactive/2017/11/10/opinion/gabriel-zucman-paradise-papers-tax-evasion.html> [<https://perma.cc/YHD7-GXXL>] (describing how Google, now Alphabet, minimized taxes by transferring profits abroad to various tax havens). *See, e.g.*, Nicholas Nehamas, *How secret offshore money helps fuel Miami’s luxury real-estate boom*, MIAMI HERALD (Sept. 6, 2018), <https://www.miamiherald.com/news/business/real-estate-news/article69248462.html> [<https://perma.cc/VB3D-N8J7>] (explaining how shell companies, by purchasing Miami luxury condominiums, have revived Miami’s economy through boosting its construction, real estate, and tourism markets).

⁶³ *See* Woodman, *supra* note 59 (discussing how offshore trusts have aided wealthy families as a tax avoidance mechanism). Establishing shell companies in international jurisdictions is a way for corporations to avoid local laws, such as corruptive laws, and avoid taxes. *Id.*; *see also* Magnuson, *supra* note 54, at 530 (explaining a corporation’s incentive for establishing shell companies). A country may be dissuaded from adopting more stringent regulatory policies if the policies could lead to corporations’ disinvestment in the country. *Id.*

tolerated by national governments, even by the EU, despite promises of concrete action to be taken against such abuses.⁶⁴ It is often stated that there are valid reasons for allowing anonymously owned companies to exist, but in light of the far greater dangers, it is difficult to see why this continues to be allowed and why more regulated regimes continue to allow the flow of unregulated money into their markets.⁶⁵

Until recently, these revelations of financial irregularity have progressed as if the “other,” familiar international system with its idealistic norms, would also continue to operate as usual. However, it has become apparent that the corrupt and easy-to-manipulate global financial system is enormously ambitious; it is fundamentally incompatible with freedom of expression and equitable development.⁶⁶ Over the past two years, it has increasingly appeared that the rise of the global oligarch class is directly related to the fall of the postwar institutions created to restrain wars, regulate trade, and support human rights.⁶⁷ Profound

⁶⁴ See Aurore Chardonnet, *Luxleaks and Tax Avoidance at EU Level: Talk Less, Act More*, EURACTIV (Nov. 5, 2015), <https://www.euractiv.com/section/eu-priorities-2020/opinion/luxleaks-and-tax-avoidance-at-eu-level-talk-less-act-more/> [<https://perma.cc/K2HA-UHG7>] (highlighting the EU’s ongoing tax avoidance issue despite discovering Luxleaks). *But see* Paul Jensen & Dallas Forbes, *The EU’s New Anti-Tax-Avoidance Package*, 27 J. INT’L TAX’N 49, 49–52 (2016) (explaining the European Commission’s Anti-Tax Avoidance Package introduced in January 2016).

⁶⁵ See Drake Forester, *The Truth About Shell Companies: The Good, the Bad, and the Ugly*, ALLBUSINESS, <https://www.allbusiness.com/shell-companies-legitimate-uses-corruption-105041-1.html> [<https://perma.cc/7DSN-L9W7>] (last visited Sept. 29, 2019) (providing legitimate reasons for establishing anonymous business entities and shell companies).

⁶⁶ See generally *While the G20 Drags Its Feet, the Corrupt Continue to Benefit from Anonymous Company Ownership*, TRANSPARENCY INT’L (Apr. 19, 2018), https://www.transparency.org/news/feature/while_the_g20_draggs_its_feet_the_corrupt_continue_to_benefit_from_anonymous [<https://perma.cc/5S7K-K7EE>] (describing existing shell companies in G20 countries that governments are unable to identify).

⁶⁷ See Javier Corrales et al., *Undermining Democracy: 21st Century Authoritarians*, FREEDOM HOUSE 1, 1–6 (June 2009), https://freedomhouse.org/sites/default/files/UnderminingDemocracy_Full.pdf [<https://perma.cc/Y3QL-GVJ6>] (providing in depth analysis of various authoritarian governments, such as China and Russia, and their implication on local and international communities). “[T]hese authoritarian regimes are undercutting or crippling the democracy-promotion and human rights efforts of rule-based organizations including the United Nations, the Organization for Security and Cooperation in Europe (OSCE), and the Organization of American States (OAS).” *Id.* at 4. See generally Whitney Milam, *The Global 1% Is Destroying Democracy*, MEDIUM (Aug. 12, 2018),

political corruption, by its nature, overwhelms the rational operation of global democracy.⁶⁸

The international system cannot develop in two contradictory directions at once. The familiar concerns of international law now seem quaint, as taxes go unpaid and money laundering reaches deep into the heart of Western capitals.⁶⁹ In the face of mass corruption virtually everywhere, “international law” as we know it has come to seem like a sideshow.⁷⁰ Of course, certain powerful nations have their own idiosyncratic views on international law.⁷¹

<https://medium.com/s/story/unraveling-the-global-web-of-corruption-thats-destroying-democracy-cd87f69ff6e2> [<https://perma.cc/5KYD-H6QM>] (discussing how the world’s wealthiest individuals are undermining international economic strategies established post-World War I). The Bretton Woods Agreement was envisaged to “stop countries from manipulating their exchange rates, curtail unrestricted international cash flows, and lock speculative capital behind national borders.” *Id.* However, the establishment of authoritarian governments exploits democratic regime and undermines the Bretton Woods system. *Id.*

⁶⁸ See generally Ken Mifsud Bonnici, *On the State of our Democracy*, TIMES OF MALTA (May 6, 2017), <https://www.timesofmalta.com/articles/view/20170507/opinion/On-the-state-of-our-democracy.647247> [<https://perma.cc/D4JM-9MGM>] (stressing how a flawed Constitution led to the nonexistence of democracy in Malta). “The ability to vote every [few] years does not make us a democracy. At most, it makes us a demagoguery A democracy requires . . . institutional separation of powers, the rule of law, proper judicial control, the equality of citizens before the law and before the public administration.” *Id.*

⁶⁹ See generally Tim Maurer, Ariel Levite & George Perkovich, *Towards a Global Norm Against Manipulation the Integrity of Financial Data*, CARNEGIE ENDOWMENT FOR INT’L PEACE (Mar. 28, 2017), <https://carnegieendowment.org/2017/03/28/towards-global-norm-against-manipulating-integrity-of-financial-data-pub-68485> [<https://perma.cc/4LGU-NTVE>] (encouraging G20 states to commit to establishing stronger cyber tools to maintain global financial integrity).

⁷⁰ See *Corruption Perceptions Index 2017 Shows High Corruption Burden In More Than Two-Thirds of Countries*, TRANSPARENCY INT’L (Feb. 21, 2018), https://www.transparency.org/news/pressrelease/corruption_perceptions_index_2017_shows_high_corruption_burden_in_more_than [<https://perma.cc/5WQD-25QG>] [hereinafter CPI 2017] (examining how increasing corruption, with respect to “shrinking space for civil society,” leads to violations of social norms by corrupt governments).

⁷¹ See, e.g., Lauri Mälksoo, *How do Russians See International Law*, OXFORD UNIV. PRESS (Mar. 2, 2015), <https://blog.oup.com/2015/03/russian-perceptions-international-law-pil/> [<https://perma.cc/DY6B-WK9P>] (summarizing Mälksoo’s book, *Russian Approaches to International Law*, which analyzes how the United Nations should implement international policies in light of Russia’s view of international law). See also Zihang Liu, *How the Chinese view International Law*, INT’L POLICY DIGEST (Aug. 29, 2016), <https://intpolicydigest.org/2016/08/29/how-the-chinese-view-international-law/> [<https://perma.cc/JN6P-KKKF>] (outlining China’s view on international law, which places national interests and sovereignty above all).

It also seems that the legal experts who might have been expected to help us understand the scope and scale of financial irregularity have all too willingly been accomplices in this epic breakdown.⁷² At least in America, law schools have to some extent abandoned their traditional mission of exploring the meaning of the “rule of law” and instead turned in the direction of training technicians who are able to carry on “transactions.”⁷³ Seen from one point of view, the study of decontextualized transactions is a way of denying the larger social purposes of legal scholarship.⁷⁴ Whether this is in fact to assist students in “finding legal employment,” as is often stated, or rather to avoid directly confronting threats to the rule of law, is difficult to say for certain.⁷⁵ It may be that the former impulse has facilitated the latter. Whatever the underlying reasons, law schools have remained remarkably tepid in their responses to the unraveling of the global rule of law, while continuing to offer an ever-increasing menu of courses in such topics as “negotiation,” “contract drafting,” “arbitration” and “mediation,” all of which sub-consciously present aspiring lawyers as technicians of the intentions of clients, rather than upholders of

⁷² See generally *Money Laundering and Terrorist Financing Vulnerability of Legal Professionals*, FIN. ACTION TASK FORCE 1, 23 (June 2013), <http://www.fatf-gafi.org/media/fatf/documents/reports/ML%20and%20TF%20vulnerabilities%20legal%20professionals.pdf> [<https://perma.cc/PB2U-ARL3>] (discussing legal professional involvement in completing money laundering transactions).

⁷³ See Mark A. Cohen, *Is the American Bar Association Passé?*, FORBES (Aug. 1, 2018), <https://www.forbes.com/sites/markcohen1/2018/08/01/is-the-american-bar-association-passe/#3fc3e72959bd> [<https://perma.cc/6BB5-HKTC>] (reporting the ABA’s failure to live up to its mission statement). Promoting the rule of law is in the ABA’s mission statement, and Cohen believes they have failed to do so, which has permeated the entire profession. *Id.*; see also John E. Cribbet, *Legal Education and the Rule of Law*, 60 A.B.A. J. 1363, 1363–66 (1974) (stressing the importance of maintaining respect for the law in order to maintain American democracy). Law schools are tasked with the duty of regulating admissions to the legal profession. *Id.* at 1364. Furthermore, law schools need to ensure adequate education to students so they become “principal representatives of the rule of law.” *Id.*

⁷⁴ See DeLloyd J. Guth, *The Shame of American Legal Education*, 31 MAN. L. J. 370, 371–72 (2005) (reviewing Alan Watson’s 2005 book, *The Shame of American Legal Education*).

⁷⁵ See, e.g., Brian Leiter, *American Law Schools: The New Economics Realities*, HUFFINGTON POST (last updated Feb. 28, 2014), https://www.huffingtonpost.com/brian-leiter/american-law-schools_b_4508504.html [<https://perma.cc/E5F2-BVF6>] (explaining that U.S. News uses self-reported statistics from law schools of employed grads when ranking).

the rule of substantive law more broadly.⁷⁶

The reasons for the complex global dis-improvements on the international law front can be speculated about, even if not definitively explained. It does seem that certain key lessons of World War II have been forgotten and, to that extent, generational memory seems to have played a large role in the failure of the structures set up postwar.⁷⁷ The weakening of historical studies, the failure of public schools to teach students about politics and civics, and the fracturing of human consciousness through the seductive presence of the internet all have surely played a role.⁷⁸ But what is undeniable is the fact that it is impossible to think of “international law” as we might have done even ten years ago. International law is only meaningful if it is resistant to the claims of autocrats.⁷⁹

⁷⁶ See generally Guth, *supra* note 74, at 371–72 (summarizing Alan Watson’s book criticizing America’s legal education for too narrowly concentrating on casebook texts rather than providing a more comparative legal analysis). Watson argues that American law schools do a disservice to law students by too heavily focusing on the “casebook system,” rather than attempting to “explain why [the] law is as it is.” *Id.* at 371. See generally A.B.A., ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2016-2017 15–17 (2016) (outlining certain “practical skills” requirements that must be offered by schools to remain accredited).

⁷⁷ See Roger Michel, *Breaking the Cycles of Hatred: Memory, Law, and Repair*, 88 MASS. L. REV. 117, 117 (2003) (reviewing Martha Minow’s 2002 book, *Breaking the Cycles of Hatred: Memory, Law, and Repair*: “[I]f there are no collective efforts to remember, a society risks repeating its atrocities by failing to undo the dehumanization that laid the groundwork for them.”); see also Tom C. Clark, *Law and Justice in the Post-War World*, 41 PROCEEDINGS OF THE AM. SOC’Y OF INT’L LAW AT ITS ANNUAL MEETING (1921-1969) 16, 17–18 (1947) (stressing that the United Nations’ ultimate goal of peace and expansion of international law cannot be achieved without adequate unity amongst the international community).

⁷⁸ See Christopher L. Doyle, *World War I: A War Too Easy to Forget*, L.A. TIMES (June 21, 2014), <https://www.latimes.com/opinion/op-ed/la-oe-doyle-teaching-wwi-20140622-story.html> [<https://perma.cc/U9PZ-864K>] (discussing public schools’ civic classes focusing more on Civil War, World War II, and current events rather than the history and importance of World War I); see also Mackenzie Carpenter, *Why World War I Gets Short Shrift in U.S. Schools*, PITTSBURG POST-GAZETTE (July 27, 2014) <https://www.post-gazette.com/news/education/2014/07/28/Why-World-War-I-gets-short-shrift-in-U-S-schools/stories/201407270025> [<https://perma.cc/J6T2-PDLF>] (commenting on the public’s general inability to recall details from World War I as opposed to World War II).

⁷⁹ See Arch Pudding & Tyler Royslance, *Populists and Autocrats: The Dual Threat to Global Democracy*, FREEDOM HOUSE 1, 1 (2017), https://freedomhouse.org/sites/default/files/FH_FIW_2017_Report_Final.pdf [<https://perma.cc/VJ8H-W986>] (rising autocracy is a direct threat to the established international order).

Nations must proactively embrace international law, lest its pursuit become a sterile and empty exercise.⁸⁰

In light of events of the past few years, the distribution of power across the world can no longer be analyzed in terms of “sovereign nations” versus “global institutions.” Instead, global wealth and power have consolidated themselves in an authoritarian vice, the audacity of which would have seemed unimaginable only a short time ago.⁸¹ Not only have illiberal regimes rejected accepted norms, but they have banded together to make common cause around an alternative set of norms, namely aggressive nationalism and the embrace of authoritarianism.⁸²

This article identifies some of the weak points in the international system which have provided impunity for a devious sub-class of persons in almost total control of vast wealth and the ability to manipulate public perceptions in their own favor. One of the key weak points is the decoupling of the financial industry from other national and transnational legal structures, and the creation of a secretive, *uber* wealthy ruling class.⁸³ But quite beyond the existence of a new oligarch class is the all-important point that this

⁸⁰ See Sara Dillon, *On the Political Geography of the Right to Survive: The EU and Mass Migration*, 21 GONZ. J. INT'L L. 37, 52–54 (2017) (arguing that absent the public recognition of international law, such as through the creation of a “geographical home,” international human rights will become void and insignificant).

⁸¹ See James Petras, *China: Rise, Fall and Re-Emergence as a Global Power*, GLOBAL RES. (last updated Dec. 12, 2018), <https://www.globalresearch.ca/china-rise-fall-and-re-emergence-as-a-global-power-2/29644> [https://perma.cc/2ZRD-38KY] (summarizing China’s economic and political history leading up to its current Communist regime). Although China has had economic successes throughout history, its current “rapid accumulation of wealth and capital” was due to the Communist government’s exploitation of labor. *Id.* See, e.g., Ed Pilkington & David Smith, *Bernie Sanders Warns of ‘International Oligarchy’ After Paradise Papers Leak*, THE GUARDIAN (Nov. 6, 2017), <https://www.theguardian.com/news/2017/nov/06/bernie-sanders-paradise-papers-leak-international-oligarchy> [https://perma.cc/7HE7-HLFG] (describing how the Paradise Papers exposed an enormous amount of wealth that is now concentrated among those who used various tactics to undermine international order to amass even more wealth).

⁸² See Fareed Zakaria, *The Rise of Illiberal Democracy*, 76 FOREIGN AFF. 22, 35 (1997) (discussing dictatorships and other illiberal democracies unifying together).

⁸³ See Cecile S. Gallego, *US, Switzerland Singled Out for Financial Secrecy by New Index*, INT'L CONSORTIUM OF INVESTIGATIVE JOURNALISTS (Jan. 30, 2018), <https://www.icij.org/blog/2018/01/us-switzerland-singled-financial-secrecy-new-index/> [https://perma.cc/5YGT-59G3] (noting that Switzerland and the U.S. are large promoters of financial secrecy thereby allowing high net-worth individuals to evade international efforts).

very group has determined that the international legal system of the postwar period is hostile to its interests, and to the extent that the system demands democratic changes in leadership in every nation, it must be discredited and thwarted.⁸⁴ This international counter-narrative is far more advanced than might have been imagined only a short time ago.

As mentioned above, the postwar system of public international law was built on Enlightenment principles of logic and progress;⁸⁵ its defining concept was rational integration. Integration that is not based on empire must rest on shared ideals and a sense of sovereign equality and mutual respect.⁸⁶ The U.N. Charter, a foundational document in this regard, was meant to establish a mechanism for the suppression of mass conflict likely to arise when nations have recourse to violence.⁸⁷ Under the Charter, all such potential conflicts were to be dealt with by the authority of the U.N. Security Council.⁸⁸ The members of the U.N., intended to comprise all countries on earth, were to adhere to human rights principles, elaborated upon in treaties.⁸⁹ The U.N. Charter was intended to create a kind of improved and enhanced League of Nations, but with enforceable qualities, a system that would endure and absorb

⁸⁴ See David Frum, *Trump Goes to War Against the Democracies*, THE ATLANTIC (Jun. 10, 2018), <https://www.theatlantic.com/international/archive/2018/06/trump-g7/562487/> [<https://perma.cc/PFU6-5V3N>] (explaining President Trump's attack on the rule of law democracies of "America's closest friends and allies"). Trump criticized America's allies for not supporting his way of governance as opposed to other more authoritarian regimes. *Id.*

⁸⁵ See Barton, *supra* note 44, at 177–84 (discussing the Enlightenment's continuous emphasis on discovering actual knowledge of morality through exploring procedurally strategic and logically sound arguments).

⁸⁶ See SNYDER, *supra* note 1, at 16 (describing the centrality of integration to modern democracy).

⁸⁷ See U.N. Charter art. 1, ¶ 1 (explaining that the purpose of the U.N. charter is "[t]o maintain international peace and security . . ."); see also Hon. Guy M. Gillette et al., *United Nations Charter Review*, 48 DEV'T OF INT'L L. 191, 191 (1954) (discussing United States' Senate ratifying the United Nations Charter to further its mission of living in a war free world).

⁸⁸ See U.N. Charter art. 24, ¶ 1 (ascribing to the U.N. Security Council the duty to maintain international peace and security).

⁸⁹ See U.N. Charter art. 1, ¶ 3 (stating that an additional purpose of U.N. Charter is to establish international co-operation by "promoting and encouraging . . . human rights . . . and . . . fundamental freedoms . . ."); see also G.A. Res. 217 (III) A, Universal Declaration of Human Rights pmbl. (Dec. 10, 1948) (envisioning a set of mutually agreed-upon human rights that all peoples and nations ought to comply with).

evolution in political leadership around the world.⁹⁰ All potentially underserved groups—peoples not in possession of their own nations, women, minorities, and children—would eventually have their own rights and legal instruments, and nations would waive their sovereign powers in favor of these shared ideals.⁹¹ It was a good vision. It had an ambitious, totalizing reach, and with each successive decade it grew to cover more aspects of human behavior.⁹²

The U.N. has also maintained certain vague objectives with regard to economic development and distribution of wealth—not based on any mandatory standards, but rather on broad, aspirational notions of forward movement according to its own human development index.⁹³ The “Millennium Development Goals” were

⁹⁰ See U.N. Charter art. 1, ¶ 1 (stating that the U.N.’s fundamental purpose is for the maintenance of international peace and security); see also Leland M. Goodrich, *From League of Nations to United Nations*, 1 INT’L ORG. 3, 6 (1947) (comparing the League of Nations’ Covenant to the Charter of the United Nations). The United Nations tasked itself with being held accountable for maintaining international peace and security through the U.N. Charter. *Id.* While the Charter does borrow language that was originally used in the League of Nations’ Covenant, the Charter states affirmative ways of maintaining peace. *Id.* at 7.

⁹¹ See Adam Hall, *The Challenges to State Sovereignty from the Promotion of Human Rights*, E-INT’L REL. STUDENTS (Nov. 17, 2010), <https://www.e-ir.info/2010/11/17/the-challenges-to-state-sovereignty-from-the-promotion-of-human-rights/> [<https://perma.cc/8Y5B-BFBN>] (discussing the opposing relationship of a nation state’s relinquishing powers of domestic intervention for the promotion of human rights and individual protection); see also David M. Smolin, *Will International Human Rights Be Used as a Tool of Cultural Genocide? The Interaction of Human Rights Norms, Religion, Culture and Gender*, 12 J. L. & RELIG. 143, 143–45 (1995) (explaining that a limited government and democracy enable individual liberty to flourish amongst a nation). A limited government, as opposed to a totalitarian government, limits its involvement with individuals, namely from force and coercion tactics. *Id.* In order for a government to perfectly embrace the fundamental principles of individual freedom, the government must “grant traditional freedom even to those who fundamentally reject the [nation’s] system.” *Id.* at 145.

⁹² See Piccone, *supra* note 9.

⁹³ See G.A. RES. A/Res/70/1, ¶ 2 (Oct. 21, 2015) (setting a list of ambitious, transformative goals, including the reduction of wealth inequality, in order to provide for a more economic sustainable future). The resolution states:

In these Goals and targets, we are setting out a supremely ambitious and transformational vision We envisage a world in which every country enjoys sustained, inclusive and sustainable economic growth and decent work for all. A world in which consumption and production patterns and use of all natural resources – from air to land, from rivers, lakes and aquifers to oceans and seas – are sustainable.

meant to steer the global ship in the direction of fairer and broader distribution of resources.⁹⁴ U.N. sub-bodies worked away at articulating economic policy goals.⁹⁵ However, in recent times, it has become apparent that for all the lip service in favor of economic development, and for all the promotion of free international trade, wealth was not in fact making its way into the lives of people in many parts of the world.⁹⁶ At the global level, economic and corporate law created for the benefit of capital was powerful, and human development principles remained largely unenforceable.⁹⁷

If nothing else, the recent migration crisis makes clear that armed conflict and grossly disproportionate distribution of wealth are the norms in many parts of the world.⁹⁸ Some scholars have

One in which democracy, good governance and the rule of law, as well as an enabling environment at the national and international levels, are essential for sustainable development, including sustained and inclusive economic growth, social development, environmental protection and the eradication of poverty and hunger.

Id. at ¶ 1, 9; see also *Sustainable Development Goals, Goal 10: Reduce Inequality Within and Among Countries*, U.N., <https://www.un.org/sustainabledevelopment/inequality/> [<https://perma.cc/8FQE-G5DM>] (specifying a method of eradicating global wealth inequality through ten aspirational sub-goals that will aid in fulfilling the overall commitment).

⁹⁴ See generally U.N. Secretary-General, *Implementation of United Nations Millennium Declaration*, U.N. Doc. A/57/270 (July 31, 2002) (listing eight goals that followed U.N. Millennium Declaration) [hereinafter *Report of the Secretary-General*]; UNITED NATIONS, *Millennium Dev't Goals and Beyond 2015*, <http://www.un.org/millenniumgoals/> [<https://perma.cc/WQH9-PH4U>] (last visited Mar 1, 2019) (detailing eight goals provided by U.N. Millennium Declaration with prospective deadlines and follow up reports); see also G.A. Res. 55/2, United Nations Millennium Declaration (Sept. 18, 2002) (declaring the U.N.'s commitment to establishing greater global wealth equality by 2015).

⁹⁵ *Report of the Secretary-General*, *supra* note 94.

⁹⁶ See C.W., *Why Globalisation May Not Reduce Inequality in Poor Countries*, *ECONOMIST* (Sept. 3, 2014), <https://www.economist.com/the-economist-explains/2014/09/02/why-globalisation-may-not-reduce-inequality-in-poor-countries> [<https://perma.cc/KF7T-CGYC>] (theorizing how increasing free trade and outsourcing of production has contributed to rising global inequality amongst nations).

⁹⁷ See Steve Charnovitz, *The Globalization of Economic Human Rights*, 25 *BROOK. J. INT'L. L.* 113, 118 (1999) (calling for enforcement of international human rights to “become more like international trade law . . . through mandatory dispute settlement and potential penalties for non-compliance.”).

⁹⁸ See Chris McKenna & Brennan Hoban, *Problems and Solutions to the International Migrant Crisis*, *BROOKINGS INST.* (Dec. 18, 2017), <https://www.brookings.edu/blog/brookings-now/2017/12/18/problems-and-solutions-to-the-international-migrant-crisis/> [<https://perma.cc/6FF7-HRWA>] (analyzing the

taken note of the fact that such problems are all the indication we need that “human rights” law and advocacy as understood since the end of World War II are simply not enough in themselves.⁹⁹ A recent book makes the point that human rights advocacy in and of itself, without addressing extremes in the maldistribution of wealth, cannot succeed.¹⁰⁰ While it is true that human rights advocacy has often taken place in isolation from issues of economic development, it is equally true that economic development in the absence of democratic rights is sterile and unsustainable. The tools of democratic succession must be present in all well-functioning states.¹⁰¹

However imperfect, the global trading system, exemplified in the creation of the World Trade Organization in 1995, is a key aspect of the international rule of law.¹⁰² The global trade regime surely failed to deliver the inclusive world economy that it might have.¹⁰³ In that sense, trade theory was not supplemented with real-world, empirically verifiable insistence on better distribution of wealth. However, the trading system dealt mainly with trade in

international migrant crisis since 2000 and the effects of armed conflict on the crisis).

⁹⁹ See GLOBAL CITIZENSHIP COMMISSION, *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS IN 21ST CENTURY: A LIVING DOCUMENT IN A CHANGING WORLD* 49 (Gordon Brown eds., 2016) (using the migration crisis to exemplify holes in human rights policies that offer inadequate policies to migrant workers); E. Tendayi Achiume, *Reimagining International Law for Global Migration: Migration as Decolonization*, 111 *AJIL UNBOUND* 142, 142 (2017) (stating international law’s issue of unregulated migration laws and conflicting ideals of individual noncitizen rights versus state sovereignty).

¹⁰⁰ See generally SAMUEL MOYN, *NOT ENOUGH: HUMAN RIGHTS IN AN UNEQUAL WORLD* (Harvard University Press, 2018).

¹⁰¹ See Philip Abbott, *Accidental Presidents: Death, Resignation, and Democratic Succession*, 35 *PRESIDENTIAL STUD. Q.* 627, 628 (2005) (defining democratic succession as the preferred way for selecting leaders because it promotes a “peaceful, swift and decisive” method); Steven Feldstein, *Remarks By Steven Feldstein*, 110 *AM. SOC’Y INT’L L.* 221, 222–23 (2016) (arguing within the *Proceedings of the Annual Meeting* issue that countries maintaining democratic succession hold stronger constitutions and are less susceptible to political instability).

¹⁰² See *Briefing, The World Trading System is Under Attack*, *ECONOMIST* (July 19, 2018), <https://www.economist.com/briefing/2018/07/19/the-world-trading-system-is-under-attack> [<https://perma.cc/6M7S-WZLF>] [hereinafter *Briefing*] (analyzing the current situation of global trade, why it is important, and how the Trump Administration has been severing relationships with old allies).

¹⁰³ See Klaus Schwab, *Our Global System Has Spun Out of Control. Here’s How to Rebalance It*, *WORLD ECON. FORUM* (Feb. 5, 2019), <https://www.weforum.org/agenda/2019/02/how-to-rebalance-our-global-system/> [<https://perma.cc/C2CX-LBRH>].

goods and services.¹⁰⁴ The missing link was the unregulated and largely ignored financial sector, with its secretive flows of capital and anonymous storehouses of wealth.¹⁰⁵ While the operation of international trade rules certainly did not deliver the broad-based prosperity it was meant to, these rules became part of the world order and helped to establish economic predictability.¹⁰⁶ Though criticized for constitutionalizing neoliberal economics, the world trading system nonetheless created conditions that have the potential to end global economic rivalry in favor of an interdependent and market-oriented future.¹⁰⁷ That in turn could provide a fairly effective guarantor of the peace.¹⁰⁸ In that regard, Donald Trump has shown us how immensely disruptive it can be to tear apart global trading relationships decades in the making.¹⁰⁹ Foreign direct investment flows have closely followed the creation of laws meant to encourage the free flow of goods.¹¹⁰ To undo all this in the name of nationalist passion offers at best a highly uncertain future.

B. Failures of Vigilance and the Rise of Oligarchy

This article argues that betrayal of the international postwar

¹⁰⁴ See, e.g., Dani Rodrik, *The Trouble with Globalization*, MILKEN INST. REV. (Oct. 20, 2017), <http://www.milkenreview.org/articles/the-trouble-with-globalization?IssueID=26> [https://perma.cc/DG9D-UDVS] (describing globalization's historical reliance on trading capital and disregard for labor).

¹⁰⁵ See Arthur J. Cockfield, *Shaping International Tax Law and Policy in Challenging Times*, 54 STAN. J. INT'L L. 223, 238–39 (2018) (discussing how an inadequately regulated international financial system, coupled with uncooperative super-power governments, has encouraged tax havens). See generally *The Financial Secrecy Index 2018 Ranking*, FIN. SECRECY INDEX (2017), <https://www.financialsecrecyindex.com/introduction/fsi-2018-results> [https://perma.cc/8543-2TLG] (providing data to financial flows or capital flight).

¹⁰⁶ See Cockfield, *supra* note 105, at 227 (overviewing the establishment of international tax regimes after World War I).

¹⁰⁷ See, e.g., G.A. Res. 55/151, Report of the United Nations Commission on International Trade Law on the work of its thirty-third session (Jan. 19, 2001) (reaffirming U.N.'s commitment to unifying international trade by removing legal barriers and promoting global economic co-operation).

¹⁰⁸ See Cockfield, *supra* note 105, at 227 (noting the League of Nations was commissioned to establish international tax regimes for the purpose of settling economic conflicts).

¹⁰⁹ See *Briefing*, *supra* note 102.

¹¹⁰ See Cynthia Crawford Lichtenstein et al., *Globalization and Investment Flows*, 93 PROC. ANN. MEETING (ASIL) 114, 117 (1999) (explaining implementation of multilateral and bilateral investment agreements requiring party members to establish complying laws and regulations).

ideal can be traced in part to the globalization of the financial industry without corresponding regulation. These unrestrained financial opportunities allowed for governmental corruption on a grand scale.¹¹¹ Over time, this extraordinary financial freedom expanded into an unabashed fusion of money and power that is unprecedented in modern society, indeed, in human society.¹¹² The attack on international idealism has been multi-faceted, but it was unified by financial audacity. Corporations enabled by national courts have openly avoided paying fair and legitimate taxes.¹¹³ The secrecy allowed to company ownership is both a symptom and contributing factor in what has come to be total deference to oligarchic interests globally. The wealthy have used anonymous shell companies to hide their wealth, often obtained through questionable means.¹¹⁴ Whereas corporate law and banking law have been treated as sub-topics in international law, a well-regulated financial sector with real penalties for violations must be seen as a vital component in the international rule of law generally.¹¹⁵ To put

¹¹¹ See Susan Strange, *Finance, Information and Power*, 16 REV. OF INT'L STUD. 259, 266–67 (1990) (stressing the consequence that unregulated financial markets lead to privatized state enterprises in pursuit of political power against other foreign nations); Matt Taylor, *Greedy Bankers Are Already Creating the Next Financial Crisis*, VICE (May 23, 2018), https://www.vice.com/en_ca/article/59q348/greedy-bankers-are-already-creating-the-next-financial-crisis [<https://perma.cc/3B64-HFQW>] (reporting on pending legislation removing government checks from banks that may lead to another financial crisis).

¹¹² See generally Strange, *supra* note 111.

¹¹³ See Henry Ordower, *Critical Issues in Comparative & International Taxation: The Culture of Tax Avoidance*, 55 ST. LOUIS U. L. J. 47, 92 (2010) (asserting courts have become unreliable allies in the fight against corporations and individuals alike regarding tax avoidance). See, e.g., Natalie Olivo, *UBS Doesn't Have to Turn Over Accounts*, SWISS COURT SAYS, LAW360 (Aug. 1, 2018), <https://www.law360.com/articles/1069044/ubs-doesn-t-have-to-turn-over-accounts-swiss-court-says> [<https://perma.cc/V5SS-6K9H>] (reporting a Swiss court blocking tax authorities from helping French authorities access the data of clients who allegedly are dodging taxes).

¹¹⁴ See Idelys Martinez, *The Shell Game: An Easy Hide-and-go-Seek Game for Criminals Around the World*, 29 ST. THOMAS L. REV. 185, 200–04 (2017) (describing current U.S. laws that have failed in deterring criminals from establishing shell companies); John Cassidy, *Rick Gates Claims That He and Paul Manafort are Tax-Evading, Money-Laundering Criminals*, NEW YORKER (Aug. 7, 2018), <https://www.newyorker.com/news/our-columnists/rick-gates-claims-that-he-and-paul-manafort-are-tax-evading-money-laundering-criminals> [<https://perma.cc/A87Z-6FHJ>] (outlining the recent Manafort trial, including Gates's testimony).

¹¹⁵ See *Corporate Liability for Violations of International Human Rights Law*, 114 HARV. L. REV. 2025, 2026 (2001) (discussing U.S. courts holding multinational corporations liable for human rights violations through the Alien Tort Claims Act).

it differently, an unregulated global financial sector will inevitably cannibalize global democracy and human rights.

Politicians around the world have unabashedly expropriated national wealth to favor themselves and their families.¹¹⁶ Instead of repressive oligarchies coming to gradually resemble transparent democracies, the opposite has happened.¹¹⁷ The much vaunted “globalization” that was meant to raise all boats, especially those of the poor and middle class, has instead been used to pursue secret agendas on the part of both wealthy individuals and corporations.¹¹⁸ The gateway to this state of affairs was surely the failure of the international community to react seriously to regulate and rein in financial abuses, including the avoidance of legitimate and proportionate taxes.¹¹⁹ States began to be corrupted by such financial flows at the point where they sought national advantages by providing corporations and individuals with tax-avoiding

¹¹⁶ See Irina Reznik, *Putin’s Next Takeover Target is Oil Giant’s \$34 Billion Cash Pile*, BLOOMBERG (May 11, 2015), <https://www.bloomberg.com/news/articles/2015-05-11/putin-s-34-billion-siberian-hoard-hunted-by-cash-starved-allies> [<https://perma.cc/2RF6-Q2TE>] (detailing Putin’s alleged plan to raid the Russian oil company, Surgutneftgas, of its cash reserves for the state); see also Dr. Louise Shelly Judy Dean, *The Rise of Reiderstvo: Implications for Russia and the West* (May 9, 2016), http://www.reiderstvo.org/sites/default/files/The_Rise_of_Reiderstvo.pdf [<https://perma.cc/UXU7-VSPR>] (analyzing the rise of the Russian practice of raiding private businesses for state gain); Sheena McKenzie, *The Full ‘Putin List’ of Russian Oligarchs and Political Figures Released by the US Treasury*, CNN (June 30, 2018), <https://edition.cnn.com/2018/01/30/politics/full-us-list-of-russian-oligarchs-with-putin-ties-intl/index.html> [<https://perma.cc/6C8G-MP5P>] (listing 96 oligarchs with a net worth of \$1 billion or more with ties to Putin); Linette Lopez, *How Russia’s Billionaire Oligarchs Got So Very Rich*, BUS. INSIDER (Mar. 25, 2013), <https://www.businessinsider.com.au/what-is-a-russian-oligarch-2013-3> [<https://perma.cc/JP5T-MZ25>] (noting the vacuum after the collapse of the Soviet Union which led to the privatization of state companies and rise in wealth of oligarchs through “loans for shares” practices).

¹¹⁷ See SNYDER, *supra* note 1, at 16 (arguing that while Western democratic values were meant to influence Russia, in fact Putin’s corruption moved in the other direction, influencing and subverting Western democracy).

¹¹⁸ See generally RICHARD PHILLIPS, ET AL., OFFSHORE SHELL GAMES 2016 REPORT: THE USE OF OFFSHORE TAX HAVENS BY FORTUNE 500 COMPANIES (2016), <https://www.ctj.org/pdf/offshoreshellgames2016.pdf> [<https://perma.cc/BS2F-AFSS>] (analyzing global tax avoidance schemes by the largest corporations in the country).

¹¹⁹ See Jonathan McMillan, *Banking in the Digital Age: The Failure of Financial Regulation*, THE GUARDIAN (Jan 20, 2015), <https://www.theguardian.com/sustainable-business/2015/jan/20/finance-in-digital-age-while-regulation-stuck-in-industrial> [<https://perma.cc/R7JD-PWCN>] (criticizing banks for failing to adopt proper financial regulatory schemes through online data).

services.¹²⁰ The political and judicial response to revelations of unfair concentrations of wealth was anemic.¹²¹ The system that was built up after World War II was unable or unwilling to react with anything like the necessary outrage.¹²² It is in this passivity in response to burgeoning corruption that we see the first erosion of the rule of law.

Again, the assumption that international virtue would spread outward was the first and the greatest mistake in our collective judgment.¹²³ Along with this was the assumption that proper and ethical administration would continue to influence poor administration and governance in a virtuous process that would witness the spread of global values.¹²⁴ Because financial corruption and global rules were allowed to exist side by side, with little effort being made to confront the former, what ensued was the opposite process, with global virtue being undone at an accelerating pace.

C. *The Failure of the “Rule of Law” Standard Bearer, the European Union*

Once upon a time, the excitement of the European Union was that it had the potential to replace national governments and nationalism generally with a supranational political structure.¹²⁵

¹²⁰ See *Irish PM Accuses EU States of Hypocrisy Over Corporate Tax*, REUTERS (Jan. 17, 2018), <https://www.reuters.com/article/taxavoidance-ireland/irish-pm-accuses-eu-states-of-hypocrisy-over-corporate-tax-idUSL8N1PC2HI> [<https://perma.cc/4N8G-4232>] (detailing the latest spat between Ireland and the EU over Ireland’s practices of giving favorable tax security to corporations such as Google).

¹²¹ See Jeff Stein, *Across the Globe, Taxes on Corporations Plummet*, WASH. POST (July 24, 2018), https://www.washingtonpost.com/business/2018/07/24/across-globe-taxes-corporations-plummet/?utm_term=.4fdf20903b6c [<https://perma.cc/J2BE-F45Z>] (noting that the average corporate tax rate globally has fallen by more than half over the past three decades). Moreover, the practice of countries failing to curb tax avoidance has led to countries simply giving up on taxing multinational corporations. *Id.*

¹²² See Cecil Bohanon, *Economic Recovery: Lessons from the Post-World War II Period*, MERCATUS CTR. AT GEORGE MASON U. (Sept. 10, 2012), <https://www.mercatus.org/publications/economic-history/economic-recovery-lessons-post-world-war-ii-period> [<https://perma.cc/G2WL-MH46>].

¹²³ See B.S. Chimni, *The Past, Present and Future of International Law: A Critical Third World Approach*, 8 MELBOURNE J. OF INT’L L. 499, 500–01 (discussing the origin of international law with respect to decolonization).

¹²⁴ See SNYDER, *supra* note 1, at 16 (explaining the fallacy of inevitability).

¹²⁵ See Matthew J. Gabel, *European Union*, BRITANNICA (Jan. 24, 2019), <https://www.britannica.com/topic/European-Union> [<https://perma.cc/AZ9E-E4JT>] (discussing the creation of the Single European Act).

Invoking the image of a grand and democratic “Europa,” the EU would lead the way forward, out of the Westphalian swamp and into a new enlightenment in governance.¹²⁶ To some degree, more traditional notions of “government” would be subverted by a transnational (more accurately, supranational) ideal and human progress would be guaranteed by these structural changes. After 2004, the EU expanded its supranational vision into Eastern Europe, and it seemed as if the postwar dream of a united and prosperous Europe, freed from its traditional rivalries, would come to pass.¹²⁷ The glowingly optimistic book, *The European Dream*, for instance, is a fairly recent publication, yet seems to hail from another world.¹²⁸

A great deal has changed in fifteen years, and the current state of global governance is barely recognizable. In a supremely ironic twist of fate, and a relatively short period of time, national governments have been replaced not with enlightened transnational structures, but rather with something quite unexpectedly fractured.¹²⁹ Through a combination of resurgent propaganda, authoritarian rule, and heavy reliance on the secrecy and easy access offered by the international financial regime, many governments in the global system have been replaced by some version of oligarchy, illiberalism, and repression of dissent.¹³⁰ Autocrats from Russia to Turkey to the Philippines to Brazil have quickly learned from one another, and they seem to be operating from a playbook immune to

¹²⁶ See PERRY ANDERSON, *THE NEW OLD WORLD* 47–49 (Verso ed., 2011) (noting that at the inception of the EU, Europe was considered a “paragon of international virtues, beacon of light, and a model for nations of the world”) (quoting TONY JUDT, *POSTWAR: A HISTORY OF EUROPE SINCE 1945*, 799 (2005)).

¹²⁷ See Elitsa Vucheva, *EU Still ‘Digesting’ 2004 Enlargement Five Years On*, EU OBSERVER (May 1, 2009), <https://euobserver.com/enlargement/28049> [<https://perma.cc/8W7Z-BFWV>] (observing that five years after the largest expansion of the EU to date, the prospects of further expansion looked increasingly grim).

¹²⁷ See generally JEREMY RIFKIN, *THE EUROPEAN DREAM* (Polity Press, 2004).

¹²⁸ See *id.*

¹²⁹ See Robin Wright, *The Rise of the World’s New Emperors – With America’s Help*, NEW YORKER (Feb. 27, 2018), <https://www.newyorker.com/news/news-desk/the-rise-of-the-worlds-new-emperors-with-americas-help> [<https://perma.cc/E3QT-HY4Y>] (explaining how leaders from Russia to Egypt hold “farcical” Presidential elections, how executives eliminate term limits, how Turkey’s amended constitution provides sweeping judicial and military powers, and how “wannabes” like the Philippine’s Rodrigo Duterte have a free playbook).

¹³⁰ See Zakaria, *supra* note 82, at 22 (finding that democracies around the world were surrendering to reforms that would lead to the erosion of democracy and illiberalism).

the criticism afforded by an increasingly weak and ineffective international legal system.¹³¹ International law's prescriptions did not hold up, perhaps not even the European Union's.¹³²

The EU can be said to be the purest embodiment of Enlightenment legal values: based on law, developed through law, and elaborate in its checks and balances. One of the most shocking developments of recent years is that at least parts of the EU have apparently succumbed to the simultaneous spread of financial corruption and neo-fascism.¹³³ Within the EU itself, Hungary, Poland, Malta, and Cyprus have to some extent "gone rogue" regarding the values upon which the EU was built.¹³⁴ Italy teeters on the brink of embracing far-right doctrines.¹³⁵ France came within

¹³¹ See Wright, *supra* note 129.

¹³² See *First EU Integrity Report Highlights Risks of Corruption in European Institutions*, TRANSPARENCY INT'L (Apr. 24, 2014), https://www.transparency.org/news/pressrelease/first_eu_integrity_report_highlights_risks_of_corruption_in_european_instit [<https://perma.cc/73AN-UVZH>].

¹³³ See Seyla Benhabib, *The Return of Fascism*, NEW REPUBLIC (Sept. 29, 2017), <https://newrepublic.com/article/144954/return-fascism-germany-greece-far-right-nationalists-winning-elections> [<https://perma.cc/CC3F-2L99>] (highlighting recent growth in fascist political movements across Europe); *First EU Integrity Report Highlights Risks of Corruption in European Institutions*, *supra* note 132 (highlighting loopholes and poor enforcement of ethics regulations, transparency, and financial control on institutions in the EU); Marissa Ryan, *The EU's Tax Haven Blacklist - Impressive or Impotent?*, EU OBSERVER (Dec. 3, 2018), <https://euobserver.com/opinion/143552> [<https://perma.cc/CEZ6-XQN6>] (discussing EU's tax haven problem within its own jurisdiction). The EU developed a blacklist of notorious tax haven countries, four of which were members of the EU. *Id.* Europe remains having the world's lowest average corporate tax rate, which permits multinational companies to avoid taxes. *Id.*

¹³⁴ Nigel O'Connor, *I Went to the Cypriot Golden Dawn's Fifth Birthday Party*, VICE (Nov. 8, 2013), https://www.vice.com/en_us/article/3b7ng9/the-cypriot-golden-dawn-just-celebrated-their-fifth-anniversary [<https://perma.cc/TH8H-FFEUE>] (Cyprus); Tjaša Pureber, *New Faces of Fascism in Slovenia*, EUROPE SOLIDAIRE SANS FRONTIÈRES (Mar. 26, 2019), <http://www.europe-solidaire.org/spip.php?article48313> [<https://perma.cc/CSF2-QUDB>] (Slovenia); Dalibor Rohac, *Hungary and Poland Aren't Democratic. They're Authoritarian.*, FOREIGN POL'Y (Feb. 5, 2018), <https://foreignpolicy.com/2018/02/05/hungary-and-poland-arent-democratic-theyre-authoritarian/> [<https://perma.cc/VN45-V82R>] (Poland); Robert Tait, *Far Right to Gather in Prague as Fears Grow of Rising Czech Populism*, THE GUARDIAN (Dec. 15, 2017), <https://www.theguardian.com/world/2017/dec/15/far-right-conference-prague-czech-republic-populism-marine-le-pen> [<https://perma.cc/K894-UCSQ>] (Czech Republic).

¹³⁵ See Alexander Stille, *How Matteo Salvini Pulled Italy to the Far Right*, THE GUARDIAN (Aug. 9, 2018), <https://www.theguardian.com/news/2018/aug/09/how-matteo-salvini-pulled-italy-to-the-far-right> [<https://perma.cc/3KCE-HLNM>] (discussing Salvini's influence in Italian politics and his increasing advocacy for anti-immigration policies); Ian

a whisker of doing so.¹³⁶ Putinism has extended its reach into the EU by its constant evocation of the dangers of mass migration.¹³⁷ Western governments seem hardly able to grasp that psy-ops and cyber ops are the current methods of warfare, and that they themselves are the targets in this war. And while large-scale migration is certainly a problem that the EU needs to solve, it is the successful manipulation of this fear that is the more important story.¹³⁸

This article rests on the argument that the assumptions that have underpinned international law since the end of World War II are now showing their advanced age. The construction of the European “project” was the most ambitious of all these ideals and institutions. Human rights advocacy, free trade, global and regional security—many of these norms appear sadly inadequate, qualifying as “fake news,” while anonymously owned companies and tainted elections become the new normal—not only in developing countries, but in Europe and the United States as well.¹³⁹ The EU might have been thought to be strong enough to withstand an onslaught of psychological and political manipulation from outside its borders, but this did not prove to be the case. No region is immune from the contemporary lure of corruption.¹⁴⁰ Corrupt structures have made

Bremmer, *These 5 Countries Show How the European Far-Right Is Growing in Power*, TIME (Sept. 13, 2018), <http://time.com/5395444/europe-far-right-italy-salvini-sweden-france-germany/> [<https://perma.cc/BR5H-CK2T>] (stressing the rise of anti-immigration advocates in Italy).

¹³⁶ See Bremmer, *supra* note 135 (highlighting France’s growing far-right supporters).

¹³⁷ See, e.g., Esteban Duarte & Chiara Albanese, *Russia Helped Shape Italy’s Twitter Obsession With Immigrants*, BLOOMBERG (Mar. 1, 2018), <https://www.bloomberg.com/news/articles/2018-03-01/russia-helped-shape-italy-s-twitter-obsession-with-immigrants> [<https://perma.cc/2WFV-BAN3>] (reporting that Russia’s state-controlled news agency was the most influential foreign media organization attacking immigration in Italy); James Kirchick, *Russia’s Plot Against the West*, POLITICO (Mar. 17, 2017), <https://www.politico.eu/article/russia-plot-against-the-west-vladimir-putin-donald-trump-europe/> [<https://perma.cc/63BT-6LBP>] (suggesting Russia’s promotion of anti-immigration was to destabilize American politics).

¹³⁸ See Duarte & Albanese, *supra* note 137.

¹³⁹ See Vail, *supra* note 61, at 151–53 (concluding that the United States ought to follow EU’s exempling in establishing laws that combat establishment of shell companies).

¹⁴⁰ See *id.* at 152 (listing countries, such as the United States, France, and the United Kingdom, that have announced their commitment to establishing stronger regulatory policies or have conducted investigations into shell companies within their country).

inroads into all but the most strongly resistant democracies inside the EU.¹⁴¹

In a negative and inter-connected spiral, the legal structures most able to confront the rise of global oligarchy and illiberalism are themselves under profound threat from the spread of corruption.¹⁴² Standing almost alone at the heart of this problem is a group of brave journalists who are pursuing facts and evidence for as long as they can hold out.¹⁴³ That anti-corruption journalists are needed to expose financial and other crimes of a political nature is a startling reality; that these journalists are being killed even in the heart of the EU for their work is even more striking.¹⁴⁴

International legal scholarship has hardly caught up with these developments, which seem to have taken on a life of their own, quite irrespective of the carefully constructed house of norms in

¹⁴¹ See Gabriel Samuels, *EU Approves Resolution to Fight Back Against Russian 'Propaganda Warfare'*, INDEP. (Nov. 24, 2016), <https://www.independent.co.uk/news/world/europe/eu-approves-resolution-to-fight-back-against-russian-propaganda-warfare-a7436036.html> [<https://perma.cc/6M53-G4X6>] (reporting EU's vote to implement measures on prohibiting Russian propaganda).

¹⁴² See *Corruption at the Heart of the United Nations*, ECONOMIST (Aug. 9, 2005), <https://www.economist.com/unknown/2005/08/09/corruption-at-the-heart-of-the-united-nations> [<https://perma.cc/7VY7-84BY>] (outlining the investigations of former head of the U.N. for a program in Iraq in which kickbacks were paid to an oil company, as well as referencing other senior U.N. officials being accused of soliciting bribes).

¹⁴³ See *A Year of the Panama Papers*, MALTA INDEP. (May 1, 2017), <http://www.independent.com.mt/articles/2017-05-01/panama-papers/A-year-of-the-Panama-Papers-6736173676> [<https://perma.cc/A59K-JCFD>] (discussing journalist Daphnee Galizia's involvement in discovering Malta's Panama Papers scandal); see also *About the Investigation*, INT'L CONSORTIUM OF INVESTIGATIVE JOURNALISTS, <https://www.icij.org/investigations/panama-papers/pages/panama-papers-about-the-investigation/> [<https://perma.cc/B3LR-8C6M>] (last visited Feb. 21, 2019) (reviewing "11.5 million leaded files to expose" offshore accounts held by individuals well known to the public, including political leaders and celebrities).

¹⁴⁴ See, e.g., Joanna Kakissis, *Who Ordered the Car Bomb that Killed Journalist Daphnee Caruana Galizia?*, NPR (July 22, 2018), <https://www.npr.org/2018/07/22/630866527/mastermind-behind-malta-journalist-killing-remains-a-mystery> [<https://perma.cc/KXY7-WR4P>] (explaining the death of a known anti-corruption journalist). "Dozens of journalists are killed every year around the world in war zones or countries with weak rule of law The European Union, a free-speech haven that's a refuge for journalists attacked in their own countries, was shocked that such a brazen murder could happen in their club." *Id.*; see also The Editorial Board, *With a Journalist's Murder in Malta, a Global Threat Grows*, N.Y. TIMES (Oct. 17, 2017), <https://www.nytimes.com/2017/10/17/opinion/journalist-murder-malta-daphne-galizia.html> [<https://perma.cc/Q7TB-4K5L>] (warning that silencing journalists represents a loss in freedom).

international human rights law and international criminal law, and an ostensible adherence to the concept of the self-determination of peoples.¹⁴⁵ As mentioned, long focused on the power of the abstract world, international law failed to insist on equally robust means of enforcement.¹⁴⁶ While often discussed by experts in the field, this contradiction was considered an interesting idiosyncrasy of international law, but not an insurmountable problem.¹⁴⁷ Did the survival of the EU require that international law also remain strong? Can the EU stand alone against global oligarchy? The answer to these questions is not yet apparent, but there is good reason to believe that the EU itself depended heavily on a global legal order to which it contributed and which in turn accounted for its own character.¹⁴⁸

As mentioned above, the destruction of the international order has gained steam so quickly that International Law and European Law textbooks suddenly seem obsolete; the discourse of progress rings hollow and a myriad of postwar legal assumptions have fallen by the wayside.¹⁴⁹

III. Killing the Messenger: Suppressing Public Knowledge of Corruption

The myth of global progress and the inevitable spread of human rights was widely held and cherished for decades after World War

¹⁴⁵ See INT'L BAR ASSOC. ET AL., RISKS AND THREATS OF CORRUPTION AND THE LEGAL PROFESSION 6 (2010), <https://www.oecd.org/investment/anti-bribery/46137847.pdf> [<https://perma.cc/4STM-ST2A>] (reporting survey results showing the legal profession's limited focus on corruption); Matthew M. Taylor, *Helping U.S. Lawyers in the Fight Against International Corruption*, COUNCIL ON FOREIGN REL. (July 12, 2017), <https://www.cfr.org/blog/helping-us-lawyers-fight-against-international-corruption> [<https://perma.cc/XD4A-BQUG>] (suggesting anti-corruption reforms that countries might adopt and assessing obstacles to adoption).

¹⁴⁶ See Beth Stephens, *Individuals Enforcing International Law: The Comparative and Historical Context*, 52 DEPAUL L. REV. 433, 472 (2002) (discussing the idea that while there have been advancements in human rights and other international law spheres, "states have resisted efforts to create comprehensive enforcement schemes").

¹⁴⁷ See *id.* at 444–45 (suggesting that an individual can be established as a mechanism of enforcing international law).

¹⁴⁸ See ANDERSON, *supra* note 126, at 47–49; Haans W. Maull, *Europe and the New Balance of Global Order*, 81 ROYAL INST. OF INT'L AFF. 775, 782–83 (2005) (detailing that European Union's international affairs is more concerned and dependent on its internal countries to maintain legal order).

¹⁴⁹ See Andelman, *supra* note 29.

II.¹⁵⁰ It comes as a shock to realize that the world is quite capable of a backsliding so profound that the entire progress of the postwar period is in danger of disappearing.¹⁵¹ There could be no more dramatic example of the fact that unreflective optimism can be dangerous and progress should never be taken for granted. While international law had its defects, the arc of progress was seen as unmistakably positive. The global constitutional order would continue to be based on treaty law and human rights principles, as well as on the unquestioned right to vote. Participatory democracy was believed to be the inevitable outcome of progress across the entire world, or at least most of it.¹⁵² It is no accident that at this moment, money laundering and oligarchy seem to be the most prevalent “trends” in global governance, as democratic structures are in decline.¹⁵³

The process of creating reliable treaty-based norms is conditional upon high functioning nation states’ willingness to put these norms into practice, whatever the political cost.¹⁵⁴ Treaty law on topics as varied as international trade law, organized crime, labor rights, and confronting climate change had been assumed to be capable of guiding government policy and over time creating geopolitics of expandable virtue.¹⁵⁵ But as this phenomenon is

¹⁵⁰ See generally *Human Rights Treaty Bodies*, OFFICE OF THE UNITED NATIONS COMM’R FOR HUMAN RIGHTS, <https://www.ohchr.org/EN/HRBodies/Pages/Overview.aspx> [https://perma.cc/YE6R-V885] (last visited Aug. 8, 2018) (listing treaties which obligate United Nation member states to ensure enjoyment of various human rights).

¹⁵¹ See Eric Posner, *The Case Against Human Rights*, THE GUARDIAN (Dec. 4, 2014), <https://www.theguardian.com/news/2014/dec/04/-sp-case-against-human-rights> [https://perma.cc/YDH7-6HHM] (arguing that efforts to promote human rights internationally have failed and a new approach is necessary).

¹⁵² See generally Jacob J. Lew, *America and the Global Economy: The Case for U.S. Leadership*, FOREIGN AFF. (May/June 2016), <https://www.foreignaffairs.com/articles/united-states/2016-04-11/america-and-global-economy> [https://perma.cc/M7Z2-R728] (promoting the United States’ commitment to the International Monetary Fund’s financial structure and adoption of democratic institutions based off of American values and principles).

¹⁵³ See generally BRECHENMACHER, *supra* note 45 (noting that recent events of financial corruption within democratic countries have led to decreasing voter turnout and trust in government).

¹⁵⁴ See Dillon, *supra* note 80, at 54–55 (explaining that treaties are enforced through a geographical state and not merely by scholars).

¹⁵⁵ See Rachel Brewster, *The Domestic Origins of International Agreements*, 44 VA. J. INT’L L. 501, 539–42 (2004).

dependent on national governments, there is a certain amount of built-in ebb and flow, as respective elected governments are more or less receptive to the idea of being influenced by international law. International legal instruments, though, are undoubtedly based on a sense of shared expectations and broad consensus, which are in turn based on a belief in rational exploration of right policy. We have now, it seems, left the “range of normal” in the implementation of familiar international norms, whereas global corruption seems every day more audacious and more assertive.¹⁵⁶

A. The Age of Corporate Secrecy, Corporate Supremacy, and Their Consequences

In a sense, the international rule of law has rotted from the tax haven outward. The simultaneous explosion of global technology and the inability to regulate financial flows created a free for all of anonymously-owned companies and dark money of all kinds.¹⁵⁷ For those who have watched as multinational corporations engaged in large-scale tax avoidance over the past twenty or more years, it has been a frustrating wait for a credible set of remedies.¹⁵⁸ In the mid-1990s, the general belief was that globalization would bring

¹⁵⁶ See CPI 2017, *supra* note 70 (discussing rising global corruption, which has threatened the freedom of press through journalist deaths and a decrease in civic participation). See, e.g., Toby Stirling Hill, ‘We’re Going to Kill You’: Nicaragua’s Brutal Crackdown on Press Freedom, THE GUARDIAN (Dec. 10, 2018), <https://www.theguardian.com/global-development/2018/dec/10/nicaragua-journalists-press-freedom-crackdown-ortega> [<https://perma.cc/85HC-LEDZ>] (reporting on government censoring media outlets and journalists); Will Fitzgibbon, ‘The World Has Changed’: Europe Targets Advisers, Accountants, Lawyers with New Tax Rules, INT’L CONSORTIUM OF INVESTIGATIVE JOURNALISTS (Mar. 14, 2018), <https://www.icij.org/blog/2018/03/world-changed-europe-targets-advisers-accounts-lawyers-new-tax-rules/> [<https://perma.cc/4Z95-8QQ4>] (discussing changing tax laws and the tax planning industry since the discovery of the Panama Papers).

¹⁵⁷ See Alexander J. Morgenstern, *Corporate Tax Avoidance: Addressing the Merits of Preventing Multinational Corporations from Engaging in the Practice and Repatriating Overseas Profits*, 16 J. INT’L BUS. & L. 333, 341–43 (2017) (discussing international technology firms, such as Google’s and International Business Machines’s involvement in tax avoidance schemes); Vail, *supra* note 61, at 138–40 (discussing how entities use shell companies to illegally obtain monies through “trade misinvoicing . . . ‘a form of trade fraud where someone misrepresents the value or amount of a good they’re importing or exporting.’”).

¹⁵⁸ See Morgenstern, *supra* note 157, at 334 (“For more than two decades, the United States Treasury Department and the international community have been concerned with multinational corporations’ engagement in tax avoidance practices . . .”).

prosperity, that free trade would distribute wealth across a wider geographical range, and that economic nationalism would wither away.¹⁵⁹ The promise of free trade in goods, and the rules created to restrain national protectionist impulses, did not extend to the financial sector.¹⁶⁰ For financial flows, globalization and technology allowed for the free movement of capital, but there were no corresponding rules to ensure responsible financial behavior.¹⁶¹ Globalization had its positive points, notably the contribution made by trade law to the international rule of law.¹⁶² However, with globalization and the erosion of economic borders, the opportunities for hoarding, transferring, and hiding wealth by the few were enhanced, and no meaningful international regulatory framework was created to respond to these new enticements.¹⁶³ Corruption cannot be seen in isolation from other aspects of international law.¹⁶⁴

¹⁵⁹ See Mike Collins, *The Pros and Cons of Globalization*, FORBES (May 6, 2015), <https://www.forbes.com/sites/mikecollins/2015/05/06/the-pros-and-cons-of-globalization/> [<https://perma.cc/4T5U-6534>]. Collins wrote:

[Twenty] years ago globalization was pitched as a strategy that would raise all boats in poor and rich countries alike. In the U.S. and Europe consumers would have their pick of inexpensive items made by people thousands of miles away whose pay was much lower than theirs. And in time trade barriers would drop to support even more multinational expansion and economic gains while geo political cooperation would flourish.

Id. (quoting Jeffrey Rothfeder, *The Great Unraveling of Globalization*, WASH. POST (Apr. 24, 2015), https://www.washingtonpost.com/business/reconsidering-the-value-of-globalization/2015/04/24/7b5425c2-e82e-11e4-aae1-d642717d8afa_story.html [<https://perma.cc/X5NV-ZW7B>]).

¹⁶⁰ See Jason Bordoff & Jason Furman, *Progressive Tax Reform in the Era of Globalization: Building Consensus for More Broadly Shared Prosperity*, 2 HARV. L. & POL'Y REV. 327, 335–36 (2008) (noting that reductions in tax changes have largely been influenced by globalization and a lack of tax code reforms).

¹⁶¹ See Collins, *supra* note 159 (arguing that while globalization has promoted global free trade, its lack of enforcement has simultaneously promoted reckless corporate behavior); see also Rodrik, *supra* note 104 (stressing the conflict between increasing foreign investment and exploitation of labor laws).

¹⁶² See Renato Ruggerio, *The Global Challenge: Opportunities and Choices in the Multilateral Trading System*, WTO (Oct. 16, 1995), https://www.wto.org/english/news_e/spr_e/harvar_e.htm [<https://perma.cc/C573-NGD4>] (introducing historical events of globalization that have contributed to increasing global integration and development of international trade laws).

¹⁶³ See Collins, *supra* note 159.

¹⁶⁴ See Lys Kulamadayil, *ESIL Reflection: When International Law Distracts: Reconsidering Anti-Corruption Law*, EUR. SOC'Y OF INT'L L. (May 7, 2018), <https://esil->

What has become apparent is that corruption is in effect an international counter-revolution, working against democracy and citizens' rights.¹⁶⁵ Economic fairness cannot be separated from human rights; not only because human rights as a field on its own is empty, but because financial secrecy leads the corrupt to move on to the suppression of knowledge and democracy.¹⁶⁶

While the need for global financial regulation was apparent, it remained unclear where that regulatory impulse would come from. One might have expected firm action from countries dependent on a predictable playing field for capital investment or from international bodies with power and prestige: from the EU, from the OECD, from the UN, or any one of a number of other entities able to marshal the necessary legal responses and enshrine these into firm law.¹⁶⁷ None of these sources proved agile or determined enough to take action that would stem the tide of wealth concealment or tax avoidance.¹⁶⁸ This is particularly surprising as

sedi.eu/institutional_member-fields/ [https://perma.cc/QC6G-JNKW] (surveying international obligations that have also required unified, coordinated work from domestic liberal governments).

¹⁶⁵ See Philip M. Nichols, *The Psychic Costs of Violating Corruption Laws*, 45 VAND. J. TRANSNAT'L L. 145, 156–67 (2012) (discussing various elements, such as economics, government, and society, that are influenced by corruption). Although corruption occurs worldwide, it is ultimately a phenomenon that incorporates domestic law, economics, government, and social structure. *Id.* at 155. For instance, a government official who places individuals in power in exchange for personal gain is, in essence, running a government for their own benefit, and not the public's. *Id.* at 157. Bribery also undermines a state's economic system, promoting "parallel institutions," which develop when state-sanctioned institutions fail and people group up as a means to complete things that the state could not have completed. *Id.* at 160–62.

¹⁶⁶ See Rodrik, *supra* note 104 (calling for democratic states to be more accountable to enforcing and complying with international laws, including using legal mechanisms to ensure compliance of corporate responsibility).

¹⁶⁷ See Nichols, *supra* note 165, at 164 (emphasizing that corruption undermines a democracy). "Many social scientists consider corruption to be the single greatest threat to the development of democracy in emerging economies." *Id.* See, e.g., *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS*, OECD, <https://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-beps.htm> [https://perma.cc/QDE6-36ZT]; *Communication From the Commission to the European Parliament and the Council Concerning the Anti-Tax Avoidance Package: Next Steps Towards Delivering Effective Taxation and Greater Tax Transparency in the EU*, COM (2016) 23 final (Jan. 28, 2016).

¹⁶⁸ See, e.g., Vail, *supra* note 61, at 136–40 (describing ongoing legal and illegal uses of shell companies to hide wealth and avoid taxes); Woodman, *supra* note 59 (describing methods employed by the ultra-wealthy to hide wealth).

the rise of the Russian “mafia state” has been apparent for at least the past fifteen years.¹⁶⁹ As indicated above, instead of global financial virtue spreading, the model of the mafia state has grown in influence, with many national imitators, including countries in the heart of Europe.¹⁷⁰

Several related phenomena have worked together to green light financially destructive behavior: the rise of the corporation with unknown beneficial owners, impunity for tax avoidance, and the rise of financially corrupted national leadership in various parts of the world.¹⁷¹ Corporations have engaged in tax avoiding behavior by funneling profits through friendly jurisdictions, even when these jurisdictions have little or nothing to do with the actual generation of the corporate profits in question.¹⁷² This financial fiction has been tolerated by national governments of all kinds.¹⁷³ Whether countries have high or low corporate tax rates makes little difference.¹⁷⁴ The corporate profits earned leech out into tax havens, and the appropriate amounts of tax do not get paid.¹⁷⁵ It is estimated

¹⁶⁹ See Jason M. Breslow, *Inequality and the Putin Economy: Inside the Numbers*, PBS: FRONTLINE (Jan. 13, 2015), <https://www.pbs.org/wgbh/frontline/article/inequality-and-the-putin-economy-inside-the-numbers/> [https://perma.cc/CQQ2-KUNW] (depicting financial corruption in Russia and unequal concentration of wealth among Russian elite); Tom Embury-Dennis, *Britain's Contribution to Fighting Russian Organized Crime Is 'Less than Negative', Says Renowned Prosecutor*, INDEP. (June 14, 2018), <https://www.independent.co.uk/news/uk/home-news/britain-oligarchs-russia-corruption-organised-crime-mafia-jose-grinda-a8399391.html> [https://perma.cc/3C2V-MGAE] (rising “corruption and organised crime” in Russia has impacted UK’s economy).

¹⁷⁰ See BÁLINT MAGYAR, DEFINITION OF THE POST-COMMUNIST MAFIA STATE, IN POST-COMMUNIST MAFIA STATE: THE CASE OF HUNGARY 67–72 (Cent. Euro. U. Press, 2016) (describing the rise of the Hungarian mafia state under Prime Minister Viktor Orbán).

¹⁷¹ See Gaita, *supra* note 57.

¹⁷² See Gabriel Zucman, *How Corporations and the Wealthy Avoid Taxes (And How to Stop Them)*, N.Y. TIMES (Nov. 10, 2017), <https://www.nytimes.com/interactive/2017/11/10/opinion/gabriel-zucman-paradise-papers-tax-evasion.html> [https://perma.cc/X468-6XZX] (describing Google’s Ireland Holdings management scheme). Google’s Ireland Holding is managed in Bermuda and moves its profits through Bermuda even though it only employs “a handful of people there.” *Id.* A significant amount of profit is moved through Bermuda by Google, to the extent that it is as if each inhabitant of Bermuda had made the company \$240,000. *Id.*

¹⁷³ See *id.*

¹⁷⁴ See *id.*

¹⁷⁵ See Jim Tankersley, *Tax Havens Blunt Impact of Corporate Tax Cut, Economists Say*, N.Y. TIMES (June 10, 2018), <https://www.nytimes.com/2018/06/10/business/corporate-tax-cut.html>

that 40% of all multinational corporate profits end up in this situation, depriving nation states of the revenue they need to improve the lives of their citizens.¹⁷⁶ Thus, corporate and personal tax avoidance and evasion seem to be the first steps in the direction of creating illiberal regimes.¹⁷⁷ In order to preserve these financial privileges, an attack on democracy itself becomes inevitable.

We now find ourselves in the eye of a global problem of financial impunity. While it was well known that large corporations and wealthy individuals did not meet their obligations to contribute to society, this was met with a surprising level of global

[<https://perma.cc/P5C8-6P5W>] (discussing tax havens in wealthy, more established countries). “[R]esearchers have concluded that multinational corps. based in the US and other advanced economies have sheltered nearly 40 percent of profits in tax havens, depriving domestic governments of tax revenues and enriching wealthy shareholders.” *Id.*

¹⁷⁶ See *id.* (explaining that “[t]he research by Mr. Zucman, Mr. Torslow and Mr. Wier . . . find[s] that multinationals operating in tax havens are far more profitable than locally owned companies in those countries, and that their profits dwarf what they pay workers Large corporations like Apple, Google, Nike and Starbucks all take steps to book profits in tax havens Their strategies have prompted a crackdown by government regulators, particularly in the European Union, where officials have tried to force companies to pay back taxes they believe are owed to their countries.”).

¹⁷⁷ See Eric Garland, *The Weakening of Nations: How Tax Work-Around Undermine Our Society*, THE ATLANTIC (Feb. 10, 2012), <https://www.theatlantic.com/international/archive/2012/02/the-weakening-of-nations-how-tax-work-arounds-undermine-our-society/252779/> [<https://perma.cc/SAH6-P4M3>] (raising the issue of foreign tax havens destroying a nation’s obligation to its citizens). Garland wrote:

The fact is, nations only function because the majority of its citizens believe that their responsibilities to that nations are fixed and immutable [W]e have corporations and individuals-rich-enough-to-be-corporations whose money is not fully expected to contribute to any of the projects of the nation-state: security, transportation, health, science. The nation-state whispers to them in a somewhat more tentative voice, “Well, we’re willing to negotiate” The nation-state looks the other way as corporate money wends its way from Seychelles to Mauritius to Ireland while lobbyists negotiate special tax rates should the money finally arrive ‘home’ – but is quick to write checks for all the tax credits it promised. And even a map hoping to be president of a nation-state can look squarely in the camera and suggest to potential voters that he and his family got wealthy from business conducted in a certain place, but want to make sure their friends do not become “entangled” in the system of taxes that is responsible for maintaining the basic infrastructure that made it all possible in the first place.

Id.

indifference.¹⁷⁸ Periodically agitated by reports of tax avoidance, the global public seemed to lack the sustained focus to demand reform.¹⁷⁹ The technical complexity of the topic also made it more difficult for lawmakers to respond or for the public to understand the full scope of the problem.¹⁸⁰ When the global wealthy saw what they could get away with, they drew the appropriate lessons and went a step further.¹⁸¹

The paradigm in question here is extremely simple. Corporations operate within countries, relying on a variety of public goods to reach their target markets. They are assigned a certain level of tax due, subject to deductions and other means of lowering their tax bill set out within national tax law.¹⁸² However, this relationship has become increasingly distorted as corporations and their tax lawyers decided that they would aggressively pursue the lowest possible tax regime, while national and even EU authorities seem to have decided not to take the problem seriously.¹⁸³ In other

¹⁷⁸ See *id.*; see also A.C. Ping, *Corporate Social Responsibility in an Age of Indifference*, THINK (Mar. 10, 2017), <https://think.iafor.org/corporate-social-responsibility-in-an-age-of-indifference/> [<https://perma.cc/R236-YPEV>] (utilizing historical events to show how and why society has been ushered into an “age of indifference” regarding corporate shortcomings through the scope of the VW “dieselgate” scandal).

¹⁷⁹ See Steven A. Bank, *When Did Tax Avoidance Become Respectable*, 71 TAX L. REV. 123, 176–77 (2017) (using Occupy Wall Street to exemplify a public protest against tax avoidance schemes that still “proved difficult to sustain”).

¹⁸⁰ See *id.* (stating that “[t]he high statutory rates permitted Democratic policymakers to maintain their commitment to progressivity while the generous exemptions and more permissive attitude toward tax planning permitted Republicans to maintain their commitment to business and investment. For the public, it seemed inconceivable that anyone would actually pay 91% on their last dollar. So, as long as such rates were in effect, it was understood that wealthy individuals would take advantage of opportunities to avoid such rates. Indeed, in the absence of those high rates, the tax avoidance revolution might not have started at all.”).

¹⁸¹ See *id.* at 159–68 (explaining the normalization of tax avoidance promoted by tax cut regimes).

¹⁸² See Kristen Jeffers, *How Corporate Tax Incentives Work and Why Cities Spend So Much on Them*, GREATER GREATER WASH. (June 26, 2018), <https://ggwash.org/view/68136/heres-how-corporate-tax-incentives-work-and-why-cities-give-them> [<https://perma.cc/QAM5-HDNG>] (explaining the rationale of cities providing tax cuts in exchange for corporate investments).

¹⁸³ See Cecile S. Gallego, *But Where is Bermuda, Luxembourg? New EU Blacklist Omits Major Tax Havens*, INT'L CONSORTIUM OF INVESTIGATIVE JOURNALISTS (Dec. 5, 2017), <https://www.icij.org/investigations/paradise-papers/bermuda-luxembourg-new-eu-blacklist-omits-major-tax-havens/> [<https://perma.cc/AW9R-Q7LD>] (noting that while the

words, tax avoidance and evasion were allowed to proliferate and fester.¹⁸⁴ Virtually every jurisdiction on earth, including the EU, came to accept the idea of “tax optional” for both corporations and wealthy individuals.¹⁸⁵ While extreme governmental corruption used to be considered the province of “banana republics” or underdeveloped states, unabashed corruption has now reached into major world capitals, including in what had until recently been considered solid democracies.¹⁸⁶

The most extreme version of this globalization-as-facilitator is the rise in global money laundering, often through ordinary transactions in familiar locations, such as through the real estate market in London.¹⁸⁷ The Putin regime in Russia is best known for its kleptocratic looting of Russian companies, in particular energy companies, and funneling these funds to Putin and his closest allies.¹⁸⁸ The fact that the Russian mafia is closely intertwined with

EU has taken some measures to curb the problem of tax havens, some of the most secretive jurisdictions exposed by the Panama Papers include Ireland, US, Bermuda, and Luxembourg).

¹⁸⁴ See *id.* (stating that “[t]he list represents substantial progress. But it remains an insufficient response to the scale of tax evasion worldwide[.]”).

¹⁸⁵ See Woodman, *supra* note 59.

¹⁸⁶ See Tina Nguyen, *Trump’s G.O.P. Has Become the Party of Corruption*, VANITY FAIR: HIVE (Aug. 10, 2018), <https://www.vanityfair.com/news/2018/08/republicans-corruption-midterm-elections> [<https://perma.cc/D3TG-RLFU>] (stressing that not only have Trump campaign aids been embroiled in a large scale corruption trial, but some of his earliest supporters, like Rep. Chris Collins, have been found in legal battles as well regarding insider trading cases).

¹⁸⁷ See Jeffrey R. Boles, *Million Dollar Ghost Buildings: Dirty Money Flowing Through Luxury Real Estate Markets*, 45 REAL EST. L.J. 476, 486–89, 489 n.68, 491–92 (2017) (discussing shell companies purchasing “U.S. luxury real estate”). See also, e.g., David Pegg, *Offshore Owners of British Property to be Forced to Reveal Names*, THE GUARDIAN (July 23, 2018), <https://www.theguardian.com/business/2018/jul/23/offshore-owners-of-british-property-to-be-forced-to-reveal-names> [<https://perma.cc/J9HL-XNU8>] (highlighting “overseas criminal gangs . . . using British property transactions to launder billions of pounds in corrupt funds”); Paradise Papers Reporting Team, *Paradise Papers: Ukraine Crime Gang Hid Proceeds in Luxury London Flats*, BBC (Apr. 23, 2018), <https://www.bbc.com/news/uk-43823962> [<https://perma.cc/K433-PWG7>] (describing how “[a] Ukrainian crime gang used offshore firms . . . to secretly invest millions of pounds in the UK” by buying “luxurious property in prime London locations”).

¹⁸⁸ See Milam, *supra* note 67 (explaining Putin stealing from Russia in order to remain in power). Vladimir Putin’s government regime has been criticized for being kleptocratic, in that he uses state profits to fund himself. *Id.* The lack of financial regulations within Russia allows Putin to continue stealing from the state without punishment. *Id.*

the Russian government has been well documented.¹⁸⁹ One might have thought that European nations would act quickly to prevent the penetration of this money into Europe itself, but this has not been the case.¹⁹⁰ Instead, major real estate markets such as London have been driven up by secretive buyers investing in expensive real estate, with their identities hidden and often without any intention of living in the properties purchased.¹⁹¹

None of this could occur without heavy reliance on the anonymous shell company, a corporate form known for the fact that it represents no real business activity and that the beneficial owners of the company remain unknown.¹⁹² While it is often stated that these anonymously-held companies have a number of legitimate uses, it is hard to see what benefit society derives from allowing company ownership to remain concealed. Revelations such as those of the Panama Papers and Paradise Papers demonstrate that shell companies are often given obscure and impenetrable names, obviously designed to ensure that the public will be unaware of the true ownership.¹⁹³

¹⁸⁹ See Scott P. Boylan, *Organized Crime and Corruption in Russia: Implications for U.S. and International Law*, 19 FORDHAM INT'L L.J. 1999, 2012–13 (1995) (overviewing mafia involvement in Russia); see also *Inside Vladimir Putin's "Mafia State,"* THE ECONOMIST (May 19, 2018), <https://www.economist.com/books-and-arts/2018/05/19/inside-vladimir-putins-mafia-state> [https://perma.cc/HQ2F-6VKK] (analyzing Russia's relationship with the Mafia); Louise Shelly, *A Tangled Web: Organized Crime and Oligarchy in Putin's Russia*, WAR ON THE ROCKS (Nov. 15, 2018), <https://warontherocks.com/2018/11/a-tangled-web-organized-crime-and-oligarchy-in-putins-russia/> [https://perma.cc/7676-NSRQ] (constituting a book review that provides an overview of “[t]he Russian criminal world, and the vory who presided over it”).

¹⁹⁰ See Council Directive 2018/843, 2018 O.J. (L 156/43) (amending, on May 30, 2018, the EU directive “on the prevention of the use of the financial system for the purposes of money laundering”); see also Juergen Kraus, *EU: 5th EU Anti-Money Laundering Directive Published*, GLOBAL COMPLIANCE NEWS (July 16, 2018), <https://globalcompliancenews.com/eu-5th-anti-money-laundering-directive-published-20180716/> [https://perma.cc/8WD7-98BM] (surveying the EU's latest Anti-Money Laundering Directive, released in 2018).

¹⁹¹ See Pegg, *supra* note 187 (noting “anonymous ownership of property via offshore companies” have significantly increased real estate prices).

¹⁹² See Vail, *supra* note 61, at 136.

¹⁹³ See Michael Forsythe, *Paradise Papers Shine Light on Where the Elite Keep Their Money*, N.Y. TIMES (Nov. 5, 2017), <https://www.nytimes.com/2017/11/05/world/paradise-papers.html> [https://perma.cc/8L3N-D6UQ] (reporting on the ICIJ's Paradise Papers publication). See also, e.g., *Archive of Known Offshore Entities in the Bahamas*, OFFSHORE LEAKS DATABASE BY THE ICIJ (Jan. 28, 2019), <https://offshoreleaks.icij.org/search?j=BAH&q=> [https://perma.cc/GK65-8RQ9] (listing known offshore entities in

How many reasons are there to conceal wealth? One is certainly tax avoidance or evasion. Another is the fact that the money was illicitly embezzled by government officials to be used for personal lifestyle (Vladimir Putin, for example, a modestly paid official, is said to be one of the richest men in the world).¹⁹⁴ This in turn begins to erode our general sense of what is permissible on the part of a public official. In the United States, a newly elected president has, for the first time, refused to divest himself of his business interests.¹⁹⁵ Dark money now flows from abroad into the campaigns of elected representatives, making it impossible to say that national decision-making is in the public interest.¹⁹⁶ The logical conclusion to this process is that, unless stopped through global regulation and national adherence, global alliances will reflect the wishes of the highest bidder, and the highest bidder will likely be the most corrupt. The next step must inevitably be to keep this knowledge

Bahamas disclosed by the Bahamas Leaks data).

¹⁹⁴ See Rob Wile, *Here's How Vladimir Putin Could Secretly Be the Richest Man in the World*, *FORTUNE* (Apr. 19, 2017), <http://fortune.com/2017/04/19/vladimir-putin-secretly-richest-man/> [<https://perma.cc/XZ5V-FBR9>] (discussing various investments and personal luxury items Putin has). See also, e.g., Jessica Schladebeck, *Former Government Official in North Carolina Pleads Guilty to Embezzling Nearly \$1 Million, Blames 'Compulsion to Hoard Money'*, *N.Y. DAILY* (Aug. 25, 2018), <https://www.nydailynews.com/news/crime/ny-news-government-official-embezzled-nearly-million-20180825-story.html> [<https://perma.cc/28N2-GHBM>] (reporting on North Carolina former Wake County Register of Deeds pleading guilty to embezzling government funds).

¹⁹⁵ See Dan Alexander, Chase Peterson-Withorn & Jennifer Wang, *Trump Refuses to Divest Assets, Passes Control To Sons*, *FORBES* (Jan. 11, 2017), <https://www.forbes.com/sites/chasewithorn/2017/01/11/donald-trump-will-hand-over-business/#28ffcdd160d7> [<https://perma.cc/3PRS-KKV3>]; Emily Stewart, *Trump is "Definitely Still Involved" in His Hotel Business, a New Report Says*, *VOX* (Dec. 30, 2017, 11:41 AM), <https://www.vox.com/2017/12/30/16832964/trump-business-washington-hotel> [<https://perma.cc/M6T6-BDUT>].

¹⁹⁶ See NEIL BARNETT & ALASTAIR SLOAN, *DEMOCRACY IN CROSSHAIRS: HOW POLITICAL MONEY LAUNDERING THREATENS THE DEMOCRATIC PROCESS* 4–5 (Atlantic Council, Sept. 2018), https://www.atlanticcouncil.org/images/publications/Democracy_in_the_Crosshairs_updated101718.pdf [<https://perma.cc/3Y99-C5YQ>] (stressing that hostile states find loopholes through “political money laundering” and threatening domestic policies); Melik Kaylan, *The Latest Bombshell: How Dark Money From Hostile States Has Entered Our Elections*, *FORBES* (Oct. 10, 2018), <https://www.forbes.com/sites/melikkaylan/2018/10/10/the-latest-bombshell-how-dark-money-from-hostile-states-has-entered-our-elections/#1f7f0a2d5cc5> [<https://perma.cc/YVV8-RV9D>] (identifying foreign entities investing in U.S. politics in order to promote legislative policies favorable to that foreign entity).

from the public, or at least to keep the public confused about who owns what and who should own what.

Unsurprisingly, wealth will be hidden if it is gained illicitly. As anonymously owned companies have been tolerated and green lighted in most jurisdictions, the idea of government regulating wealth in the interests of civil society has been turned upside down, creating stronger incentives for corporations to cannibalize governmental power.¹⁹⁷ Citizens may not even be aware of these activities, even as corruption proliferates within ostensibly democratic societies. Luxury buildings sitting empty in London, while Brexit plays out in real time, is the best metaphor for the destruction of a postwar international order.¹⁹⁸

There is no firm line between the accumulation of wealth and the accumulation of political power. It would seem that much of the instability and upheaval in Europe at this time is attributable to, or at least indistinguishable from, the rise in dark money flows and the involvement of elected politicians in courting such wealth.¹⁹⁹

B. Feeble Efforts to Confront Unregulated Money

Despite the strikingly idealistic nature of the EU treaties and the reach of the EU's laws, the EU has largely failed to deal effectively with the twin global problems of tax avoidance and corporate secrecy and the rise of anti-democratic illiberalism.²⁰⁰ Given the nature of its promises to its own people, one might have expected the EU to seek solutions through the firm deployment of EU law. Yet, as the implications of these two phenomena came into clear focus in recent years, the EU has proven essentially incapable of doing much about it.²⁰¹ It is true that the EU has taken some steps

¹⁹⁷ See Bank, *supra* note 179, at 166–67 (discussing corporations using foreign investment excuses for tax avoidance schemes).

¹⁹⁸ See *id.* at 176–77.

¹⁹⁹ See George Monbiot, *Dark Money is Pushing Democracy in UK Over the Edge*, THE GUARDIAN (May 17, 2017), <https://www.theguardian.com/commentisfree/2017/may/17/dark-money-democracy-billionaires-funding> [<https://perma.cc/2S4C-46VC>] (calling for stronger regulations on political funding). See, e.g., Jim Fitzpatrick, *BBC Spotlight: Brexit, Dark Money and the DUP*, BBC (June 27, 2018), <https://www.bbc.com/news/uk-northern-ireland-44624299> [<https://perma.cc/9ZUA-3P9D>] (raising concerns of dark money funding the Brexit campaign).

²⁰⁰ See Zakaria, *supra* note 82.

²⁰¹ See Gallego, *supra* note 83.

to confront tax avoidance and evasion. The Commission has used a state aids rationale to act against the “sweetheart deals” given by EU member states to multinational corporations.²⁰² The EU has recently passed a fifth Anti-Money Laundering Directive, aimed at providing common standards for criminalizing money laundering across the EU.²⁰³ Nonetheless, relative to the danger, the EU’s legal responses have remained tepid. The rise of authoritarianism in former Eastern bloc countries has been met with a similarly confused response from the EU institutions.²⁰⁴

It could be said that if the EU is unable to rein in financial and tax abuses, then no jurisdiction will be able to do so. Did the excessively rational nature of EU law weaken the EU from within? Did the recent migration crisis cause the EU nations to lose confidence in the EU’s ability to protect and enhance the sovereignty of individual nations? The EU was in the best position to act, yet has remained indecisive.²⁰⁵ It is noteworthy that Ukrainian protesters several years ago expressed the belief that the way to end corruption in their country was to turn towards Europe.²⁰⁶ Instead, the EU has failed as a guarantor of probity in

²⁰² See Tove Maria Ryding, *Tax ‘Sweetheart Deals’ Between Multinationals and EU Countries at Record High*, EURODAD (March 2018), <https://eurodad.org/files/pdf/1546881-tax-sweetheart-deals-between-multinationals-and-eu-countries-at-record-high.pdf> [<https://perma.cc/8L6S-FGPC>] (discussing how “sweetheart deals” were made for multinational investment incentives).

²⁰³ See Council Directive 2018/843, *supra* note 190, at 4 (“[t]his Directive aims not only to detect and investigate money laundering, but also to prevent it from occurring”).

²⁰⁴ See Mykhailo Minakov, *The Authoritarian Belt in Europe’s East*, WILSON CTR. (May 15, 2018), <https://www.wilsoncenter.org/blog-post/the-authoritarian-belt-europes-east> [<https://perma.cc/9EGH-DJTV>] (researching rising authoritarian regimes in Romania, Estonia, and Macedonia).

²⁰⁵ See Simon Bowers, *A Fair Tax System Will be Lost to Vested Interests Without Public Pressure: EU Tax Commissioner*, INT’L CONSORTIUM OF INVESTIGATIVE JOURNALISTS (Jan. 15, 2018), <https://www.icij.org/investigations/paradise-papers/fairer-transparent-tax-system-will-lost-vested-interests-without-public-pressure-warns-eu-tax-commissioner/> [<https://perma.cc/5EQT-VL3A>] (interviewing EU tax commissioner French Pierre Moscovici regarding the EU’s efforts coordinated by member states to combat tax evasion but acknowledging the resistance of few member states that benefit from market loopholes in their own tax codes).

²⁰⁶ See Leonid Ragozin, *Four Years After its Revolution, Ukraine is Still a Mess*, BLOOMBERG (Aug. 1, 2018), <https://www.bloomberg.com/news/features/2018-08-01/ukraine-reforms-stall-as-economy-lags-and-corruption-lingers> [<https://perma.cc/P7KR-E9MU>] (reporting that four years after the revolution in Ukraine, there is still lingering corruption that proves as a lag on the rest of the Ukrainian economy).

politics.

It is not surprising that the European Union as an entity has been the repository of democratic aspiration since its inception in the 1950s.²⁰⁷ The EU is, when seen in the broadest possible terms, the antithesis of emotive nationalism.²⁰⁸ It would have to be said that the EU is the most highly developed rules-based and law-based system ever devised.²⁰⁹ One might have thought that the EU foresaw all such looming problems, anticipated backsliding and national deviation, and created a set of ongoing remedies designed to solve most problems in real time across a wide range of political histories. Indeed, as the EU developed, through treaty evolution that included both the new ease of regulation and an accretion of new subject matter areas, the heavy infusion of human rights was meant to prevent a coming together of the powerful economic structures of the EU with anything remotely resembling fascism, the region's original sin.²¹⁰ And yet, for all that, financial corruption began to erode the credibility of this complex ethic, and the rule of law base of the EU foundered on political timidity.²¹¹ It is not unreasonable to ask, if the EU cannot control the resurgence of

²⁰⁷ See *A peaceful Europe – the beginnings of cooperation*, EUROPEAN UNION (Jan. 27, 2019), <https://europa.eu/european-union/about-eu/history/1945-1959> [<https://perma.cc/HFC7-8PSE>] (creating European Economic Community to symbolize peace after Second World War).

²⁰⁸ See *The Guardian View on Hungary's Election: Europe Faces a Grassroots Fight*, THE GUARDIAN (Apr. 8, 2018), <https://www.theguardian.com/commentisfree/2018/apr/08/the-guardian-view-on-hungarys-election-europe-faces-a-grassroots-fight> [<https://perma.cc/CS3P-7YLQ>] [hereinafter *Hungary's Election*] (explaining that “[t]he EU was founded, in part, to eliminate the prospect of continental nationalism ever again achieving that murderous frenzy”).

²⁰⁹ See Paolo Carozza, *European Law*, ENCYCLOPÆDIA BRITANNICA (Nov. 22, 2015), <https://www.britannica.com/topic/European-law> [<https://perma.cc/E4M8-DWMC>].

²¹⁰ See *Hungary's Election*, *supra* note 208.

²¹¹ See David R. Cameron, *EU Deploys Article 7 Against Poland & Hungary for Democratic Backsliding*, YALE MACMILLAN CTR. EUR. STUD. COUNCIL (Sept. 17, 2018), <https://macmillan.yale.edu/news/eu-deploys-article-7-against-poland-hungary-democratic-backsliding> [<https://perma.cc/2UGU-X4HB>] (describing the EU's enforcement of its own institutions to condemn Hungarian Prime Minister Viktor Orbán's actions). The European Council criticized Prime Minister Orbán's actions as “clear risk of a serious breach” of Article 2 of the Lisbon Treaty on the European Union. *Id.* Article 2 of the Lisbon Treaty, providing the EU's founding principles, declares for the “respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights . . .” *Id.*

European fascism, what possible structure ever could?²¹²

Even if it is not too late for the EU to act in response to widespread corruption and illiberalism, it is clear that the international order taken for granted only a few years ago will not return to what it had been. It remains to be seen whether the EU's latest Anti-Money Laundering Directive will be any more effective than its predecessors.²¹³ As the international sense of a Western Alliance has frayed, Russia has been increasingly acting the part of a mafia state, one with the clear aim of duplicating itself internationally.²¹⁴ This is a role that the EU has played without a great deal of objection, implicating the EU itself in Russian global ambitions.²¹⁵ In addition to individual Russians using the EU as a financial base of operations, it is not surprising that Malta and Cyprus have succumbed to the temptations of money laundering and become major sites for global corruption.²¹⁶ On the political side, Hungary, Poland, and Romania have in varying degrees turned their backs on the democratic ideals of the EU treaties.²¹⁷ EU co-founder Italy is also at risk.²¹⁸ There is no simple cause and effect

²¹² See Tobias Jones, *The Fascist Movement That Has Brought Mussolini Back to the Mainstream*, THE GUARDIAN (Feb. 22, 2018), <https://www.theguardian.com/news/2018/feb/22/casapound-italy-mussolini-fascism-mainstream> [<https://perma.cc/LE9X-U2PC>] (discussing appeal to new fascism spread by CasaPound militants over past 15 years and its direct threat to European Union).

²¹³ See Will Fitzgibbon, *Fairy Tales, Spaghetti and Patience: How Authorities Are Responding to the Paradise Papers*, INT'L CONSORTIUM OF INVESTIGATIVE JOURNALISTS (Jan. 22, 2018), <https://www.icij.org/investigations/paradise-papers/fairy-tales-spaghetti-patience-authorities-responding-paradise-papers/> [<https://perma.cc/8JD3-GGS3>] (describing difficulty with investigating tax evasion crimes at corporate and individual levels because of intermediary tax advisers creating complex schemes).

²¹⁴ See Boylan, *supra* note 189.

²¹⁵ See, e.g., Embury-Dennis, *supra* note 169.

²¹⁶ See *Malta and Cyprus Face Growing Pressure Over Money-Laundering*, ANTI-CORRUPTION DIG. (Jan. 25, 2019), <https://anticorruptiondigest.com/anti-corruption-news/2019/01/25/malta-and-cyprus-face-growing-pressure-over-money-laundering/#axzz5dsyuVLeW> [<https://perma.cc/C94L-AW45>] (reporting EU's warning to Malta and Cyprus to start "cracking down" on money laundering).

²¹⁷ See Cameron, *supra* note 211 (discussing states that have "experienced substantial democratic backsliding in recent years").

²¹⁸ See Michael Albertus & Victor Menaldo, *Why Are So Many Democracies Breaking Down?*, N.Y. TIMES (May 8, 2018), <https://www.nytimes.com/2018/05/08/opinion/democracy-authoritarian-constitutions.html> [<https://perma.cc/674U-GZ4H>] (discussing Italy's "erosion of democratic norms" trending towards authoritarianism).

here, only a drastic weakening in the resolve of key nations to adhere to democracy and human rights. That financial corruption has acted as a cancer on that political ideal is unmistakable at this stage.²¹⁹ It seems no coincidence that Britain, one of the world's most stable democracies until recently, has been roiled both by money laundering scandals and dark money interference in the Brexit vote that saw its unsettling decision to leave the European Union, despite having been a member since 1973.²²⁰

*C. The Information Wars; Journalists as Substitute
Government and the Last Line of Defense*

At no time since the end of the Cold War, if it ever ended, has the role of journalism in the maintenance of democracy been more vital. As national governments give in to supposedly “populist” impulses, investigative journalists have distinguished themselves as the final line of defense against encroaching illiberalism.²²¹ In particular, journalists have revealed the deepest secrets of the corrupt, notably in the form of revealing the identities of owners of anonymous companies and hidden wealth in tax havens around the world, including within the EU itself.²²² In fact, it was investigative journalists who managed to unearth the secrets found in the Panama Papers and the more recent Paradise Papers.²²³

Inside the EU, journalists have informed the public about money laundering and other financial crimes in member countries such as Malta and Cyprus.²²⁴ Unfortunately, this in turn has led to a

²¹⁹ See *Rights Body: Poland's Laws on Judges Weaken Corruption Fight*, ASSOCIATED PRESS (June 22, 2018), <https://www.apnews.com/867fce89e7cd41f49bfd2c6d598a9787> [<https://perma.cc/W4YE-4KB9>] (citing the Council of Europe's concern over the lack of judicial independence outlined in Poland's new laws affecting judicial authority and the negative impact they will have on the judiciary's ability to fight corruption).

²²⁰ See Mark Hollingsworth, *Is Going After Russian Oligarch's Property Assets the Key to Inflicting Pain on Putin?*, INDEP. (Apr. 16, 2018), https://www.independent.co.uk/news/long_reads/russia-sanctions-us-uk-oligarch-money-property-putin-a8274356.html [<https://perma.cc/47PB-LY6H>] (discussing steps the British government is taking to tackle money laundering by Russian oligarchs in British real estate market).

²²¹ See Fitzgibbon, *supra* note 213.

²²² See *id.*

²²³ See *id.*

²²⁴ See Juliette Garside, *Malta Car Bomb Kills Panama Papers Journalist*, THE GUARDIAN (Oct. 16, 2017), <https://www.theguardian.com/world/2017/oct/16/malta-car->

disturbing new phenomenon: the killing of European journalists, as has long happened in Russia and other countries where freedom of expression has been extinguished.²²⁵ The brutal murder of Daphne Caruana Galizia, mentioned at the beginning of this Article, seems to have been directly linked to her work exposing the corruption at the heart of the Maltese government.²²⁶ In addition, a journalist was recently murdered in Slovakia for what seem to be similar reasons.²²⁷ Journalists specializing in corruption cases have been threatened and intimidated.²²⁸ This technique of information suppression is a familiar one in Vladimir Putin's Russia, where the ruling elite rely on the orchestration of public perception and wage a relentless and violent campaign against truth-tellers in the media.²²⁹ In this context as well, instead of freedom spreading

bomb-kills-panama-papers-journalist [<https://perma.cc/N8QP-DTNF>] (explaining Galizia's role in unearthing corruption in Malta and the high price she paid for it); *see also Cyprus Corruption Report*, GAN BUS. ANTI-CORRUPTION PORTAL (Apr. 2018), <https://www.business-anti-corruption.com/country-profiles/cyprus/> [<https://perma.cc/C2RR-B886>] (summarizing various journalistic sources reporting on corruption in Cyprus).

²²⁵ See David Filipov, *Here are 10 Critics of Vladimir Putin Who Died Violently or in Suspicious Ways*, WASH. POST (Mar. 23, 2017), https://www.washingtonpost.com/news/worldviews/wp/2017/03/23/here-are-ten-critics-of-vladimir-putin-who-died-violently-or-in-suspicious-ways/?utm_term=.7a58c07b71ba [<https://perma.cc/V25R-JEMY>].

²²⁶ See Margaret Atwood, *A Year After Her Murder, Where is Justice for Daphne Caruana Galizia?*, THE GUARDIAN (Oct. 16, 2018), <https://www.theguardian.com/commentisfree/2018/oct/16/murder-justice-daphne-caruana-galizia-malta> [<https://perma.cc/H7KC-3BA7>] (seeking justice for Galizia, "Malta's leading investigative journalist and anti-corruption campaigner").

²²⁷ See *Jan Kuciak murder: Three People Charged with Journalist's Killing*, BBC (Sept. 28, 2018), <https://www.bbc.com/news/world-europe-45684062> [<https://perma.cc/H685-2Z8P>] (reporting Kuciak's death following his unfinished report on a Slovakia's businessman's embezzling of money into the EU); *Slovak Journalist's Murder was Contract Killing, Says Prosecutor*, THE GUARDIAN (Mar. 26, 2018), <https://www.theguardian.com/world/2018/mar/26/slovak-journalists-was-contract-killing-says-prosecutor> [<https://perma.cc/TBR3-CZ4L>] (discussing facts known in Ján Kuciak and his fiancée's murder).

²²⁸ See, e.g., Georgi Gotev, *Journalists Investigating EU Funds Theft Threatened*, EURACTIV (Nov. 18, 2015), <https://www.euractiv.com/section/justice-home-affairs/news/journalists-investigating-eu-funds-theft-threatened/> [<https://perma.cc/GMA2-A529>].

²²⁹ See Alyssa Rosenberg, *Opinion, How Censorship Works in Vladimir Putin's Russia*, WASH. POST (Feb. 9, 2016), https://www.washingtonpost.com/news/act-four/wp/2016/02/09/how-censorship-works-in-vladimir-putins-russia/?noredirect=on&utm_term=.f6764c97fb22 [<https://perma.cc/WWT2-3JDE>].

outward, the rollback of fundamental rights moves in the opposite direction.

The most efficient way to suppress investigative activity is of course to murder the journalists concerned, as this induces terror.²³⁰ The recent murder of Saudi journalist and U.S. permanent resident Jamal Khashoggi is illustrative of the audacity with which governments now proceed to eliminate honest reporting on corruption and its link to poor governance.²³¹ Just as financial corruption is inconsistent with democracy, autocracy cannot easily co-exist with the free flow of information.²³²

Without a protected mechanism of succession, there can be no progress. As the world's people have worked, since the end of World War II, to move ahead in history, more powerful forces have been working to end history in favor of a stagnant global plutocracy. This is not mere hyperbole, but rather the imminent and threatening reality. Democracy is actually quite simple: with a commitment to the mechanism of succession, the old verities of voting and the possibility of change, it works. When there is significant interference in the process of succession, it cannot work. No "idea" or theory or party can dominate this process of free choice and political succession. The postwar order created an elaborate infrastructure of public international law. It was meant to reflect and ensure a shared consensus on democracy and human rights to be protected through the articulation of norms and their ultimate

(discussing tactics Putin uses to limit public information, namely through media outlets).

²³⁰ See Editorial Board, *Dozens of Journalists Were Murdered in 2018. This is a Crisis of Press Freedom.*, WASH. POST (Dec. 30, 2018), https://www.washingtonpost.com/opinions/global-opinions/dozens-of-journalists-were-murdered-in-2018-this-is-a-crisis-of-press-freedom/2018/12/30/eab8ad2e-092d-11e9-88e3-989a3e456820_story.html?utm_term=.596f82d16681 [<https://perma.cc/FL3M-A86K>]; Aamna Mohdin & Bibi van der Zee, *'Killed for Speaking the Truth': Tributes to Nine Journalists Murdered in 2018*, THE GUARDIAN (Dec. 6, 2018), <https://www.theguardian.com/media/2018/dec/05/journalists-murdered-khashoggi-kuciak-panama-papers> [<https://perma.cc/DU9J-HPWY>] (listing journalist deaths in 2018).

²³¹ See Jamal Khashoggi: *All you Need to Know About Saudi Journalist's Death*, BBC (June 19, 2019), <https://www.bbc.com/news/world-europe-45812399> [<https://perma.cc/V4U4-SUW8>] (discussing the ongoing case regarding Khashoggi's death).

²³² See Rep. Marlin Stutzman, *Info Flow Crucial to Democracy*, POLITICO (June 17, 2013), <https://www.politico.com/story/2013/06/a-free-flow-of-information-crucial-to-our-democracy-092924> [<https://perma.cc/3D4U-TG5Z>] (stressing that "without a free and independent press, transparency and accountability are just cheap and cynical slogans").

adoption by nation states. It is past the time to consider the previously unimaginable: that this familiar and comforting postwar order may not be up to the task of holding back a global tide of dark money determined to purchase the levers of government in state after state.

