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The Two Faces of Bribery: International Corruption Pathways Meet Conflicting Legislative Regimes

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*Jeffrey R. Boles**

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INTRODUCTION

Suppose a government agency tasks its purchasing agent with buying a set of computer servers for the agency's use, and the agent contacts a technology company to make the purchase. After selecting the needed servers, the agent learns of the servers' fair market value but does not negotiate with the technology company to obtain the lowest possible price. Instead, unbeknownst to the government, the agent agrees with the technology company's sales manager to purchase the servers on behalf of the government for an amount significantly above their fair market value, and, in return, the company agrees to give the agent a hefty side payment for inflating the company's profits. In this scenario, the technology company gives a side payment to the purchasing agent to influence the agent's official act—purchasing the servers for the government. Their agreement fits the classic definition of public sector bribery,¹ a crime outlawed in virtually every jurisdiction in the world.² Both parties could face heavy prison sentences and fines for engaging in this corrupt act.³

Imagine now that the purchasing agent's employer is not a government agency, but instead a private sector company. The purchasing agent buys the same quantity of identical servers on behalf of her company for the same inflated price and receives the same side payment unbeknownst to her employer. Under this scenario, the arrangement between the purchasing agent and technology company still constitutes bribery, but of

1. See, e.g., BLACK'S LAW DICTIONARY 187 (7th ed. 1999) (bribery is "the corrupt payment, receipt, or solicitation of a private favor for official action."); 11 C.J.S. *Bribery* § 1 (2008) (defining bribery). Assume for the purpose of this scenario that the purchasing agent qualifies under the pertinent bribery statute as a "public official." See, e.g., 18 U.S.C. § 201 (2012) (defining public official as including any "employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government").

2. See Claire Moore Dickerson, *Political Corruption: Free-Flowing Opportunism*, 14 CONN. J. INT'L L. 393, 395 (1999) ("[S]cholars have asserted that every country has laws against bribery of its own officials.").

3. See Philip M. Nichols, *The Business Case for Complying with Bribery Laws*, 49 AM. BUS. L.J. 325, 355–56 (2012) (discussing penalties for domestic public bribery and listing penalty ranges).

a form that transpires wholly within the private sector, as no government official is involved. Sanctioning this type of bribery, known as private bribery or commercial bribery, garners wildly inconsistent treatment from governments across the world.⁴ The perpetrators of this offense may face heavy prison sentences and fines, nominal fines, or no criminal sanctions, depending upon the jurisdiction in which the private bribery agreement occurs.⁵

Public and private bribery are twin forms of corruption, with public officials and private persons, respectively, abusing entrusted power for personal gain by accepting bribes.⁶ Both bribery forms share core conceptual features of fiduciary duty violations and betrayals of trust and can be viewed as essentially the same offense—perpetrators corruptly giving or receiving benefits in exchange for undue advantage. In fact, the only fundamental difference between the two forms is that in private bribery, the recipient is a private agent rather than a public official.

A significant volume of research demonstrates that public and private bribery each generate a host of economic and social harms that impair governments, commercial entities, global markets, and the general public.⁷ For instance, both bribery forms have the power to disrupt international market economies by distorting fair competition within and across markets, interfering with global trade, and hampering economic development.⁸ Grounded in deceit, both bribery forms also bring detrimental effects to social spheres in part by undermining the moral virtues of trust, confidence, and loyalty necessary for the development and maintenance of healthy interpersonal and economic relationships.⁹

While public and private bribery “are two variants of the same censurable conduct,”¹⁰ stakeholders respond to the two bribery forms in radically dissimilar ways. Public bribery generates widespread anger and concern from citizens and growing remedial action from governments

4. See Barbara Huber, *Supranational Measures, in PRIVATE COMMERCIAL BRIBERY* 559, 564 (Gunter Heine et al. eds., 2003) (discussing rates of private bribery criminalization).

5. See *infra* Part I.C.2 (analyzing private bribery penalties).

6. See ORG. FOR ECON. CO-OPERATION & DEV. [OECD], *CORRUPTION: A GLOSSARY OF INTERNATIONAL STANDARDS IN CRIMINAL LAW* 22 (2008), available at <http://www.oecd.org/daf/anti-bribery/41194428.pdf> [hereinafter OECD CORRUPTION] (defining corruption as the “abuse of public or private office for personal gain”).

7. See, e.g., Tor Krever, *Curbing Corruption? The Efficacy of the Foreign Corrupt Practices Act*, 33 N.C. J. INT’L L. & COM. REG. 83, 86 (2007).

8. See, e.g., Franklin A. Gevurtz, *Commercial Bribery and the Sherman Act: The Case for Per Se Illegality*, 42 U. MIAMI L. REV. 365, 384 (1987) (explaining how bribers “drive out competitors and thereby achieve a significant increase in market concentration”).

9. See, e.g., *State v. Bunch*, 177 S.W. 932, 935 (Ark. 1915) (“Bribery is an offense against public justice. The essence of it is the prostitution of a public trust, the betrayal of public interests, the debauchment of the public conscience.”).

10. Antonio Argandoña, *The 1996 ICC Report on Extortion and Bribery in International Business Transactions*, 6 BUS. ETHICS: A EUR. REV. 134, 142 (1997).

worldwide.¹¹ Solid bodies of domestic criminal laws, coupled with mounting worldwide enforcement actions, reflect a global focus on thwarting public bribery as it occurs domestically and internationally.¹²

Conversely, governments largely ignore the same corrupt activity when it transpires within the business community but without the presence of a government official. Citizens often remain unaware of the private bribery phenomenon and its criminalization or lack thereof.¹³ In many countries the criminal law either plays a minor or no role in addressing private bribery, leaving the corrupt conduct effectively unsanctioned.¹⁴

Most countries that sanction private bribery essentially separate their public and private bribery prohibitions into two distinct statutory offenses, typically with serious criminal penalties assigned to public bribery violations and nominal sanctions assigned to private bribery violations.¹⁵ Moreover, there is an enforcement trend where prosecutors focus resources on public bribery law enforcement while ignoring private bribery even as it blooms in marketplaces.¹⁶ France and Japan, for instance, place their public bribery statutes in their penal codes, where such statutes receive due attention, but the two countries place their private bribery legislation in labor and commercial codes, respectively, where the statutes lie dormant.¹⁷ Given the lax or nonexistent regulation, private bribery currently flourishes across industry segments, and by failing to adequately combat this offense, governments expose their citizens and business communities to its significant moral and economic harms.

This Article analyzes the conceptual and practical dynamics of bribery as it courses through public and private sectors and critiques the divergent legislative approaches to criminalizing both bribery forms. It advocates for the adoption of specific statutory reforms to combat private bribery more effectively as part of a larger anti-corruption regime and to limit the differences between criminal laws governing public and private bribery so that sanctions balance for both bribery forms. Part I provides an overview of public and private bribery as manifestations of corruption and an analysis of international approaches to public and private bribery criminalization.

11. See, e.g., FRITZ F. HEIMANN, SHOULD FOREIGN BRIBERY BE A CRIME? 7 (1994) (“There is no country in the world where bribery is either legally or morally acceptable.”), as cited in Peter J. Henning, *Public Corruption: A Comparative Analysis of International Corruption Conventions and United States Law*, 18 ARIZ. J. INT’L & COMP. LAW 793, 793 n.2 (2001).

12. See *infra* Part I.B.2.

13. See Edmund Searby, *Domestic Commercial Bribery: An Often Overlooked Issue*, BUS. CRIMES BULL., Aug. 1, 2012, at 3 (discussing public unawareness of private bribery).

14. See Gunter Heine, *Comparative Analysis*, in PRIVATE COMMERCIAL BRIBERY, *supra* note 4, at 603, 634.

15. See *infra* notes 110–11 (describing public and private bribery criminalization trends).

16. See *infra* Part I.C.2 (describing enforcement trends).

17. See Stephane Bonifassi, *France*, in PRIVATE COMMERCIAL BRIBERY, *supra* note 4, at 87, 91; Toyoji Saito, *Japan*, in PRIVATE COMMERCIAL BRIBERY, *supra* note 4, at 191, 197, 204–05.

Next, Part II critically examines the theoretical and practical justifications for treating the twin bribery forms as separate offenses. Finally, Part III proposes a set of robust legislative reforms to re-design private bribery criminalization and to synchronize it with the legislative treatment received by its public bribery twin.

I. PUBLIC AND PRIVATE BRIBERY ARE TWIN MANIFESTATIONS OF CORRUPTION

A. *The International Fight against Corruption*

Corruption, generally defined as the abuse of entrusted power for personal gain, permeates international markets.¹⁸ Given that corrupt practices are naturally shrouded in secrecy, their prevalence and economic impact are notoriously difficult to measure, but approximations do exist.¹⁹ The World Economic Forum estimates that worldwide corruption costs more than \$2.6 trillion annually, roughly five percent of global gross domestic product (“GDP”).²⁰ International surveys routinely reflect the pervasiveness of the problem across countries and particularly in rapid-growth markets. For example, in a recent Ernst & Young survey of business executives, thirty-nine percent of respondents polled from forty-three countries agreed that corrupt business practices happen frequently in their countries, with a survey high of eighty-four percent of Brazilian respondents agreeing that widespread corruption exists in their country.²¹

Corruption blooms in many forms. Perpetrators may commit fraud, launder money, construct illegal cartels, misstate financial statements, bribe officials, and exert undue influence, among other acts. The acts have the collective power to cripple governments and decimate economies.²² Every corrupt act covertly taxes the cost of doing business and weakens economic growth, and cumulatively, “corruption not only erodes the trust and confidence that citizens hold in one another and in their governments, it also robs citizens and governments of resources that could be invested in

18. See, e.g., OECD CORRUPTION, *supra* note 6 (defining corruption); Joshua V. Barr et al., *A Legal Perspective on the Use of Models in the Fight against Corruption*, 8 S.C. J. INT’L L. & BUS. 267, 270–71 (2012) (discussing definitions of corruption).

19. See, e.g., TRANSPARENCY INT’L, CORRUPTION PERCEPTIONS INDEX (2012), available at http://files.transparency.org/content/download/537/2229/file/2012_CPI_brochure_EN.pdf.

20. See *Global Agenda Council on Anti-Corruption & Transparency 2012–2014*, WORLD ECON. F., <http://www.weforum.org/content/global-agenda-council-anti-corruption-2012> (last visited Apr. 10, 2014).

21. ERNST & YOUNG, GROWING BEYOND: A PLACE FOR INTEGRITY 12TH GLOBAL FRAUD SURVEY 4 (2012), available at [http://www.ey.com/Publication/vwLUAssets/Global-Fraud-Survey-a-place-for-integrity-12th-Global-Fraud-Survey/\\$FILE/EY-12th-GLOBAL-FRAUD-SURVEY.pdf](http://www.ey.com/Publication/vwLUAssets/Global-Fraud-Survey-a-place-for-integrity-12th-Global-Fraud-Survey/$FILE/EY-12th-GLOBAL-FRAUD-SURVEY.pdf).

22. See Ethan S. Burger & Mary S. Holland, *Why the Private Sector Is Likely to Lead the Next Stage in the Global Fight Against Corruption*, 30 FORDHAM INT’L L.J. 45, 45–7 (2006) (detailing effects of corruption); J.S. Nye, *Corruption and Political Development: A Cost-Benefit Analysis*, 61 AM. POL. SCI. REV. 417, 419 (1967) (same).

a brighter future.”²³ Former United Nations Secretary General Kofi Annan reminded the audience at the 2003 U.N. Convention against Corruption that the most disadvantaged members of society experience corruption’s severest effects because “corruption hurts the poor disproportionately—by diverting funds intended for development, undermining a government’s ability to provide basic services, feeding inequality and injustice, and discouraging foreign investment and aid.”²⁴

B. *Global Corruption in the Public Sector: Domestic and Transnational Public Bribery*

1. A Brief Overview of Public Bribery and Its Harms

Public bribery, or the bribing of public officials, is one of the quintessential forms of corruption.²⁵ Legal scholars commonly define the offense as the giving, offering, promising, taking, or agreeing to take money or other consideration in order to improperly influence a public official’s actions.²⁶ Colloquially known as the world’s second oldest profession, bribery features a quid pro quo relationship between a public official’s specific act and a payment made to influence that act.²⁷ It is bribery’s *this-for-that* element that separates a bribe from a legitimate gift, for one gives legitimate gifts with no strings attached.²⁸

A public bribe may feature domestic and transnational facets, as perpetrators may bribe domestic and foreign officials. Perpetrators proffer bribes, directly or indirectly, to domestic and foreign public officials essentially for the same reason: to corrupt or subvert an official’s loyalty and judgment and thereby obtain an unfair advantage.²⁹ Legislators and scholars conceptually divide the offense into active and passive forms. The term

23. *International Anti-Corruption Day: What They’re Saying*, TRANSPARENCY INT’L (Dec. 9, 2012), http://www.transparency.org/news/feature/20121209_feature_international_anti-corruption_day_2012 (quoting Hillary Clinton).

24. U.N. Secretary-General, Statement on the Adoption by the General Assembly of the United Nations Convention Against Corruption (Oct. 31, 2003), <http://www.unodc.org/unodc/en/treaties/CAC/background/secretary-general-speech.html>.

25. See JOHN T. NOONAN, BRIBES, at xi (1984) (discussing history of bribery); George D. Brown, *The Gratuities Offense and the RICO Approach to Independent Counsel Jurisdiction*, 86 GEO. L.J. 2045, 2051 (1998) (“Bribes are an example, perhaps the quintessential example, of political corruption.”).

26. See *supra* note 1 (listing various definitions of bribery); NOONAN, *supra* note 25 (defining bribery as “an inducement improperly influencing the performance of a public function meant to be gratuitously exercised.”).

27. See Brown, *supra* note 25, at 2048; Joseph T. Wells, *Fraudbasics: Ancient Corruption*, FRAUD MAGAZINE (Jan./Feb. 2002), available at <http://www.fraud-magazine.com/article.aspx?id=4294968150> (“Bribery, it could be argued, is mankind’s second oldest profession.”).

28. See, e.g., *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 404–05 (1999) (explaining that “for bribery there must be a quid pro quo—a specific intent to give or receive something of value in exchange for an official act.”)(emphasis omitted).

29. See *United States v. Duvall*, 846 F.2d 966, 972 (5th Cir. 1988).

“active bribery” refers to the promising, offering, or giving of a bribe,³⁰ and “passive bribery” refers to the accepting or agreeing to accept a bribe.³¹

The alleged facts in *United States v. Kay*, 513 F.3d 432 (5th Cir. 2007), illustrate the mechanics of public bribery at work in an international context.³² In *Kay*, a federal jury convicted two American Rice, Inc. corporate executives under the Foreign Corrupt Practices Act (“FCPA”) for bribing Haitian customs officials to import rice.³³ The United States executives allegedly paid bribes to the Haitian officials in order to reduce duties and taxes on the rice their company exported to Haiti.³⁴ The bribes functioned as consideration for the unlawful evasion of customs duties and sales taxes, and the bribes’ ultimate effect, which was tax savings, assisted the executives in retaining lucrative overseas business.³⁵

Public bribery invites universal condemnation for the social and economic damage it causes. It generates collective moral outrage that transcends historical periods and cultural boundaries.³⁶ Scholars have thoroughly catalogued its attendant harms to the public order and to international markets.³⁷ Bribing public officials especially impairs governmental integrity and effectiveness, as it restricts a government’s capacity to execute vital functions, distorts the apportionment of government spending, reduces funding for public health, education, and other social welfare areas, decreases the quality of infrastructure, and erodes public confidence in governmental institutions, among other public ills.³⁸ Moreover, this type of bribery deters economic efficiencies within companies and across industries, and it causes long-term harm to a host country’s economic development.³⁹ Empirical research demonstrates public bribery’s negative impact on global economies, including its power to reduce private foreign

30. See Jamila Lajcakova, *Violation of Human Rights Through State Tolerance of Street-Level Bribery: Case Study, Slovakia*, 9 BUFF. HUM. RTS. L. REV. 111, 123 (2003); Bruce Zagaris & Shaila Lakhani Ohri, *Emergence of an International Enforcement Regime on Transnational Corruption in the Americas*, 30 LAW & POL’Y INT’L BUS. 53, 70 (1999) (describing active bribery as defined by OECD Anti-Bribery Convention to include bribery that is “committed by the person who promises or gives the bribe”).

31. Lajcakova, *supra* note 30, at 122–23.

32. *United States v. Kay*, 513 F.3d 432, 439–40 (5th Cir. 2007).

33. *Id.* at 439–40.

34. *Id.* at 439.

35. See *id.* at 439–40.

36. See generally NOONAN, *supra* note 25, at 4 (detailing cross-cultural bribery condemnation across historical periods).

37. For an overview of the harms caused by transnational bribery, see Philip M. Nichols, *Regulating Transnational Bribery in Times of Globalization and Fragmentation*, 24 YALE J. INT’L L. 257, 274–79 (1999).

38. See BRUCE ZAGARIS, *INTERNATIONAL WHITE COLLAR CRIME* 96 (2010); David Hess & Thomas W. Dunfee, *Fighting Corruption: A Principled Approach*, 33 CORNELL INT’L L.J. 593, 594, 596–97 (2000).

39. See David Hess & Cristie L. Ford, *Corporate Corruption and Reform Undertakings: A New Approach to an Old Problem*, 41 CORNELL INT’L L.J. 307, 320 (2008).

investment into countries that host bribery, lower a host country's tax base, and positively correlate with reduced economic development.⁴⁰ The solid body of scholarship overwhelmingly concludes that bribing domestic and foreign public officials harms governments, commercial entities, global markets, and the public at large.⁴¹

2. A Strong International Consensus Exists to Deter Public Bribery

Virtually all countries outlaw the bribery of domestic public officials,⁴² and a growing subset criminalizes the bribery of foreign public officials.⁴³ The United States' enactment in 1977 of the seminal FCPA, which "mak[es] it unlawful for certain classes of persons and entities to make payments to foreign government officials to assist in obtaining or retaining business,"⁴⁴ ignited a global anti-corruption movement to combat public bribery worldwide.⁴⁵ The anti-bribery measures of international organizations, such as the 1997 OECD Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions ("OECD Convention")⁴⁶ and the 1999 Council of Europe Criminal Law Convention on Corruption ("Council of Europe Convention"),⁴⁷ significantly facilitated the creation and development of transnational bribery laws by requiring signatory countries to criminalize bribery involving foreign public officials.⁴⁸ According to TRACE International, "[t]he goal of such laws and conventions is to create a fair and transparent international business market rather than one skewed by under-the-table deals that enrich government officials at the expense of their fellow citizens."⁴⁹

Countries generally punish domestic and international public bribery violations typically with prison sentences and fines.⁵⁰ While enforcement

40. See Nichols, *supra* note 37, at 275; Krever, *supra* note 7, at 86.

41. See Nichols, *supra* note 37, at 274.

42. See *id.* at 352.

43. See *id.* at 362 (listing over 50 countries that criminalize the bribery of foreign officials).

44. *Foreign Corrupt Practices Act: An Overview*, U.S. DEP'T OF JUSTICE, <http://www.justice.gov/criminal/fraud/fcpa/> (last visited Apr. 10, 2014).

45. See James A. Barta & Julia Chapman, *Foreign Corrupt Practices Act*, 49 AM. CRIM. L. REV. 825, 851 (2012).

46. See OECD, CONVENTION ON COMBATTING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND OTHER RELATED DOCUMENTS 7 (2011) [hereinafter OECD CONVENTION], available at http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf.

47. Council of Europe, Criminal Law Convention on Corruption art. 5, Jan. 27, 1999, C.E.T.S. No. 173 [hereinafter Council of Europe Convention], available at <http://conventions.coe.int/Treaty/en/Treaties/Html/173.htm>.

48. See Nichols, *supra* note 37, at 362 (discussing the impact of international agreements upon the creation of laws prohibiting foreign public official bribery).

49. TRACE INT'L, GLOBAL ENFORCEMENT REPORT 2011 1 (2011), available at http://www.traceinternational.org/data/public/documents/GlobalEnforcementReport2011_000-64723-1.pdf.

50. See Nichols, *supra* note 37, at 355 (discussing domestic public bribery penalties).

of transnational anti-bribery laws in many countries has traditionally been lacking, increased enforcement efforts are on the rise worldwide.⁵¹ More countries are enacting laws that criminalize transnational public bribery, and are gradually initiating prosecutions under these laws.⁵²

C. *Global Corruption in the Private Sector: Domestic and Transnational Private Bribery*

1. A Brief Overview of Private Bribery and Its Harms

Public bribery's twin, private bribery, is a separate bribery offense that transpires entirely within the private sector. The commission of a private bribery offense implicates no public officials. The offense involves the bribing of private sector employees or other types of private sector agents so that the agents show favor to the briber when carrying out their workplace duties.⁵³ At common law, a private bribe is an "offer of consideration to another's employee or agent in the expectation that the latter will, without fully informing his principal of the 'gift,' be sufficiently influenced by the offer to favor the offeror over other competitors."⁵⁴ Like public bribery, private bribery may be separated into an active form, where the briber offers or gives the bribe, and a passive form, where the agent accepts or agrees to accept the bribe.⁵⁵ The offense may proceed domestically or with international aspects, as perpetrators may bribe agents of domestic and foreign businesses.

The briber's corruption of the agent is the essence of private bribery.⁵⁶ In a private bribery offense, the briber proffers a bribe with the intent to induce the agent to act in the interest of the briber instead of the agent's principal. The agent who accepts a bribe violates a contractual duty of loyalty to his principal and "abuses his [principal]'s trust and loyalty for his

51. See *id.* at 355, 366 (analyzing transnational bribery enforcement efforts); TRANSPARENCY INT'L, EXPORTING CORRUPTION? COUNTRY ENFORCEMENT OF THE OECD ANTI-BRIBERY CONVENTION PROGRESS REPORT 2012 4 (2012), available at http://files.transparency.org/content/download/510/2109/file/2012_ExportingCorruption_OECDProgress_EN.pdf (classifying signatory countries into one of the following foreign anti-bribery enforcement categories: active, moderate, little or no enforcement).

52. Nichols, *supra* note 37, at 366 (citation omitted) (internal quotation marks omitted).

53. See Jeffrey R. Boles, *Examining the Lax Treatment of Commercial Bribery in the United States: A Prescription for Reform*, 51 AM. BUS. L.J. 119, 119–23 (2014) (providing overview of private bribery).

54. 2 RUDOLF CALLMANN, THE LAW OF UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES § 49 (3d ed. 1968). See also BLACK'S LAW DICTIONARY 204 (8th ed. 1999) (defining commercial bribery as "[t]he knowing solicitation or acceptance of a benefit in exchange for violating an oath of fidelity, such as that owed by an employee, partner, trustee, or attorney.") (citing MODEL PENAL CODE § 224.8(1)).

55. See, e.g., Council of Europe Convention, *supra* note 47, arts. 7–8 (defining active and passive bribery); United Nations Convention Against Corruption, G.A. Res. 58/4, Annex, art. 21, U.N. Doc. A/RES/58/4/Annex (Oct. 31, 2003) [hereinafter United Nations Convention Against Corruption] (same).

56. JSG Trading Corp. v. Dep't of Agric., 235 F.3d 608, 615 (D.C. Cir. 2001).

own economic benefit.”⁵⁷ In delineating the statutory elements of the offense, jurisdictions largely require that the private bribery transpire without the knowledge and consent of the agent’s principal.⁵⁸ This secrecy element requires a showing that the bribery participants hid their bribery agreement and the attendant bribe(s) from the principal. The participants’ secrecy and dishonesty reinforce the corrupt nature of their actions.⁵⁹

Private bribery typically occurs in the course of commercial activity where a company makes covert payments to another company’s employee, unbeknownst to this employee’s employer company, and the employee in return steers business to the bribing company and to the exclusion of the bribing company’s competitors.⁶⁰ The bribing company usually clinches a business contract with the employee’s company as a result of the bribe.⁶¹ By winning this contract, the briber attains its ultimate goal and the bribe facilitates that goal.

United States v. Carson, No. SACR 09-00077-JVS, 2011 U.S. Dist. LEXIS 154145, at *3–*4, *28 (C.D. Cal. Sept. 20, 2011), demonstrates a typical private bribery transaction with an international flavor. In *Carson*, the defendants, U.S. citizens who were executives of Controlled Components Inc. (“CCI”) at the time, allegedly paid roughly \$2 million in bribes to “foreign employees of [CCI’s] foreign compan[y]” customers during a five year period.⁶² The defendants purportedly gave monetary payments and gifts and arranged extravagant vacations and entertainment for these employees. In short, the bribes served “the purpose of assisting in securing [CCI] business.”⁶³

Like its public counterpart, private bribery impairs a multitude of public and private interests, and these harms can be separated into two overarching categories: fiduciary duty violations and unfair competitive effects. The offense’s most well-recognized harm is perhaps a violation of the

57. Peter Burckhardt & Benjamin Borsodi, *Switzerland Tightens Anti-Corruption Laws, Focuses on Private Sector Bribery*, 23 INT’L ENFORCEMENT L. REP. 213 (2007).

58. See, e.g., *Mantek Div. of NCH Corp. v. Share Corp.*, 780 F.2d 702, 705 n.3 (7th Cir. 1986) (“The essence of commercial bribery is that the [briber] is secretly giving a bribe to the . . . agent to induce the agent to betray his principal”); Peter J.P. Tak, *The Netherlands*, in PRIVATE COMMERCIAL BRIBERY, *supra* note 4, at 275, 287 (discussing the secrecy element in the private bribery statute under Dutch law).

59. See Tak, *supra* note 58, at 287 (“The corrupt and untrustworthy behavior is the non-disclosure by the bribed person.”).

60. See Note, *Commercial Bribery: The Need for Legislation in Minnesota*, 46 MINN. L. REV. 599, 599–600 (1962) [hereinafter *Need for Legislation*] (explaining that private bribery usually occurs in commercial transactions); see Boles, *supra* note 53, at 145.

61. Private bribery typically concludes with the briber obtaining a business contract with the bribery recipient’s employer company. See Franklin A. Gevurtz, *Politics, Corruption, and the Sherman Act After City of Columbia’s Blighted View*, 27 U.C. DAVIS L. REV. 141, 169 (1993) (discussing prototypical case of private bribery).

62. *United States v. Carson*, No. SACR 09-00077-JVS, 2011 U.S. Dist. LEXIS 154145, at *3–*4, *28 (C.D. Cal. Sept. 20, 2011).

63. *Id.* at *4–*5.

bribed agent's fiduciary duty of loyalty.⁶⁴ A universal facet of contract law recognizes that agents owe a general duty of loyalty in relation to their principals' affairs or business,⁶⁵ and agents violate this duty and thereby harm their principals when they accept bribes in their role as agents.⁶⁶ These principals also face substantial economic losses when their agents accept bribes.⁶⁷ In the normal transactional course, the bribers surreptitiously add the cost of the bribes into the business contracts that they enter into with the bribed agents' principals.⁶⁸ The principals correspondingly suffer losses, at a minimum, in the amount of the bribes when the agents of those principals accept the bribes and purchase the bribers' goods or services on behalf of their principals.⁶⁹ Hence the duty of loyalty violation may foster heavy financial losses for these principals victimized by the offense.

Private bribery also causes public and private sector harm through the anti-competitive effects it engenders. The private bribery scheme provides the briber with an unfair competitive advantage by eliminating from consideration products or services offered by the bribing company's competitors in the usual course of business.⁷⁰ This method of unfair competition may severely disadvantage industry competitors, potentially forcing them from the marketplace,⁷¹ and thus distort any smooth functioning of do-

64. See, e.g., 2660 Woodley Rd. Joint Venture v. ITT Sheraton Corp., 369 F.3d 732, 737 n.4 (3d Cir. 2004) ("As a general principle, a critical element of commercial bribery is the breach of the duty of fidelity."); Heine, *supra* note 14, at 614 (discussing the duty of loyalty violation as recognized under the laws of France, the Netherlands, Korea and Italy).

65. See Huber, *supra* note 4, at 577 (analyzing breach of duty violations as addressed by supranational conventions).

66. See, e.g., UNITED KINGDOM LAW COMMISSION, REFORMING BRIBERY – A CONSULTATION PAPER 27 (2007), available at http://lawcommission.justice.gov.uk/docs/cp185_Reforming_Bribery_consultation.pdf ("The principal and agent model regards the impropriety in bribery (connected to an advantage conferred or to be conferred on the agent) as the breach of a duty of loyalty owed by an agent to his or her principal.").

67. See *Novartis Corp. v. Luppino (In re Luppino)*, 221 B.R. 693, 703 n.4 (Bankr. S.D.N.Y. 1998) (noting that commercial bribery is almost certain to cause economic harm to the principals of the bribed agents).

68. See *State v. Cohen*, No. 1 CA-CR 97-0707, 1999 Ariz. App. LEXIS 49, at *13 (Apr. 1, 1999) (referencing how the briber adds the cost of the bribe into the contract it enters into with the bribed agent's principal); Joan Jimenez Queralt, *Spain, in PRIVATE COMMERCIAL BRIBERY*, *supra* note 4, at 353, 365 ("[C]ommercial practices show that the bribery, in one way or another, is often included in the price or value of the transaction to which the corporation is a party, so that the corporation employing a corrupt manager suffers damage.").

69. *United States v. Fagan*, 821 F.2d 1002, 1009 (5th Cir. 1987). The principals' economic losses translate into corresponding losses for shareholders and others with ownership interests in businesses. See Heine, *supra* note 14, at 613–14 (detailing how private bribery adversely affects corporate assets).

70. See Gevurtz, *supra* note 8 at 384.

71. See Jaroslav Fenyk, *Czech Republic, in PRIVATE COMMERCIAL BRIBERY*, *supra* note 4, at 13, 28 ("[Private bribery may] jeopardize the operation or development of a competitor's company by acting contrary to the rules on economic competition, or contrary to accepted practices of competition.").

mestic and international markets.⁷² In addition, research findings demonstrate that private bribery's anti-competitive effects harm consumers through higher prices and poorer quality goods and services.⁷³ Professor Madeleine Leijonhufvud notes that, "To the extent that bribery in the private sector results in goods and services becoming more expensive, their quality becoming inferior, or that they are marketed without truthful information, it is ultimately the general public that suffers."⁷⁴ Consumers bear the final cost of private bribery through an "undue surtax" on the goods and services affected by the bribery.⁷⁵ If left unfettered, transnational private bribery threatens the existence of free markets, given that the offense disrupts the proper functioning of global market economies by interfering with international trade, distorting fair competition and impeding economic development.⁷⁶

2. Private Bribery Is Inconsistently Criminalized, with Minimal Enforcement Globally

While virtually all jurisdictions criminalize some form of public bribery,⁷⁷ many ignore formally addressing bribery in the private sector. Traditionally, "the fight against corruption has centered around active and passive bribery of national public officials, as well as of international public officials," to the exclusion of addressing corruption in the private sector.⁷⁸ Numerous countries with relatively powerful national economies,

72. See Heine, *supra* note 14, at 613 ("Commercial bribery is seen as a factor that distorts or prevents fair competition and, thus, the proper functioning of the market.").

73. See Gevurtz, *supra* note 8, at 365 (1987) (detailing private bribery's "significant toll on consumer welfare" through price and quality competition erosion); Note, *Bribery in Commercial Relationships*, 45 HARV. L. REV. 1248, 1248 n.6 (1932) [hereinafter, *Bribery in Commercial Relationships*] ("The public, by paying higher prices and receiving inferior quality, bears the cost of this widespread graft.").

74. Madeleine Leijonhufvud, *Sweden*, in PRIVATE COMMERCIAL BRIBERY, *supra* note 4, at 401, 411–12. Accord Searby, *supra* note 13, at 2 (explaining that private bribery poses obvious dangers to free markets as the offense yield significantly inflated prices and inferior products in the marketplace).

75. Luigi Foffani & Roberto Acquaroli, *Italy*, in PRIVATE COMMERCIAL BRIBERY, *supra* note 4, at 149, 153.

76. See UNITED KINGDOM MINISTRY OF JUSTICE, THE BRIBERY ACT 2010 – GUIDANCE 2 (2011) available at <http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf> ("At stake is the principle of free and fair competition, which stands diminished by each bribe offered or accepted."); Joint Action, 1998 O.J. (L 358) 2 (European Union Joint Action finding that private bribery "distorts fair competition and undermines the principles of openness and freedom of markets, and in particular the smooth functioning of the internal market, and also militates against transparency and openness in international trade"); Heine, *supra* note 14, at 616–17 (analyzing international responses to private bribery's effects upon free competition).

77. See *supra* note 2 and accompanying text.

78. Huber, *supra* note 4, at 564.

such as India,⁷⁹ Japan,⁸⁰ Thailand,⁸¹ Philippines,⁸² Saudi Arabia,⁸³ and Indonesia,⁸⁴ do not criminalize private bribery, whether in domestic or international business transactions. Among countries that do criminalize private bribery, the number of prosecutions is generally miniscule.⁸⁵

The disparate treatment of private bribery in the United States exemplifies the haphazard approach taken by legislatures globally. Jurisdictions within the United States do not uniformly criminalize private bribery. At the federal level, there is no general federal criminal statute in the United States that outlaws the offense.⁸⁶ The federal government has the ability to prosecute the offense indirectly through the Travel Act,⁸⁷ the mail and wire fraud statutes,⁸⁸ and the Racketeer Influenced and Corrupt Organizations Act (“RICO”),⁸⁹ but these statutes contain application restrictions

79. See *Private Sector Bribery Could Become Criminal Offense: PM*, TIMES OF INDIA (Oct. 21, 2011, 1:33 PM), <http://timesofindia.indiatimes.com/india/Private-sector-bribery-could-become-criminal-offense-PM/articleshow/10439539.cms> (“Prime Minister Manmohan Singh on Friday said [the] government is considering changes in [the] law to make private sector bribery a criminal offence.”).

80. NORTON ROSE, ANTI-CORRUPTION IN ASIA PACIFIC 22 (2010) <http://www.nortonrosegraduates.com/sites/default/files/media-archiv/pdfs/The%20anti-corruption%20guide.pdf> (noting that private sector bribery is not criminalized in Japan).

81. *Id.* at 28 (noting that there is no private sector bribery offense in Thailand).

82. *Id.* at 24 (“There is as yet, no offence of private sector bribery” in the Philippines).

83. See *Saudi Arabia Country Profile*, BUS. ANTI-CORRUPTION PORTAL, <http://www.business-anti-corruption.com/country-profiles/middle-east-north-africa/saudi-arabia/initiatives/public-anti-corruption-initiatives.aspx> (last visited Apr. 10, 2014) (reporting that Saudi Arabia’s Law for Combating Bribery does not cover purely private sector bribery).

84. See ASHEESH GOEL, INTERNATIONAL ANTI-BRIBERY AND CORRUPTION TRENDS AND DEVELOPMENTS 166 (2012), available at http://www.ropesgray.com/files/upload/2012_0521_ABC_Book.pdf (private sector bribery is not an offense under Indonesian law).

85. See Heine, *supra* note 14, at 625, 634 (describing minimal private bribery prosecution rates in numerous countries).

86. See Boles, *supra* note 53, at 135.

87. The Travel Act prohibits the use of an instrumentality of interstate or foreign commerce to commit “unlawful activity” under U.S. state or federal law. Travel Act, 18 U.S.C. § 1952(a)(3) (2013). The Act defines “unlawful activity” to include bribery “in violation of the laws of the State in which committed or of the United States.” 18 U.S.C. § 1952(b)(2). This statutory definition of “bribery” encompasses private bribery offenses. *United States v. Perrin*, 444 U.S. 37, 50 (1979).

88. The mail fraud statute, 18 U.S.C. § 1341, and wire fraud statute, 18 U.S.C. § 1343, prohibit the use of mail and wire communications, respectively, in furtherance of any scheme to defraud, and courts find that private bribery activity qualifies under these statutes as a scheme to defraud. See *United States v. Hausmann*, 345 F.3d 952, 957 (7th Cir. 2003) (“[T]he knowing payer of an illegal kickback is criminally liable for conspiracy to commit mail or wire fraud to the same extent as the recipient of such a payment.”).

89. The RICO Act prohibits “racketeering activity” as conducted through an ongoing criminal enterprise, and the Act specifies that “racketeering activity” includes “bribery . . . which is chargeable under State law and punishable by imprisonment for more than one year.” 18 U.S.C. § 1961(1)(A) (2012). Courts find that “bribery” under the statute encompasses private bribery. See *United States v. Bowling*, No. 6:09-16, 2010 U.S. Dist. LEXIS 129708, at *26 (E.D. Ky. Dec. 7, 2010) (noting that “commercial bribery . . . constitute[s] [a] valid RICO predicate” and collecting cases).

that limit their ability to address domestic and transactional private bribery comprehensively.⁹⁰ Moreover, the federal government's anti-private bribery enforcement efforts under these statutes have been decidedly weak.⁹¹

Within the United States, state legislatures radically differ in their treatment of private bribery. Some states criminalize the offense, while others do not.⁹² Those states that criminalize private bribery can be separated into further categories. Some states penalize the offense as a felony carrying potentially heavy incarceration sentences and fines, whereas other states choose to penalize the offense as a misdemeanor with minimal jail time and/or minor fines.⁹³ State governments rarely prosecute private bribery, and the offense has earned a reputation as "the most under-prosecuted crime in penal law."⁹⁴

Despite the widespread lack of transnational regulation and enforcement, there is a growing international movement to combat private bribery through the enactment of domestic criminal laws. The movement stems largely from the initiatives of the United Nations,⁹⁵ the Council of

90. By their operation, the federal mail and wire fraud statutes would only apply to private bribery conduct involving the use of mail and wire communications, respectively. *See supra* note 88 and accompanying text. The Travel Act and RICO Act have predicate act requirements that restrict their ability to combat private bribery offenses. In order for the federal government to prosecute private bribery under these statutes, the conduct at issue must transpire in a state that criminalizes private bribery. *See Boles, supra* note 53, at 138. If the bribery transpires within a state that has not criminalized the offense, federal prosecutors may not use these federal statutes to prosecute the offense.

91. *See* John S. Siffert & Jed S. Rakoff, 5–22 BUSINESS CRIME P 22.01 (2012) (noting that "there has been limited prosecutorial activity" in the area of private bribery); JOHN P. RUPP & DAVID FINK, FOREIGN COMMERCIAL BRIBERY AND THE LONG REACH OF U.S. LAW (2012), available at http://www.cov.com/files/Publication/6f93a9ee-340d-49b3-83fe-252d3ddc8ced/Presentation/PublicationAttachment/5af5fff4-f264-42f2-aace-2781d6869cd9/Foreign_Commercial_Bribery_and_the_Long_Reach_of_U.S._Law.pdf ("The U.S. government has not used the mail and wire fraud statutes to prosecute foreign commercial bribery wholly unrelated to the bribery of government officials. . . . [T]he mail and wire fraud statutes in this respect remains unrealized."). Federal prosecutions of transnational private bribery have been especially minimal. In what appears to be the first instance of its kind, the U.S. Department of Justice has recently brought Travel Act charges to prosecute a set of U.S. executives for engaging in transnational private bribery. *See Carson*, 2011 U.S. Dist. LEXIS 154145, at *37–38 (rejecting defendants' arguments that the Travel Act only applies to conduct occurring within the United States).

92. *See* Boles, *supra* note 53, at 129–35 (discussing state law approaches to private bribery criminalization).

93. *Compare* R.I. GEN. LAWS § 11-7-5 (2012) (violators of private bribery statute face up to twenty years in prison and/or fines up to \$50,000 or three times the amount of the bribe, whichever is greater) *with* VA. CODE ANN. §§ 18.2-444, 18.2-11 (2012) (violators of private bribery statute simply face "a fine of not more than \$ 500."). *See also* Boles, *supra* note 53, at 131 (detailing state law private bribery penalty disparities).

94. Bob Wacker, *Inside the Case of Commercial Bribery: How a Kickback Scheme in Hawaii Led to LI Sting*, NEWSDAY, Feb. 8, 1988, at B1.

95. The United Nations Convention against Corruption, which assembled in 2005, recommends that member states consider criminalizing private bribery. *See* United Nations Convention Against Corruption, *supra* note 55, art. 21.

Europe,⁹⁶ the International Chamber of Commerce (“ICC”),⁹⁷ and other international organizations that aim to “promote and strengthen measures to prevent and combat corruption [in all its forms] more efficiently and effectively.”⁹⁸ These organizations actively encourage their members to adopt criminal legislation that penalizes private bribery, and their efforts have produced encouraging results.⁹⁹ Many European countries, as well as China, Russia, and other members of these international organizations, have enacted domestic private bribery legislation¹⁰⁰ in apparent recognition that “both public morals and the public order [are] jeopardized by this type of bribery.”¹⁰¹

Transnational private bribery is perhaps the bribery facet most neglected by national and subnational legislatures. In crafting and enforcing private bribery criminal legislation, most countries adhere to the standard principle of territoriality and establish jurisdiction when the bribery-related conduct transpires within their territories.¹⁰² This approach leads countries to focus on domestic private bribery violations to the exclusion of private bribery conduct with international aspects.¹⁰³ Countries encounter prosecutorial difficulties if their citizens perpetrate private bribery overseas in private commercial transactions, for murky questions of extra-territoriality arise, and countries hesitate to extend their national jurisdiction.¹⁰⁴ As a result, “in foreign business transactions [the prosecutorial] practice seems to follow the maxim: ‘When in Rome, do as the Romans do.’”¹⁰⁵

96. See Council of Europe Convention, *supra* note 47, arts. 7–8 (prohibiting private bribery in its passive and active forms).

97. In 1999, the ICC published its rules of conduct that include provisions that prohibit private bribery. See ICC, COMBATING EXTORTION AND BRIBERY: ICC RULES OF CONDUCT AND RECOMMENDATIONS 3, 5–6 (2005), available at <http://www.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2004/ICC-Rules-of-Conduct-and-Recommendations-to-Combat-Extortion-and-Bribery-%282005-Edition%29/>.

98. United Nations Convention Against Corruption, *supra* note 55, art. 1.

99. See Ryan J. Rohlfen, *Recent Developments in Foreign and Domestic Criminal Commercial Bribery Laws*, 2012 U. CHI. LEGAL F. 151, 153–57 (2012) (discussing international conventions and positions regarding private bribery).

100. See CMS LEGAL SERVICES, ANTI-BRIBERY AND CORRUPTION LAWS: AN INTERNATIONAL GUIDE 15, 23, 26, 32 (2011), available at <http://www.cms-cmck.com/Hubbard.File System/files/Publication/e3ca4c34-f31c-4e69-9ca9-01000b628b26/Presentation/Publication Attachment/2e7a1cc4-22b6-4327-b4c0-0434b2ea7417/Anti-bribery%20and%20corruption%20laws%20guide.pdf> (noting the presence of private bribery legislation in Russia, China, the United Kingdom, Germany, Austria, among other countries).

101. Tak, *supra* note 58, at 281.

102. See Huber, *supra* note 4, at 584–85 (explaining principles of territoriality).

103. See Heine, *supra* note 14, at 625 (“International matters relating to private bribery crimes seem to be a new subject for most countries.”). Reports suggest government officials ignore private bribery offenses with international aspects, often not reporting them for prosecution. See *id.* at 625.

104. Cf. *id.* at 625–27 (describing the growing recognition of jurisdiction over nationals, wherever they commit a crime).

105. *Id.* at 627.

The recent passage of the 2010 Bribery Act (the “U.K. Bribery Act”) promises more aggressive global enactment and enforcement of private bribery legislation. The United Kingdom enacted the Bribery Act (“the Act”), arguably the most comprehensive piece of anti-bribery legislation in the world, and the legislation criminalizes a broad range of corruption, including domestic and transnational private bribery.¹⁰⁶ The Act features an extraterritorial provision that extends the statute’s jurisdictional reach to all British citizens and residents, and all business entities “incorporated under the law of any part of the United Kingdom,” regardless of whether the improper conduct at issue has any territorial connection to the United Kingdom¹⁰⁷ Thus, if U.K. citizens or business entities with sufficient connections to the United Kingdom engage in private bribery abroad, they could face prosecution in the United Kingdom under the Bribery Act.

II. DISMANTLING THE CLASSIC DISTINCTION BETWEEN PUBLIC AND PRIVATE BRIBERY

The fundamental conceptual difference between public and private bribery lies in the identity of the bribery recipient, with the former featuring a public official and the latter a private sector agent. The public official’s presence in the bribery scheme directly exposes the state to various “corrupting, public-trust eroding effects,”¹⁰⁸ and the offense commands near universal concern and remedial action from governments worldwide as a consequence. Conversely, traditional understandings of private bribery highlight the absence of a direct connection to the public sector.¹⁰⁹ Conventional views deem this offense as “less serious” and less deserving of governmental intervention than public bribery,¹¹⁰ given its reception as an offense that extends its reach only into the business community.¹¹¹

Reinforcing this classic distinction, legislative and judicial bodies largely address the two forms of bribery as separate and independent wrongdoings, with some jurisdictions only regulating public bribery, and others treating the two as isolated and distinct crimes.¹¹² Legislatures that criminalize private bribery generally assign a weaker set of penalties for

106. Bribery Act, 2010, c. 23, § 1 (U.K.).

107. *Id.*, c. 23, §§ 12(4)–(5). *Accord* Andrew S. Boutros & T. Markus Funk, “Carbon Copy” *Prosecutions: A Growing Anticorruption Phenomenon in a Shrinking World*, 2012 U. CHI. LEGAL F. 259, 271 n.50 (2012) (noting the extraterritorial reach of U.K. Bribery Act).

108. *United States v. Lipscomb*, 299 F.3d 303, 309 (5th Cir. 2002) (citation omitted) (internal quotation marks omitted).

109. *See, e.g.*, *United States v. Zacher*, 586 F.2d 912, 916 (2d Cir. 1978) (“[Private bribery] denotes violation of a trust or duty—but of a private rather than a public nature.”) (citation omitted).

110. *See infra* note 115 and accompanying text; *United States v. Michael*, 456 F. Supp. 335, 347 (D. N.J. 1978) (“It appears that the New York Legislature has confined its view of bribery as a serious crime to only those cases involving bribery of a public official . . .”).

111. *See* Albin Eser, *Preface* to PRIVATE COMMERCIAL BRIBERY, *supra* note 4, at vii, vii (noting the conventional view that private bribery merely threatens the commercial sector).

112. *See supra* Parts I.B–C.

this offense than for public bribery.¹¹³ Some governments leave their anti-private bribery legislation outside of their penal codes, instead placing the legislation in labor or commercial codes, where such legislation lies ignored.¹¹⁴ The actions of the Louisiana legislature represent the traditional approach adopted by many national legislatures toward the public-private bribery divide.

Louisiana distinguished between bribery of its public officials and commercial bribery: the public bribery statute has a five year, \$1000 fine maximum punishment whereas commercial bribery has only a six month, \$500 fine maximum punishment. It is obvious that the legislature considered bribery of public officials to be much more serious. . . . In other words, bribery of Louisiana public officials is very serious because it affects their government, commercial bribery is somewhat less serious but it affects the economy of the state¹¹⁵

Existing legal scholarship buttresses the distinction between public and private bribery, but the bulk of this scholarship neither critically examines the conceptual links that connect these two forms of bribery nor analyzes the substantive justifications for treating them as separate offenses.¹¹⁶ The interrelated nature of public and private bribery remains underexplored. This Part analyzes the conceptual similarities between public and private bribery, the commonalities in the harms generated by both offenses, and the substantive morphing of the two offenses worldwide from the effects of privatization.

113. See, e.g., *Michael*, 456 F. Supp. at 347 (“Under the statutory mechanism prevailing in New York—commercial bribery is a misdemeanor subject to not more than 3 months’ imprisonment while bribery of a public official is punishable by up to 7 years’ imprisonment. . . .”); Bonifassi, *supra* note 17, at 101 (comparing the “mild sanctions” for private bribery violations to the harsher penalties for public bribery); Michael Uberhofen, *Germany*, in *PRIVATE COMMERCIAL BRIBERY*, *supra* note 4, at 115, 120 (“Although the bribery of public officials has been a codified criminal offense for centuries and was included as a crime in the Criminal Code (StGB) of 1871, bribery in the private sector in Germany has been, and still is, only minimally penalized.”).

114. See, e.g., Bonifassi, *supra* note 17, at 91 (describing the decision of the French government to move its private bribery legislation from its Criminal Code to its Labor Code, where it effectively has been “thrust aside” and ignored); Saito, *supra* note 17, at 195-96 (explaining that Japan’s private bribery prohibitions are located in its Code of Commerce, not its Penal Code).

115. *United States v. Tonry*, 837 F.2d 1281, 1284 (5th Cir. 1988).

116. See *Need for Legislation*, *supra* note 60, at 599 (differentiating between public and private bribery); Note, *Control of Nongovernmental Corruption by Criminal Legislation*, 108 U. PA. L. REV. 848, 848 (1960) (same). Private bribery itself continues to be under-examined in legal scholarship. See David Mills & Robert Weisberg, *Corrupting the Harm Requirement in White Collar Crime*, 60 STAN. L. REV. 1371, 1406 (2008) (describing commercial bribery as a “fascinatingly under-explored area”).

A. *Public and Private Bribery Embody Parallel Conceptual Features*

By separating bribery in the public and commercial arenas into two independent crimes, modern criminal jurisprudence treats the two manifestations of bribery as discrete and unconnected offense categories. Such treatment emphasizes the differences and ignores the substantive commonalities between the two types of bribery and leads to different treatment in the criminal justice system. The underlying acts that constitute both crimes arguably function as the congruent halves of bribery that produce a coherent conceptual whole. Both crimes derive from the same corrupt foundation and feature parallel, central duty-violation and breach-of-trust elements.

1. *Public and Private Bribery Are Twin Manifestations of Corruption*

Whether in the public or private sector, bribery agreements constitute fundamentally corrupt arrangements.¹¹⁷ This concept of corruption establishes the foundation for both bribery forms, for “[b]ribery is regarded as active corruption.”¹¹⁸ Corruption is “the act of doing something with an intent to give some advantage inconsistent with official duty and the rights of others; [or] a fiduciary’s or official’s use of a station or office to procure some benefit either personally or for someone else, contrary to the rights of others.”¹¹⁹ Public and private bribery at their core epitomize this standard definition of corruption. They both feature a briber giving a benefit to an agent (of a public or private entity) in return for that agent showing favor to the briber.¹²⁰ This suspect agreement between the parties induces agents to misuse their position for self-enrichment, the classic marker of corruption.¹²¹

The nature of corruption shared by public and private bribery is the “selling of what our society deems not to be legitimately for sale,” whether it be, for instance, a politician’s vote, in the instance of public bribery, or a purchasing manager’s actions on behalf of his or her employer, in the in-

117. See 1976–1977 VA. ATT’Y GEN. OPINION (Sept. 22, 1976), 1976 Va. AG LEXIS 96, at *14 (“The gist of a bribe is corruption, which in the context under consideration, arises when an improper variable is injected into the decision making process . . .”); Boles, *supra* note 53, at 144.

118. Leijonhufvud, *supra* note 74, at 409.

119. BLACK’S LAW DICTIONARY 371 (8th ed. 1999). Accord Leijonhufvud, *supra* note 74, at 410 (“[C]orruption’ denotes various kinds of improper actions undertaken with the object of influencing the decision-making processes and procedural activities of society.”); Nye, *supra* note 22, at 419 (“Corruption is behavior which deviates from the formal duties of a public role because of private-regarding (personal, close family, private clique) pecuniary or status gains; or violates rules against the exercise of certain types of private-regarding influence.”).

120. See Franklin A. Gevurtz, *Rethinking Corruption: An Introduction to a Symposium and a Few Additional Thoughts*, 20 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 237, 238 (2007) (“The essence of bribery is giving something of value to an official or agent in exchange for the official or agent exercising his or her authority in a manner favorable to the party giving the payment.”).

121. See *supra* note 119 and surrounding text.

stance of private bribery.¹²² Corruption is a central defining factor for public and private bribes, in that its presence distinguishes public and private bribes from legitimate business gifts and appropriate payment for services.¹²³ Legislatures,¹²⁴ courts,¹²⁵ scholars,¹²⁶ and international organizations¹²⁷ acknowledge the significant role that corruption plays in bribery agreements, but despite this plethora of voices, some continue to justify bribery as an economically efficient ways “to get things done.”¹²⁸ Such viewpoints ignore the corrupt nature of these practices and the practical harms that flow from them.¹²⁹ In short, “[t]he common thread that runs through common law and statutory formulations of [public and private bribery] is the element of corruption.”¹³⁰

2. Public and Private Bribery Are Functionally Equivalent Offenses

Beyond public and private bribery’s corrupt underpinnings lies a set of core conceptual elements present in both offenses. The elements, fiduciary duty and breach of trust violations, demonstrate that public and private bribery can be viewed as virtually the same offense perpetrated in two

122. United States v. Zacher, 586 F.2d 912, 916 (2d Cir. 1978)

123. *Id.*

124. See, e.g., Corruption of Foreign Public Officials Act, 1998 S.C., c. 34 (Can.) (corruption of foreign public officials encompasses public bribery); ARIZ. REV. STAT. ANN. § 13-2602(A) (2012) (“A person commits bribery of a public servant or party officer if with corrupt intent . . .”); CAL. PENAL CODE § 641.3 (2013) (“Any employee who solicits, accepts, or agrees to accept . . . anything of value . . . corruptly and without the knowledge or consent of the employer . . . is guilty of commercial bribery.”); W. VA. CODE § 61-5A-10 (2012) (addressing “bribery and other corrupt practices”).

125. See, e.g., Man-Seok Choe v. Torres, 525 F.3d 733, 738 (9th Cir. 2008) (explaining that Korea’s public bribery statute mirrors the corresponding U.S. statute in that both criminalize the corruption of public officials); In Town Hotels Ltd. P’ship. v. Marriott Int’l, Inc., 246 F. Supp. 2d 469, 481 (S.D.W.V. 2003) (describing private bribery as corruption of the principal-agent relationship).

126. Fenyk, *supra* note 71, at 18 (“Corruption in the private sector includes the offer of a bribe to an intermediary who awards a contract.”) (emphasis omitted); Leijonhufvud, *supra* note 74, at 405 (defining private bribery as “corruption in business relations”).

127. Council of Europe, Civil Law Convention on Corruption art. 2, Sept. 9, 1999, C.E.T.S. No. 174, available at <http://conventions.coe.int/Treaty/en/Treaties/Html/174.htm> (defining “corruption” as the offering, giving, requesting or accepting a bribe or any other undue advantage).

128. Jac C. Heckelman & Benjamin Powell, *Corruption and the Institutional Environment for Growth* 1 (Suffolk Univ. Research Working Paper No. 2008-6, 2008), available at <http://192.138.214.118/RePEc/docs/wpaper/2008-6.pdf>. Researchers Kaufmann and Wei coined the term “efficient grease hypothesis” to describe the notion that bribery yields lower amounts of red tape, and this hypothesis posits that bribery can boost economic efficiency and thus regulating bribery would be counter-productive. Daniel Kaufmann & Shang-Jin Wei, *Does “Grease Money” Speed Up the Wheels of Commerce?* 2 (Nat’l Bureau of Econ. Research, Working Paper No. w7093, 1999), available at <http://ssrn.com/abstract=162974>.

129. See *infra* Part II.B. As aptly expressed by the Second Circuit Court of Appeals, “[t]here can be no question but that any crime of bribery involves moral turpitude.” United States v. Esperdy, 285 F.2d 341, 342 (2d Cir. 1961).

130. United States v. Zacher, 586 F.2d 912, 915 (2d Cir. 1978)

different contexts.¹³¹ Common law and statutory formulations cast these elements in differing terminology when defining public and private bribery, but from a comparative standpoint, the elements represent a theoretical base shared by both offenses.

a. Public and Private Bribery Feature Fiduciary Duty Violations

An essential component of public and private sector bribery is the violation of a fiduciary duty of loyalty owed to the public or to the private sector principals.¹³² In both bribery forms, the bribe “in essence is an attempt to influence another to disregard his duty while continuing to appear devoted to it or to repay trust with disloyalty.”¹³³ Under the lens of this primary characteristic, the sole difference between the two bribery forms is the identity of the fiduciary duty beneficiary.

Public agents owe fiduciary duties of loyalty to the public to make and execute governmental decisions that serve the public’s best interest.¹³⁴ In democracies, the public elects its officials, and governmental entities hire their personnel, with the understanding that these agents will act for the common good.¹³⁵ From this relationship emerges a political contract, where the public agent works to benefit the public, and the public compensates the agent in return.¹³⁶ Whenever a third party bribes a public agent, that agent violates fiduciary duties of loyalty arising from the political contract he or she formed with the public.¹³⁷ The facilitating third party briber correspondingly seeks to benefit by influencing the public agent to breach the fiduciary duties.¹³⁸

Fiduciary duty violations also form the crux of private bribery agreements.¹³⁹ Employees and other agents in the private sector owe their prin-

131. *See id.* (explaining that public and private bribery offenses entail fiduciary duty and breach of trust violations).

132. *See* *United States v. Rooney*, 37 F.3d 847, 852 (2d Cir. 1994) (the essence of public sector bribery is a breach of fiduciary duty owed to the public); *United States v. Walgren*, 885 F.2d 1417, 1422 (9th Cir. 1989) (relaying notion that “if an employee of the State accepts bribes, he violates his duty of loyalty to the people of the State”) (citation omitted) (internal quotation marks omitted); CITY OF OAKLAND, ETHICS RESOURCE GUIDE 18 (2013), available at <http://www2.oaklandnet.com/oakca1/groups/cityadministrator/documents/webcontent/oak023337.pdf> (“Public officials have a duty of loyalty to their constituents.”).

133. *Esperdy*, 285 F.2d 341, 342 (2d Cir. 1961).

134. *United States v. Langford*, 647 F.3d 1309, 1321 (11th Cir. 2001).

135. *Id.* (quoting *United States v. deVegter*, 198 F.3d 1324, 1328 (11th Cir. 1999)).

136. *See id.*

137. *See id.*; *United States v. Jacobs*, 431 F.2d 754, 759 (2d Cir. 1970) (“[T]he evil sought to be prevented by the deterrent effect of [the bribery statute] is the aftermath suffered by the public when an official is corrupted and thereby perfidiously fails to perform his public service and duty.”).

138. *United States v. Alfisi*, 308 F.3d 144, 155 (2d Cir. 2002).

139. *See Bribery in Commercial Relationships*, *supra* note 73, at 1249 n.10 (“The breach of fiduciary duty has been considered the foundation of the [private bribery] offense.”); *United States v. Parise*, 159 F.3d 790, 805 (3d Cir. 1998) (“[T]he core of the offense is the breach of an agent’s duty of loyalty.”).

cipals a fiduciary duty of loyalty that requires the agents to act in their principals' best interests by putting the principals' interests above all others in matters connected to the agency relationship.¹⁴⁰ This affirmative duty arises by virtue of the principal-agency relationship,¹⁴¹ and virtually all employment agreements encompass the duty as an implied contractual condition.¹⁴² If private sector agents accept bribes from third parties when performing their workplace obligations, they violate this duty of loyalty.¹⁴³ Agents do not demonstrate undivided loyalty to their principals if the agents solicit or receive bribes in exchange for acting on their bribers' behalf when conducting their principals' affairs.¹⁴⁴ By accepting bribes, agents further their own interests at their principals' expense, in automatic violation of their fiduciary duty.¹⁴⁵ Indeed, legislatures criminalize private bribery "on the theoretical premise that such acts represent a violation of the duty of loyalty that an employee owes to an employer."¹⁴⁶

Public and private bribery's theoretical connections to fiduciary duty violations, and, more broadly, agency law, derive from Roman law, which held that a person charged with official duties must not implement them in exchange for receiving benefits from third parties.¹⁴⁷ Under contemporary formulations, public and private sector bribes uniformly violate fiduciary duties of loyalty. The source of differentiation between the two bribery forms merely lies with the classification of the principal, in that public and private sector bribery recipients owe their duties to public and private entities, respectively.

b. Public and Private Bribery Implicate Betrayals of Trust

Alternative conceptualizations of public and private bribery cast the offenses as the concealed abuse of a position of trust, defined as "the expectation that one will do what one is relied on to do."¹⁴⁸ This approach

140. See RESTATEMENT (THIRD) OF AGENCY § 8.01 (2006) (stating that agent has a fiduciary duty to act loyally for the principal's benefit); Bruce A. McGovern, *Fiduciary Duties, Consolidated Returns, and Fairness*, 81 NEB. L. REV. 170, 179-80 (2002) ("[T]he fiduciary's duty of loyalty generally requires the fiduciary to act in the best interests of the beneficiary and to put the beneficiary's interests above the interests of all other parties, including those of the fiduciary.").

141. See *supra* Part I.C.1 (discussing the duty of loyalty held by agents in the private sector).

142. See *Need for Legislation*, *supra* note 60, at 603.

143. See *supra* Part I.C.1.

144. See *Parise*, 159 F.3d at 800.

145. *Id.*

146. *Id.* at 799–800. Accord CMS LEGAL SERVICES, *supra* note 100, at 8, 13, 34 (referencing fiduciary duty violation within Albanian, Slovakian and Swiss private bribery laws).

147. See Saito, *supra* note 17, at 197; NOONAN, *supra* note 25, at 52 (describing Cicero's views that "the foulest of acts was taking money for something judged.").

148. NOONAN, *supra* note 25, at 704. Accord *United States v. Duvall*, 846 F.2d 966, 972 (5th Cir. 1988) (defining a bribe as "money or favor bestowed on or promised to a person in a position of trust to pervert his judgment or influence his conduct; [it is] something that serves to induce or influence.") (citation omitted) (internal quotation marks omitted).

views both forms of bribery as undermining the integrity of those placed in positions of trust, given that such individuals betray trusts that are bestowed upon them when they accept bribes.¹⁴⁹ The Council of Europe Convention relays the approach's underlying premise, that interpersonal trust is "necessary for the maintenance and development of social and economic relations" in the public and private sectors.¹⁵⁰ Under this viewpoint, bribery prohibitions safeguard the integrity of relationships by deterring individuals from participating in bribery and thereby protecting established bonds of trust.

The conception of bribery as a breach of trust emanates from multiple international sources¹⁵¹ and connects to the notion of bribery as fiduciary duty, in that the bribery recipient, by accepting a bribe, simultaneously breaches a fiduciary duty and violates garnered trust. The bribery as a breach of trust approach treats public and private bribery as essentially equivalent offenses, with recipients of public and private bribes abusing their positions of public and private trusts, respectively.¹⁵²

A seemingly universal tenet of democratic governance posits that the public imparts its trust to its elected officials and other government employees and agents to carry out their duties in the public's best interest.¹⁵³ If government agents accept bribes, they violate the trust bestowed upon them and defraud the public of their honest services.¹⁵⁴ Their conduct damages the public's trust and confidence in government actors and institutions,¹⁵⁵ harming the social fabric. As Judge Noonan explains:

149. See NOONAN, *supra* note 25, at 704 (explaining the notion that bribery is "always a betrayal of trust").

150. COUNCIL OF EUR., CRIMINAL LAW CONVENTION ON CORRUPTION EXPLANATORY REPORT art. 7 (1998) [hereinafter COUNCIL OF EUROPE EXPLANATORY REPORT], available at <http://conventions.coe.int/Treaty/en/Reports/Html/173.htm>.

151. See, e.g., text accompanying note 148; G.R. Sullivan, *England and Wales*, in PRIVATE COMMERCIAL BRIBERY, *supra* note 4, at 55, 65 (noting that under U.K. law, the essence of bribery is "the clandestine abuse of a position of trust"); *R. v Boston* (1923) 33 CLR 386 (Austl.), (explaining that all bribery cases addressed by the High Court of Australia "rest on the violation of a public trust."); *Queen v Nua*, [2001] 3 NZLR 483 (CA) (describing bribery as a "gross breach of trust").

152. See *United States v. Zacher*, 586 F.2d 912, 916 (2d Cir. 1978) (distinguishing public and private bribery as involving respective violations of public and private trusts).

153. See, e.g., *United States v. Snook*, 366 F.3d 439, 450 (7th Cir. 2004) (government agents and employees hold positions of trust with the public); Granting Immunity From Prosecution to Givers of Bribes and Other Gifts and to Their Accomplices in Bribery and Other Graft Cases Against Public Officers, PRES. DEC. NO. 749 (July 18, 1975) (Phil.), available at http://www.worldlii.org/ph/legis/pres_decree/pdn749181/pdn749181.html ("Whereas, public office is a public trust: public officers are but servants of the people, whom they must serve with utmost fidelity and integrity"); *Boston*, 33 CLR 386 (Austl.) ("[E]very member elected by the people undertakes, and has imposed upon him, a public duty and a public trust.") (citation omitted) (internal quotation marks omitted).

154. *United States v. deVegter*, 198 F.3d 1324, 1328 n.4 (11th Cir. 1999).

155. See, e.g., Saito, *supra* note 17, at 197.

The social injury inflicted by breaches of trust goes beyond any material measurement. When government officials act to enrich themselves they act against the fabric on which they depend, for what else does government rest upon except the expectation that those chosen to act for the public welfare will serve that welfare? The trust comes with the office.¹⁵⁶

Given the importance of maintaining confidence in the public sector, governments criminalize public bribery in part to promote the honesty of public officials and promote the public's trust and confidence in government.¹⁵⁷

Individuals and business entities similarly place their trust in the agents whom they select to manage their affairs and act on their behalf in the private sector. Principal-agent engagements create "relationships of trust" that, in the aggregate, foster transparency and assurance in national and global marketplace operations.¹⁵⁸ When private sector agents accept bribes in the course of administering their responsibilities, they betray the trust expected of them.¹⁵⁹ Such betrayal weakens principals' dependence in their agents and decreases the levels of integrity in business transactions.¹⁶⁰ In addition, public confidence in the viability of the commercial sector erodes when private bribery arrangements are brought to light.¹⁶¹ Mindful of these public and private sector dangers, countries that maintain criminal laws penalizing private bribery do so in order to protect "the trust between an employer and his employees."¹⁶²

By violating interpersonal trust, public and private bribery deplete an essential ingredient for a stable, functioning society. Social psychological research findings demonstrate that trust is necessary to create and maintain healthy relationships as it strengthens cooperation within and among

156. NOONAN, *supra* note 25, at 704.

157. See Randy J. Curato et al., *Government Fraud, Waste and Abuse: A Practical Guide to Fighting Official Corruption*, 58 NOTRE DAME L. REV. 1027, 1089 (1983).

158. *Niagra Mohawk Power Corp. v. Freed*, 288 A.D.2d 818, 830 (N.Y. App. Div. 2001).

159. See Huber, *supra* note 4, at 579 ("The employee, partner, or managing director who accepts a bribe to act or refrain from acting in a manner that is contrary to his principal's interest betrays the trust and loyalty expected of him based upon the contract between them.").

160. See Byung-Sun Cho, *Korea, in PRIVATE COMMERCIAL BRIBERY*, *supra* note 4, at 231, 244 (relaying the majority view adopted by the Korean Supreme Court that private bribery prohibitions protect "the legal interest [of] . . . integrity in commercial transactions.").

161. See Dale A. Oesterle, *Limits on a Corporation's Protection of its Directors and Officers from Personal Liability*, 1983 WIS. L. REV. 513, 514 n.4 (1983) (discussing a severe erosion of public confidence in the private sector after the widespread disclosure of commercial bribery and questionable political contributions in the 1970s).

162. Bonifassi, *supra* note 17, at 92 (describing purpose of private bribery prohibitions in France). *Accord* Tak, *supra* note 58, at 284 (Dutch law criminalizes private bribery to safeguard the trust between employers and employees); *State v. Cohen*, No. 1 CA-CR 97-0707, 1999 Ariz. App. LEXIS 49, at *13 n.4 (Ariz. Ct. App. Apr. 1, 1999) (Washington State private bribery statute penalizes the conferring of a benefit "upon an employee with the understanding that the employee will violate a duty of . . . trust owed to the employer.").

groups and promotes stability across social networks.¹⁶³ A bribery agreement yields pernicious effects upon trust maintenance; it decreases the expectations, predictability, and confidence in agents' behavior. The secrecy and deception inherent in public and private bribery arrangements particularly enable the breaches of trust and the agents' disloyalty to remain unnoticed.¹⁶⁴ When one views an act of bribery as a breach of trust, any differences between public and private bribery become immaterial, as the underlying nature of the trust violation remains unchanged whether it transpires in the public or private bribery context.¹⁶⁵

B. *Public and Private Bribery Jointly Harm Public and Private Sector Interests*

Worldwide awareness of public bribery and its attendant harms generally remains strong. The OECD crisply summarizes public bribery's harms to the public and private sectors, noting that the offense "is a widespread phenomenon in international business transactions, including trade and investment, which raises serious moral and political concerns, undermines good governance and economic development, and distorts international competitive conditions."¹⁶⁶ The global citizen largely understands the dangers inherent in bribing domestic public officials,¹⁶⁷ and international consciousness of foreign public bribery and its harms continues to grow.¹⁶⁸

Conversely, the general public is less familiar with private bribery and its damaging effects.¹⁶⁹ A growing body of research reveals how private

163. See generally Daniel Balliet & Paul A. M. Van Lange, *Trust, Conflict, and Cooperation: A Meta-Analysis*, PSYCHOL. BULLETIN (Dec. 10, 2002), available at http://www.academia.edu/2033226/Trust_Conflict_and_Cooperation_A_Meta-analysis.

164. See COUNCIL OF EUROPE EXPLANATORY REPORT, *supra* note 150, ¶ 55 (noting that secrecy is "the essence of the [private bribery] offence" and that it "threatens the interests of the private sector entity and makes it dangerous"); *United States v. Holzer*, 816 F.2d 304, 309 (7th Cir. 1987) (observing that "no public official in the United States takes bribes openly"); *Sirkin v. Fourteenth Street Store*, 124 A.D. 384, 391 (N.Y. App. Div. 1908) ("The vice [of private bribery] lies in making the agreement without the knowledge of the master.").

165. Cf. *United States v. Forsythe*, 429 F. Supp. 715, 721 n.5 (W.D. Pa. 1977) (noting the violations of trust inherent in public and private bribery offenses).

166. OECD CONVENTION, *supra* note 46, at 6. See also *supra* Part I.B (explaining how public bribery harms the public and private sector).

167. See, e.g., OECD, TURKEY: PHASE 2 REPORT ON THE APPLICATION OF THE CONVENTION ON COMBATTING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS 10 (2007), available at <http://www.oecd.org/investment/anti-bribery/anti-briberyconvention/39862163.pdf> (noting widespread public awareness of domestic bribery in Turkey); UNITED NATIONS OFFICE ON DRUGS & CRIME, CORRUPTION IN AFGHANISTAN: RECENT PATTERNS AND TRENDS 3 (2012), available at <http://info.publicintelligence.net/UNODC-AfghanCorruption.pdf> (population survey report detailing how the vast majority of the Afghan population experiences harms attendant to public bribery).

168. See *Fighting Foreign Bribery: An Initiative to Raise Awareness*, OECD 3–4 (2010), <http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/45791299.pdf> (last visited Apr. 10, 2014) (detailing increasing awareness of foreign public bribery).

169. See C. Gopinath, *Recognizing and Justifying Private Corruption*, 82 J. BUS. ETHICS 747, 749 (2008) (discussing public awareness of private bribery); Keith E. Henderson &

bribery offenses harm a broad spectrum of public and private sector interests,¹⁷⁰ but a number of policy makers, legal scholars, and business people worldwide appear to misunderstand grossly the nature of these harmful effects.¹⁷¹ Because public sector agents cannot engage in private bribery by definition, many apparently reach the conclusion that private bribery does not harm the public sector. Such misunderstandings contribute to an assumption that private bribery is considerably less serious than public bribery, and reinforce the impulse to treat the two bribery forms as separate and distinct offenses, with attention and enforcement action devoted towards thwarting only public bribery.¹⁷²

The traditional view of private bribery's harms, widely held internationally, posits that the offense *only* threatens the private sector, and in particular, private sector employers.¹⁷³ Criticisms leveled by a set of Swiss right-wing political parties concerning certain Swiss private bribery criminal statutes exemplify the traditional view, for these parties have argued that private bribery "is not a danger to everyone, but only to major companies, which can defend themselves."¹⁷⁴ Various private bribery discussions in legal scholarship allude to the offense's supposed lack of harm to the public sector and perpetuate the traditional view.¹⁷⁵ This view fails to recognize the ways in which private bribery simultaneously harms a range of public and private sector interests¹⁷⁶ and reinforces an overall "what's

Karen A. Guida, *United States*, in PRIVATE COMMERCIAL BRIBERY, *supra* note 4, at 479, 552 ("[T]here [is] a dearth of information related to private bribery as opposed to public bribery.").

170. See Boles, *supra* note 53, at 153-58 (explaining harmful effects of private bribery); Gevurtz, *supra* note 8, at 373-87 (same); *Bribery in Commercial Relationships*, *supra* note 73, at 1248 (same).

171. See, e.g., D.E. Ytreberg, Annotation, *Validity and Construction of Statutes Punishing Commercial Bribery*, 1 A.L.R. 3d 1350 §3(b) (2010) (describing viewpoint that private bribery statutes are "not needed to protect the health, morals, or welfare of the public"); Christopher R. Yukins, *Integrating Integrity and Procurement: The United Nations Convention against Corruption and the UNCITRAL Model Procurement Law*, 36 PUB. CONT. L. J. 307, 323-24 (2007) (criticizing the U.N. Convention against Corruption for encouraging its member states to adopt laws that prohibit private bribery).

172. See John P. Woods, *Civil Forfeiture as a Remedy for Corruption in Public and Private Contracting in New York*, 75 ALB. L. REV. 931, 961 (2011) (relaying that the public interest in deterring private bribery is not as strong as it is in deterring public bribery); Eser, *supra* note 111, at vii (enforcement of private bribery violations lags significantly behind that of public bribery violations).

173. See Eser, *supra* note 111, at vii (detailing the traditional view that private bribery is simply a form of disloyalty to one's employer).

174. Karl-Ludwig Kunz, Nadja Capus & Philipp Keller, *Switzerland*, in PRIVATE COMMERCIAL BRIBERY, *supra* note 4, at 435, 471.

175. See Evan Tsen Lee, *Cancelling Crime*, 30 CONN. L. REV. 117, 136 n.55 (1997) ("Commercial bribery, of course, does not involve the public trust.").

176. Through bribing a company's agent, the briber effectively shuts out its competitors from consideration by the bribed agent's company, thereby creating anti-competitive effects. The bribed agent's company may likely pay for the cost of the bribe through inflated contracts with the briber. See *supra* Part I.C. For these reasons, the offense "poses an obvious risk to free markets" domestically and internationally. Searby, *supra* note 13, at 2 ("If you

the big deal?” attitude towards the offense.¹⁷⁷ Fox Sports Australia commentator Andy Harper described this attitude when he opined on private bribery allegations faced by FIFA leadership: “people sort of shrug their shoulders and well, you know, in some cases that’s the way business is done.”¹⁷⁸

Recent scholarship documents how the traditional view is demonstrably incorrect, as the research highlights how the crime’s anticompetitive effects distort the functioning of economies, boost prices, and lower the quality of goods and services for consumers.¹⁷⁹ Private bribery threatens free and unrestrained competition, the effective functioning of local, national and international trade, the integrity of labor relations, and the protection of free competition.¹⁸⁰ Hence, “the public moral and public order regarding commercial transactions [are] at stake in cases of [private] bribery.”¹⁸¹ The traditional view that private bribery only impacts businesses rests on false assumptions, for the public is the ultimate victim in this offense.¹⁸²

C. *The Merging of Public and Private Bribery Boundaries in Domestic and International Markets through Privatization*

Conceptual similarities aside, the boundaries of public and private bribery are merging as a result of the international privatization movement. The movement involves the transfer of functions from the public to the private sectors, and is reconfiguring government at all levels. Codifying public and private bribery as two discrete and distinct offenses clashes with the privatization movement in its shifting of governmental functions to the private sector.

1. Privatization Is Internationally Omnipresent

Privatization describes an international movement designed to shift ownership of assets and services from the state to the private sector.¹⁸³

can bribe your customer’s purchasing manager, you may succeed without having the lowest price or the best product.”).

177. See Peter Williams, *The Only Way Is Ethics*, THE TREASURER, Oct. 2011, at 37, available at www.treasurers.org/system/files/Oct11TTethics36-38.pdf (describing the viewpoint that bribery is just “part of doing business”).

178. Ashley Hall, *Bribery Revelations ‘No Surprise’ to Soccer Fans*, AUSTRALIAN BROAD. CORP. (July 12, 2012, 12:42 PM), <http://www.abc.net.au/worldtoday/content/2012/s3544281.htm> (discussing private bribery allegations surrounding leaders of the International Federation of Association Football).

179. See *supra* Part I.C.1.

180. See *supra* Part I.C.1.

181. Cho, *supra* note 160, at 244.

182. See *id.*

183. Alfred C. Aman, Jr., *Globalization, Democracy, and the Need for a New Administrative Law*, 49 UCLA L. REV. 1687, 1690 (2002). See also Lawrence Azubuike, *Privatization and Foreign Investments in Nigeria*, 13 TULSA J. COMP. & INT’L L. 59, 63 (2005) (“Privatization is essentially the withdrawal of the government from active and direct participation in the affairs of an enterprise, which it hitherto owned.”).

The term is synonymous with private-sector outsourcing, “the use of the private sector in the provision of a good or service, the components of which include financing, operations (supplying, production, delivery), and quality control.”¹⁸⁴ Privatization encompasses a number of different forms, including a government’s departure from an activity area or from the provision of certain services to the public.¹⁸⁵ One of its most prevalent models involves the use of private sector entities “to implement government programs or to provide services to others on the government’s behalf.”¹⁸⁶ Governments implement privatization programs by contracting, leasing, selling, franchising, and vouchering government-held assets to private entities; commercializing government departments; terminating services; and deregulating industry segments to permit private entities to produce and deliver goods and services to the public, among other methods.¹⁸⁷ Telecommunication networks and facilities, garbage collection, fire-fighting services, public utilities, military support services, airports, highways, air traffic control systems, and other public infrastructure segments are frequent targets for sweeping privatization efforts around the world.¹⁸⁸

Privatization efforts aim to downsize governmental functions by placing “traditionally public decisions into the hands of the private sector.”¹⁸⁹ Many conservative policymakers, academics, and public intellectuals promote privatization efforts as a technique to shrink the size of government, reap cost savings, and provide the public with the same goods and services more efficiently,¹⁹⁰ under the assumption that the marketplace operates

184. Matthew Titolo, *Privatization and the Market Frame*, 60 *BUFF. L. REV.* 493, 493–94 (2012) (citation omitted) (internal quotation marks omitted).

185. Gillian E. Metzger, *Privatization as Delegation*, 103 *COLUM. L. REV.* 1367, 1370 (2003). See also Matthew Diller, *Introduction: Redefining the Public Sector: Accountability and Democracy in the Era of Privatization*, 28 *FORDHAM URB. L.J.* 1307, 1389 (2001) (describing the strands of privatization to include “contracting out the delivery of services, divestiture of government owned resources and institutions, the establishment of private communities with quasi-governmental powers, the creation of voucher programs to replace the direct delivery of services, [and] the movement toward incentive-based or private forms of regulation . . .”).

186. Metzger, *supra* note 185, at 1370.

187. Richard W. Bauman, *Foreword*, 63 *LAW & CONTEMP. PROBS.* 1, 2 (2000); Diller, *supra* note 185, at 1308; Jody Freeman, *Extending Public Law Norms through Privatization*, 116 *HARV. L. REV.* 1285, 1287 (2003).

188. See Bauman, *supra* note 187, at 9 (listing segments of public infrastructure frequently targeted for privatization); Michele Estrin Gilman, *Legal Accountability in an Era of Privatized Welfare*, 89 *CALIF. L. REV.* 569, 598 (2001) (same).

189. Alfred C. Aman, Jr., *The Globalizing State: A Future-Oriented Perspective on the Public/Private Distinction, Federalism, and Democracy*, 31 *VAND. J. TRANSNAT’L L.* 769, 774 (1998). Professor Aman explains that the purpose of privatization “is to return decision-making back to the private sector, where private ordering and a market economy, coupled with clear property rights and effective criminal law enforcement, will supply the structure, order, stability, and rules needed for the economy to prosper.” *Id.* at 803.

190. Freeman, *supra* note 187, at 1291–92; Jon D. Michaels, *Privatization’s Pretensions*, 77 *U. CHI. L. REV.* 717, 718–19 (2010).

more efficiently than the government.¹⁹¹ Thus, privatization's principal lure "is the lure of market competition—and the concomitant belief that private firms can provide goods and services better, faster, and cheaper than the government."¹⁹²

Privatization programs are flourishing internationally,¹⁹³ with many governments operating under the premise that the private sector should conduct as much public business as possible.¹⁹⁴ As the World Bank notes, "[i]t is hard to find a country without a privatization program, or a sector of activity not susceptible to private management if not ownership."¹⁹⁵ Supporters tout the movement as a method for developing national markets and facilitating economic growth.¹⁹⁶ For instance, the International Monetary Fund and the World Bank actively encourage developing countries to employ privatization methods,¹⁹⁷ as such methods purportedly strengthen national economies by attracting foreign capital and promoting foreign investment.¹⁹⁸

The process of "reinventing government as leaner and meaner" through privatization has effectively expanded the scope of private sector activity across the world.¹⁹⁹ Implementing this privatization process in turn has blurred the boundaries of the public and private sectors. A fundamental tenet of many legal systems casts the public and private sectors into distinct spheres, with different constitutional constraints applied to each,

191. Titolo, *supra* note 184, at 494.

192. Michaels, *supra* note 190, at 725 (citation omitted) (internal quotation marks omitted). Despite its purported benefits, privatization has attracted heavy criticism due to its harmful effects. See, e.g., Panel Discussion, *The Changing Shape of Government*, 28 FORDHAM URB. L.J. 1319, 1320 (2001) [hereinafter, *Changing Shape of Government*] (criticizing privatization efforts for "diminishing . . . transparency, diminishing . . . opportunities for public participation, and, in particular, . . . diminishing . . . information flows that make public participation meaningful"); Michaels, *supra* note 190, at 718 (discussing how "the excessive delegation of sovereign authority pav[es] the way for private contractors to abuse their discretion, evade oversight, and generate unanticipated cost overruns").

193. See Bauman, *supra* note 187, at 1 (describing international privatization movements as transformational in their impact); Azubuike, *supra* note 183, at 60 ("[P]rivatization is part of the overall restructuring of the political and economic lives of many nations; from communism to market economies, from dictatorship to democracy, and, in the case of developing countries, from neo-colonialism to an attempt at true independence.").

194. Titolo, *supra* note 184, at 525. Accord Michaels, *supra* note 190, at 725 ("[P]rivate contractors are assuming ever larger and ever more sensitive roles in carrying out public functions, all ostensibly in the name of efficiency and good governance.").

195. Sunita Kikeri, John Nellis & Mary Shirley, *Outreach #3: Policy Views from the Country Economics Department*, WORLD BANK (July, 1992), <http://www.worldbank.org/html/prddr/outreach/or3.htm>.

196. See Stavros Gadinis, *Can Company Disclosures Discipline State-Appointed Managers? Evidence from Greek Privatizations*, 13 THEORETICAL INQUIRIES IN L. 525, 527 (2012) (discussing privatization as a method for developing national markets).

197. See Bauman, *supra* note 187, at 7; Jeffrey Davis et al., *Fiscal and Macroeconomic Impact*, INT'L MONETARY FUND (2000), <http://www.imf.org/external/pubs/nft/op/194/>.

198. See Azubuike, *supra* note 183, at 68.

199. Michaels, *supra* note 190, at 718 (citation omitted) (internal quotation marks omitted); see Azubuike, *supra* note 183, at 64.

and with a clear demarcating line of separation.²⁰⁰ Privatization morphs this traditional border by embedding private entities in governance, causing “the boundaries between the public and private sectors [to] become pervasively blurred.”²⁰¹ By delegating governmental power to the private sector, privatization has blended together public and private power at every level of government, redefining the nature of public and private in contemporary society.²⁰²

As a result of privatization, private entities now exercise public power throughout the world and supplant many functions of local and national government.²⁰³ For instance, private entities “provide a vast array of social services for the government; administer core aspects of government programs; and perform tasks that appear quintessentially governmental, such as promulgating standards or regulating third-party activities.”²⁰⁴ Current trends show the private sector’s role in the public sphere increasing, with governments delegating broader responsibilities and increasing discretion to private entities, in a variety of divisions, including public education, prison, and health care and welfare systems.²⁰⁵ In short, the worldwide popularity of privatization has expanded the gray area between the public and private sectors, creating an “extensive intermixing of public and private.”²⁰⁶

2. Privatization Obscures Public and Private Bribery Classifications

As privatization fogs any clear divide between the public and private spheres, the movement has caused difficulties in distinguishing between public sector and private sector actors.²⁰⁷ When private actors perform public functions, traditional distinctions between public and private erode,

200. See Metzger, *supra* note 185, at 1370.

201. Metzger, *supra* note 185, at 1369. *Accord* Curtis Publishing Co. v. Butts, 388 U.S. 130, 163 (1967) (“Increasingly in this country, the distinctions between governmental and private sectors are blurred.”); Memorandum on Gov’t Contracting, 2009 DAILY COMP. PRES. DOC. 123 (Mar. 4, 2009), available at <http://www.govexec.com/pdfs/030409e1.pdf> (“[T]he line between inherently governmental activities that should not be outsourced and commercial activities that may be subject to private sector competition has been blurred and inadequately defined.”).

202. See Aman, *supra* note 183, at 1688.

203. See Diller, *supra* note 185, at 1311; Aman, *supra* note 183, at 1694 (“The delegation of public functions to private bodies now occurs as part of a larger, global regulatory context in which nonstate actors play an increasingly prominent role at all levels of government.”).

204. Metzger, *supra* note 185, at 1369.

205. See *id.*

206. Metzger, *supra* note 185, at 1369. *Accord* *Changing Shape of Government*, *supra* note 192, at 1319, 1321 (discussing how privatization expands the gray area between the public and private sectors).

207. See Metzger, *supra* note 185, at 1369 (discussing the lack of clear divide between public and private sector as a result of privatization); Rohlfen, *supra* note 99, at 157 (noting the difficulties in distinguishing between public and private officials due to the effects of privatization). For a general overview on the public-private distinction, see Paul M. Schoenhard, *A Three-Dimensional Approach to the Public-Private Distinction*, 2008 UTAH L. REV. 635 (2008) (offering a general overview on the public-private distinction).

as “[n]ew forms of governmental activities, developing within the growing scope of the privatization, change the reality of state actions.”²⁰⁸ In a Consultation Paper, the OECD Working Group on Bribery highlights this issue, opining that “the distinction between public sector and private sector officials is not always clear, especially in countries where there has been significant privatization, including in high-risk areas such as energy, telecommunications and transport.”²⁰⁹ When private actors carry out public functions as a result of privatization, can those actors be treated as public officials? Domestic and international courts and legal scholars struggle with adequately addressing this thorny issue in multiple areas of law.²¹⁰

The conceptual ambiguity surrounding public and private actor determinations translates into practical difficulties in the context of bribery law application. When private actors accept bribes in the course of carrying out public functions, it is unclear whether public or private bribery laws should apply to penalize such conduct. For example, suppose a privately-owned waste management company contracts with a municipality to provide garbage collection services to the municipality’s residents. The company needs to purchase twenty additional garbage trucks in order to address residential growth. The company employee charged with purchasing the additional trucks covertly accepts a \$300,000 bribe from a waste collection vehicle dealer, in exchange for purchasing ten of the dealer’s trucks on behalf of the company. Unbeknownst to the company, the dealer charges the company twice the fair market value for the trucks and builds the cost of the bribe into the contract for the trucks. The company ultimately passes the inflated cost of the trucks onto the municipality. If the government learns of this bribery agreement, could it successfully prosecute the employee for violating the public bribery statute, or should it charge under the private bribery statute? Prosecutors and courts face a murky legal issue; and scant judicial authority exists to guide in this situation.

Assume for the purpose of the above hypothetical that the bribery transpires in a jurisdiction that does not criminalize private bribery. The prosecutor’s only apparent option would be to charge the company em-

208. Daphne Barak-Erez, *A State Action Doctrine for an Age of Privatization*, 45 SYRACUSE L. REV. 1169, 1191 (1995). Accord Christiana Ochoa, *Advancing the Language of Human Rights in a Global Economic Order: An Analysis of a Discourse*, 23 B.C. THIRD WORLD L.J. 57, 62 (2003) (“Under a globalizing order that erodes national sovereignty and increases the importance of private actors, a clear delineation between private and public law and their relationship to one another is difficult to discern.”).

209. OECD, CONSULTATION PAPER: REVIEW OF THE OECD INSTRUMENTS ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS TEN YEARS AFTER ADOPTION 12 (2008) [hereinafter OECD REVIEW], available at <http://www.oecd.org/investment/anti-bribery/39882963.pdf>. Accord Rohlfen, *supra* note 99, at 156–57 (discussing the OECD Working Group’s response to the public/private official issue).

210. See Laura A. Dickinson, *Government for Hire: Privatizing Foreign Affairs and the Problem of Accountability under International Law*, 47 WM. & MARY L. REV. 135, 165–69 (2005) (providing an overview of transnational approaches to the state actor problem).

ployee with a violation of the applicable public bribery statute. Public bribery statutes generally require the alleged bribery recipient—the defendant in the criminal action—to qualify as a “public official,” “public servant,” or another variant thereof.²¹¹ Legislatures commonly define “public official” and synonymous terms as a variation of “any officer or employee of government, including legislators and judges, and any person participating as juror, advisor, consultant or otherwise, in performing a governmental function.”²¹² Accordingly, the company employee would need to qualify as a type of “public official” according to the applicable bribery statute in order to be prosecuted under it. If the company employee does not qualify as such under a court’s interpretation of the statute, the government would be unable to prosecute the company employee for the bribery offense, possibly rendering the bribery recipient unaccountable for the corrupt act.

Classifying the company employee may become even more unclear if the employee resides under a foreign jurisdiction and the bribery is transnationally based. In China and in a number of developing nations, “many persons that appear to be private or ordinary businesspersons will qualify as foreign officials,” and could arguably be prosecuted under public or private transnational bribery statutes.²¹³ Untangling the status of bribery recipients from foreign jurisdictions in transnational private bribery cases is essentially untested in the courts.

By bifurcating bribery into public and private offense types, legislatures create this legal conundrum. As the difference between public and private bribery largely revolves around the classification of the bribery recipient, a bribery recipient with an ambiguous status creates conceptual gray areas and practical prosecutorial hurdles. Private parties essentially function as public officials when executing public functions as a result of privatization efforts, but the divergent bribery statutes are ill-suited to address such persons when they accept bribes. Privatization’s rapid growth

211. N.J. STAT. ANN. § 2C:27-10 (West 2013) (indicating New Jersey public bribery statute applies to “public servants”). *Accord* Bribery of Public Servants by Persons Having Dealings with Public Bodies Ordinance, (2003) Cap. 201, § 8 (H.K.); Bribery (Amendment) Act (No. 20 of 1994), § 7 (Sri Lanka).

212. N.J. STAT. ANN. § 2C:27-1g (West 2013).

213. Daniel Chow, *The Interplay Between China’s Anti-Bribery Laws and the Foreign Corrupt Practices Act*, 73 OHIO ST. L.J. 1015, 1017 (2012). Ostensibly private businesspersons could qualify as public officials under bribery statutes because many business enterprises, whether state- or privately-owned, could qualify as state-controlled and/or active in performing governmental functions. *See id.* at 1024; Dominique T. Fasano, *United States v. Aguilar: District Court Attempts Clarification of the Foreign Corrupt Practices Act by Further Defining “Foreign Official”*, 20 TUL. J. INT’L & COMP. L. 489, 501 (2012) (noting, in the context of the FCPA’s extraterritorial application, that the “foreign official definition “is stretched beyond traditional government employees; it is now broad enough to include . . . officials who hold a variety of private and public positions, . . . since the lines in developing nations are blurred between privatization of state-owned enterprises and government agencies.”); Agnieszka Klich, *Bribery in Economies in Transition: The Foreign Corrupt Practices Act*, 32 STAN. J. INT’L L. 121, 122 (1996) (noting an individual’s status as either an official or non-official is frequently unclear in the context of privatization occurring in formerly communist states).

compounds the problem, for international organizations²¹⁴ and legal scholars recognize that increased privatization rates correspond with increased opportunities for bribery.²¹⁵ In short, privatization has blurred the distinction between public and private bribery, along with its reliance on the categorization of entities as public and non-public. As such, the classical distinction between public and private bribery no longer appears tenable in a world of privatization.²¹⁶

III. REFORMING TRANSNATIONAL APPROACHES TO PRIVATE BRIBERY LEGISLATION AND ENFORCEMENT

As explored in Parts I and II of this Article, countries diverge greatly in their approaches to public and private bribery criminalization. Many countries outlaw the former and employ active enforcement regimes, while essentially ignoring the latter. Moreover, those countries that criminalize both public and private bribery follow a conventional approach that treats the bribery types as separate and distinct offenses, yet this approach conflicts with conceptual understandings of the bribery types and the practical realities of bribery as it transpires globally. This Part proposes a set of comprehensive legislative reforms to improve governmental responses to private bribery and align nations around a common standard that properly deters this offense.

A. Nations Should Criminalize Private Bribery in Its Domestic and Transnational Forms

As previously discussed, disparities exist globally between bribery types in rates of criminalization, penalty levels and enforcement frequencies.²¹⁷ Essentially all countries criminalize domestic public bribery, and an increasing number criminalizes transnational public bribery.²¹⁸ Yet only a subset criminalizes domestic private bribery, and a tinier subset

214. See OECD REVIEW, *supra* note 209, at 12 (“[P]ermissiveness toward private sector bribery could result in a business climate conducive to foreign bribery, particularly given that the private sector in many countries is larger than the public sector, thus providing more opportunities for corrupt dealings.”).

215. See Aaron G. Murphy, *The Migratory Patterns of Business in the Global Village*, 2 N.Y.U. J.L. & BUS. 229, 239 (2005) (discussing how privatization increases opportunities for bribery); Virginia Newell & Benedict Sheehy, *Corporate Militaries and States: Actors, Interactions, and Reactions*, 41 TEX. INT’L L.J. 67, 84 n.80 (2006) (“The privatization of global water services has resulted in huge profits [for the private corporations], higher prices for water, cut-offs to customers who cannot pay, little transparency in their dealings, reduced water quality, bribery, and corruption.”) (citation omitted) (internal quotation marks omitted); Elizabeth Spahn, *International Bribery: The Moral Imperialism Critiques*, 18 MINN. J. INT’L L. 155, 180 (2009) (“[U]nregulated privatization in the absence of developed civil society and rule of law presented opportunities for widespread bribery and corruption that undermined the economy and development of Russia.”).

216. See Rohlfsen, *supra* note 99, at 156 (noting that the privatization of formerly public industries has blurred the distinction between private and public corruption).

217. See *supra* Parts I.B–C.

218. See *supra* note 52 and accompanying text.

criminalizes transnational private bribery. Penalties and enforcement trends also split widely between bribery types, for among countries with enacted public and private bribery legislation, governments prosecute public bribery offenses far more frequently than private bribery and punish the former offenses with a harsher range of penalties than the latter.²¹⁹ Simply put, bribery involving public officials clearly garners more world-wide government concern and action than does bribery involving private sector agents.²²⁰

1. A Host of Historical Factors Have Discouraged Private Bribery Criminalization

Many nations have refrained from proactively addressing private bribery due to a number of converging factors, ranging from a lack of public awareness to misunderstandings surrounding the nature of the offense. First, many legislators and policymakers believe that criminal sanctions are inappropriate for a perpetrator of private bribery, as they maintain that the companies injured by commercial bribes should seek civil remedies or self-regulate by taking disciplinary action against any employee who accepts bribes.²²¹ Under this commonly held belief, “implementation of a state’s system of prosecution for [private bribery] is unwarranted and wasteful.”²²²

Second, the 1997 OECD Convention, widely viewed as “the most successful instrument in the fight against corruption thus far,”²²³ has established legally binding standards for its signatory countries to criminalize transnational public sector bribery,²²⁴ but the Convention does not require its signatories to outlaw private bribery.²²⁵ As Parties to the Convention, the 34 members of the OECD and six non-member countries have enacted transnational public sector bribery laws or are in the process

219. See *supra* note 172 and accompanying text (comparing public and private bribery enforcement trends).

220. See, e.g., Tak, *supra* note 58, at 280 (explaining that “Dutch criminal law traditionally has been less oriented toward safeguarding contractual or private law relations than providing safeguards in the public sphere.”).

221. See Thomas O. Rose, *Introduction*, in PRIVATE COMMERCIAL BRIBERY, *supra* note 4, at 1, 3 (explaining the viewpoint that private bribery should be addressed through civil law and self-regulation); Bonifassi, *supra* note 17, at 108 (discussing the “strong impression that the matter is left to the business community to police through self-regulation and internal corporate programs.”); Yukins, *supra* note 171, at 324 (“[I]t is assumed that *other* enforcement mechanisms—workplace opprobrium, or simply firing the employee—will contain whatever threat ‘commercial bribery’ may pose.”) (emphasis in original).

222. Rose, *supra* note 221.

223. Huber, *supra* note 4, at 572.

224. OECD CONVENTION, *supra* note 46, at 7. The OECD explains that the Convention “establishes an open-ended, peer-driven monitoring mechanism to ensure the thorough implementation of the international obligations that countries have taken on under the Convention.” *Bribery and Corruption*, OECD, <http://www.oecd.org/corruption/oecdantibriberyconvention.htm> (last visited Apr. 10, 2014) [hereinafter *Bribery & Corruption*].

225. Huber, *supra* note 4, at 572.

of implementing such laws; hence the Convention has effectively facilitated positive change in combatting transnational public bribery.²²⁶ The Parties share a major commercial presence, as they collectively account for roughly 80 percent of the world's exports and roughly 90 percent of the worldwide outflows of foreign direct investment.²²⁷ According to Angel Gurria, the OECD Secretary-General, the Convention "sets the highest and toughest standards for fighting bribery in business,"²²⁸ but its failure to address private bribery is particularly glaring. The OECD Working Group on Bribery has opined that private bribery is outside of its mandate and that it will defer addressing the offense until its "prohibition against public sector bribery has been successfully implemented."²²⁹

Third, the collective body of criminal laws in many countries traditionally has been more oriented toward protecting the public sphere.²³⁰ "[P]rivate law takes as its starting point the concept of *autonomy of parties*, which means that each contracting party is responsible for his choice of contractual partner."²³¹ Many government officials analyze private bribery under this framework. They accordingly categorize as a "matter of the party's own risk" the possibility that its contractual counterparty has engaged in private bribery as part of the deal.²³² This perspective essentially maintains that companies assume the risk that their contractual counterparties may have engaged in private bribery and that, as a result, companies should diligently investigate the parties with whom they do business before proceeding.²³³

Fourth, there has never been a major public outcry for governments to address private bribery for a number of reasons. The offense in practice most often goes undetected by the business sector and the larger community.²³⁴ When a company learns of a specific incident of private bribery involving one of its employees, sources suggest that the company typically addresses the matter internally by taking disciplinary measures against the employee.²³⁵ News of private bribery occurrences and explanations of the

226. See *Bribery & Corruption*, *supra* note 224.

227. OECD, OECD WORKING GROUP ON BRIBERY 2011 ANNUAL REPORT 7 (2012), available at <http://www.oecd.org/daf/anti-bribery/AntiBriberyAnnRep2011.pdf>.

228. *Id.* at 2.

229. OECD REVIEW, *supra* note 209, at 11. Accord Rohlfen, *supra* note 99, at 156–57 (discussing the OECD Working Group's treatment of private bribery).

230. See Tak, *supra* note 58, at 280. But see Part II.C (critiquing the traditional notions of separated public and private sectors based upon advances in privatization) (emphasis in original).

231. Tak, *supra* note 58, at 280 (emphasis omitted).

232. *Id.*

233. Inherent in this perspective are the false assumptions that private bribery is solely a matter of private law and that any harms caused by the bribery do not extend into the public sphere. See *supra* Part II.B (outlining the public sector harms caused by private bribery).

234. See Gevurtz, *supra* note 8, at 365 (discussing the prevalence of private bribery).

235. Sullivan, *supra* note 151, at 60.

crime's effects rarely ever reach the public. Given this global lack of public awareness, many governments treat private bribery with minimal attention and expend virtually no resources in combatting it.²³⁶ There has been no organized approach for presenting a message to the legislature, judiciary, prosecutorial authorities, and the public that more attention and importance should be given to prosecuting private bribery.²³⁷

Fifth, as discussed in Part II.B, general misunderstandings surround the nature of the harms caused by private bribery. Many lawmakers and scholars believe that the offense solely harms private sector companies,²³⁸ despite the existence of a growing body of scholarship that shows how the offense causes concrete harms to industry sectors, labor relations, all levels of trade, and free market operations.²³⁹ While private bribery in operation does not implicate public sector officials, consumers ultimately shoulder the harmful effects of the crime through higher prices and lower quality goods and services.²⁴⁰

2. Governments Should Criminalize Domestic and Transnational Private Bribery

A strong need exists to align the transnational body of laws governing private bribery. The offense currently thrives in international markets, according to surveys of business executives. In a 2012 Deloitte survey, seventy-five percent of business executive participants from multinational companies identified private bribery as a top integrity-related risk concern of their companies,²⁴¹ and a similar survey showed over sixty percent of polled companies relaying that they have been recently harmed by private bribery.²⁴² The crime causes material harm to the public and private sectors, but remains essentially ignored by countries around the globe.

Sound justifications grounded in public policy warrant enacting and expanding criminal legislation to penalize domestic and transnational private bribery. Governments cannot rely on private civil actions and corporate self-regulation to deter the offense, for the offense's victims expand beyond individual companies to include industry participants and the public sector.²⁴³ The offense threatens the public order and deserves criminal treatment, for it causes moral and economic damage to the public and private sectors. Given the rapid growth of privatization and globalization, the crime's pernicious effects harm commercial and consumer interests

236. See *supra* Part I.C.2.

237. See Bonifassi, *supra* note 17, at 109.

238. See *supra* Part II.B.

239. See *supra* Part II.B.

240. See *supra* Part II.B.

241. DELOITTE DEVELOPMENT LLC, LOOK BEFORE YOU LEAP: NAVIGATING RISKS IN EMERGING MARKETS 1, 5 (2012), available at http://www.deloitte.com/assets/Dcom-United States/Local%20Assets/Documents/FAS_ForensicCenter_us_fas-us_dfc/us_fas_lbyl_navigating_risks_in_emerging_markets_102412.pdf.

242. See Burckhardt & Borsodi, *supra* note 57, at 213 (discussing survey results).

243. See *supra* Part II.B.

across nations.²⁴⁴ In order to adequately combat the crime, governments should outlaw both domestic and transnational private bribery through the enactment of comprehensive criminal laws.

a. Outlawing Private Bribery Serves the Public Interest

Some question the merits of outlawing bribery in the private sector, given that such governmental action will expend public resources for a crime that, in its commission, implicates no public officials.²⁴⁵ This argument fails to acknowledge how the crime injures significant public sector interests. When private sector employees accept bribes, their fundamentally corrupt actions damage the labor relationship with their employers. The private bribery arrangement undermines the social values of trust, confidence, and loyalty, “which are necessary for the maintenance and development of social and economic relations.”²⁴⁶ Moreover, employers face concrete financial harms when their employees accept bribes, for bribers may surreptitiously include the cost of the bribes into any subsequent contract prices with the employers.²⁴⁷ Even when a particular incident of private bribery does not cause concrete economic damage to a particular victim, the offense nevertheless harms societies through the erosion of social values.²⁴⁸ According to the Council of Europe, “Criminalisation of bribery in the private sector seeks to protect the trust, the confidence and the loyalty that are indispensable for private relationships to exist.”²⁴⁹

Private bribery criminalization also ensures respect for fair competition across societies.²⁵⁰ The private bribery arrangement gives the briber an unfair competitive advantage by removing from consideration goods and services offered by the briber’s competitors.²⁵¹ Such action can harshly disadvantage the briber’s industry competitors and, on a larger scale, distort the routine functions of domestic and international markets.²⁵² Private bribery’s anti-competitive effects eventually injure the public in due course because consumers experience higher prices and inferior quality goods and services as a result of the offense.²⁵³

244. See Heine, *supra* note 14, at 608 (“International and supranational instruments and incentives seem to reveal the need for substantial improvement in the law for combating private commercial bribery.”).

245. See *supra* Part II.B.

246. COUNCIL OF EUROPE EXPLANATORY REPORT, *supra* note 150, ¶ 52.

247. See *supra* Part I.C.1.

248. See COUNCIL OF EUROPE EXPLANATORY REPORT, *supra* note 150, at ¶ 52.

249. *Id.* ¶ 55.

250. *Id.* ¶ 52.

251. See *supra* Part I.C.1.

252. See *supra* Part I.C.1.

253. See *supra* Part I.C.1.

b. Privatization Increases the Threat of Domestic and Transnational Private Bribery

The widespread prevalence of privatization has exacerbated the need to criminalize domestic and transnational private bribery. Privatization blurs the distinction between the public and private sectors, and creates extensive opportunities for private bribery.²⁵⁴ The 8th International Anti-Corruption Conference Declaration acknowledges this danger, as it posits that “there must be a sustained campaign against corruption within the private sector as, with greater privatisation and deregulation, it assumes a greater role in activities traditionally performed by the state.”²⁵⁵ Moreover, the Council of Europe mandates private bribery criminalization on the ground that it is “logical to protect the public from the damaging effects of corruption in businesses . . . particularly since the financial or other powers concentrated in the private sector, necessary for their new functions, are of great social importance.”²⁵⁶

Most countries fail to address transnational private bribery adequately, as they either have ineffective or no legislation outlawing the offense. The offense’s harms are becoming more transparent to the global community, as the ICC and other international bodies recently observed that this offense has a “growing adverse impact on world trade and economic progress.”²⁵⁷ The prevalence of privatization reinforces the need for government action to criminalize domestic and transnational private bribery; without such action, the offense will continue to fester across markets.

c. Nations Must Coordinate a Comprehensive Approach to Combat Private Bribery

In order to combat private bribery adequately, a coordinated, comprehensive strategy is necessary among nations to criminalize and actively prosecute private bribery involving domestic and foreign agents. The bulk of existing criminal private bribery statutes, which outlaw the offense only as it occurs domestically, need reform; countries that have enacted such laws need to revise the laws to prohibit both domestic and transnational private bribery.²⁵⁸ In addition, countries that have not formally addressed

254. See Aman, *supra* note 189, at 819 (“The public/private distinction once demarcated two relatively separate worlds - government and the private market. Private capital markets tended to be primarily local, and capital had little mobility. Private in this sense, however, has long passed into history.”).

255. *The Lima Declaration against Corruption*, INT’L ANTI-CORRUPTION CONFERENCE [IACC], (Sept., 1997), available at <http://www.8iacc.org/lima/e-limadecl.html>.

256. COUNCIL OF EUROPE EXPLANATORY REPORT, *supra* note 150, ¶ 52.

257. OECD REVIEW, *supra* note 209, at 11. *Accord* COUNCIL OF EUROPE EXPLANATORY REPORT, *supra* note 150, ¶ 52; Kunz et al., *supra* note 174, at 442 (“There is no convincing reason why Swiss criminal law does not explicitly punish private bribery, especially since the influence of Swiss banks, enterprises, and high tech companies with worldwide activities exceeds by far the influence of the Swiss federal state.”).

258. See *supra* Part I.C.2 (describing the legislative approaches to private bribery).

the offense should take action by outlawing both its domestic and transnational forms. As the United Nations reminds us, “[t]he prevention and eradication of corruption is a responsibility of all States, [for] [c]orruption is no longer a local matter but a transnational phenomenon that affects all societies and economies, making international cooperation to prevent and control it essential.”²⁵⁹

The OECD and other international organizations can facilitate this movement by implementing, through their successful convention processes, provisions that prohibit active and passive forms of domestic and transnational private bribery.²⁶⁰ The OECD Working Group’s current reluctance and “caution about extending its mandate” to address private bribery do not serve the public interest; this highly influential body should be at the forefront of addressing the offense.²⁶¹ As scholar Thomas Rose has noted, “private sector bribery is the twin of bribery of public officials and its condemnation is the natural next step of the OECD Working Group.”²⁶² The OECD should follow the lead of the Council of Europe Criminal Law Convention on Corruption, which set an example for all by treating private bribery as a mandatory offense for its members.²⁶³

B. *Merging Public and Private Bribery Prohibitions into Comprehensive Legislation*

If a country wishes to combat corruption in an adequate way, it must criminalize private bribery, as anti-private bribery legislation is a necessary component for any comprehensive anti-corruption strategy.²⁶⁴ The risk that private agents will abuse power entrusted to them is arguably just as high as the risk that public officials will abuse equivalent powers; moreover, a society’s laxness toward private bribery may elicit a business climate conducive to public bribery by sending an implicit message that companies may seek undue competitive advantage by bribing others.²⁶⁵ Societies must

259. United Nations Convention Against Corruption, *supra* note 55, pmbl.

260. See *supra* note 46 and accompanying text (describing the OECD Working Group on Bribery’s highly successful convention prohibiting transnational public bribery). The United Nations Convention Against Corruption treats private bribery as an optional offense to criminalize. The aims of the United Nations Convention would be better met if the Convention shifted its treatment of private bribery from an optional to a mandatory offense to criminalize. See United Nations Convention Against Corruption, *supra* note 55; OECD REVIEW, *supra* note 209, at 11.

261. OECD REVIEW, *supra* note 209, at 11.

262. Rose, *supra* note 221, at 7.

263. See, Council of Europe Convention, *supra* note 47 (detailing the Council of Europe Criminal Law Convention on Corruption’s treatment of private bribery).

264. See COUNCIL OF EUROPE EXPLANATORY REPORT, *supra* note 150, art. 7 (“Criminalising private corruption appeared as a pioneering but necessary effort to avoid gaps in a comprehensive strategy to combat corruption.”).

265. See Rohlfsen, *supra* note 99, at 152 (“One influential NGO has noted that permissiveness toward private sector bribery may foster a business climate conducive to bribery of public officials.”).

address both facets of corruption.²⁶⁶ In criminalizing private bribery, legislatures face a structural question as to how best to draft private bribery legislation, namely, whether to draft it separate and apart from enacted public bribery statutory prohibitions, or to couple it with public bribery prohibitions into one comprehensive bribery offense.

The traditional approach legislatures take, of severing bribery into separate and distinct public and private bribery offense categories, clashes with conceptual understandings of the crime, as explored in Part II of this Article, because public and private bribery are interconnected halves of the same corrupt whole. For public and private bribery agreements, whether they occur domestically or transnationally, “[t]he transaction [is] nothing more or less than the acceptance by the agent of a bribe to perform his duties in the manner desired by the person who gave the bribe.”²⁶⁷ Furthermore, maintaining separate public and private bribery offenses creates application issues, as the distinctions between bribery in the public and private sectors in many societies are increasingly blurred and more difficult to differentiate. The growing privatization movement contributes to the morphing of public and private sectors in this regard.²⁶⁸ The decision to differentiate statutorily the two types of bribery is the weaker solution.

Consolidating public and private bribery offenses into one all-purpose bribery statute yields practical benefits that serve the public interest. Consolidation draws the public’s attention to the significance of private bribery, raises awareness of the crime’s existence, and reinforces that the crime is part of the family of bribery offenses. The enactment of the Bribery Act in the United Kingdom reflects such benefits. The Act addresses public and private sector bribery through statutory text that prohibits active and passive bribery without differentiating between public and private types.²⁶⁹ By coupling together public and private bribery prohibitions into one comprehensive bribery statute, the Act has generated significant public discussion among legal professionals²⁷⁰ and the general public more broadly,²⁷¹ increasing awareness and equating the seriousness of private

266. See Kunz et al., *supra* note 174, at 442 (“[T]he risk of abuse of power in the private sector exceeds the one in the public sector, so that the decision to criminalize only the bribery of public officials, and not private bribery, does not really make sense.”).

267. Lum v. McEwen, 57 N.W. 662, 663 (Minn. 1894).

268. See *supra* Part II.C; Kunz et al., *supra* note 174, at 442.

269. See Bribery Act, 2010, c. 23, § 3 (U.K.) (noting, *inter alia*, that the Act applies to “any function of a public nature, . . . any activity connected with a business, [and] any activity performed in the course of a person’s employment . . .”).

270. See, e.g., *The New UK Bribery Act: Why GCC Companies Need to Be Prepared*, CLIFFORD CHANCE 1 (2011), http://www.cliffordchance.com/content/dam/cliffordchance/PDFs/DUBAI-1-Client_Briefing_UK_Bribery_Act_for_GCC_companies.pdf (noting that the Bribery Act criminalizes private bribery); Davina Garrod & Gordon Davidson, *UK Bribery Act: Current Enforcement Trends*, BINGHAM (2012), <http://www.bingham.com/Alerts/2012/03/UK-Bribery-Act-Current-Enforcement-Trends> (same).

271. See, e.g., *New Legislation – Bribery Act 2010*, NATIONAL PRESCRIBING CENTER (May 11, 2011), <http://www.npc.nhs.uk/rapidreview/?p=3449> (discussing Bribery Act’s private

bribery with its public bribery twin. Rhode Island also follows a combined approach with comprehensive active and passive bribery statutes that encompass public and private bribery as part of a single statutory design.²⁷²

International organizations are slowly aligning with this inclusive approach. The ICC Rules on Combating Corruption, “intended as a method of self-regulation by business against the background of applicable national law and key international legal instruments,” combines public and private bribery prohibitions into one comprehensive bribery rule, which does not differentiate between domestic and foreign-based bribes.²⁷³ Since 1977, the ICC consistently has declared that “no meaningful distinction exists between public and private bribery, that they both distort commercial dealings and that they deserve similar treatment in the law.”²⁷⁴

Combining public and private bribery prohibitions into one offense shifts the range of private bribery sanctions to a more appropriate level that balances with penalties for public bribery. Rhode Island, for instance, punishes bribery violations, whether public or private, as felonies, with maximum twenty year prison sentences and/or fines that roughly match the monetary equivalent of the attendant bribes’ value.²⁷⁵ Conversely, a private bribery violation in France carries a maximum two year imprisonment penalty with a fine of 30,000 Euros. As noted by French scholar Stéphane Bonifassi, “[t]hese are mild sanctions when compared to the maximum penalties for public corruption (ten years imprisonment and a fine of 150,000 Euros).”²⁷⁶ Private bribery in many countries is minimally penalized, but combining this offense statutorily with public bribery can set more appropriate sanctions for this crime.²⁷⁷

Finally, a comprehensive bribery statute should criminalize public and private bribery as it transpires internationally. “The policy rationale for prosecuting foreign public bribery seems equally applicable to foreign commercial bribery,”²⁷⁸ as both forms of bribery in international business

bribery component); BRITISH BANKERS ASS’N (BBA), BRIBERY ACT 2010 GUIDANCE ON COMPLIANCE PRACTICAL IMPLEMENTATION ISSUES FOR THE BANKING SECTOR (2011), available at https://www.bba.org.uk/wp-content/uploads/2011/12/Bribery_Guidance_-_final.pdf (explaining that “bribery in both the public and private sectors are covered” under the Bribery Act).

272. See R.I. GEN. LAWS § 11-7-4 (2012) (“Bribery of agent, employee, or public official”); R.I. GEN. LAWS § 11-7-3 (2012) (“Solicitation or acceptance of bribe by agent, employee, or public official”). See also Rohlfen, *supra* note 99, at 163 (discussing Rhode Island bribery law).

273. INTERNATIONAL CHAMBER OF COMMERCE [ICC], ICC RULES ON COMBATING CORRUPTION 4 (2011), available at <http://www.iccwbo.org/Data/Policies/2011/ICC-Rules-on-Combating-Corruption-2011>. See also Rohlfen, *supra* note 99 at 156 (“ICC makes no distinction between public officials or private persons, whether foreign or domestic.”).

274. Rose, *supra* note 221, at 1.

275. See R.I. GEN. LAWS § 11-7-5 (2012).

276. Bonifassi, *supra* note 17 at 101.

277. See, e.g., Uberhofen, *supra* note 113, at 120 (noting that private bribery in Germany is “only minimally penalized.”).

278. RUPP & FINK, *supra* note 91, at 4.

transactions distort competition, weaken economic development, and undermine confidence in the marketplace.²⁷⁹ Virtually no country has focused on deterring transnational private bribery through robust enforcement actions,²⁸⁰ but given the integration of the global economy, policy makers must formally begin to combat the offense.²⁸¹ Otherwise, one may easily circumvent a domestic focused bribery statute by conducting the bribe overseas.²⁸²

The U.K. Bribery Act provides a useful example of a suggested statutory test that countries may adopt to prohibit active and passive instances of public and private bribery domestically and transnationally.²⁸³ The Act is a prototype for unified domestic criminal private bribery legislation with extraterritorial reach. Adopting such a comprehensive bribery statute is a necessary step to direct much-needed prosecutorial attention to bribery in its varied forms.

CONCLUSION

Many jurisdictions across the world actively combat public bribery through criminal legislation and rigorous law enforcement measures. Far fewer address its twin, private bribery. Both forms of bribery cause a multitude of harms to the public and private sectors, but the conceptual similarities between the bribery forms, and the harms they cause, are widely misunderstood or ignored. This Article advocates for a unified approach in combatting both forms of corruption as they transpire within and across jurisdictions.

279. Lanny A. Breuer, Assistant Att’y Gen, United States Dep’t of Justice, Speech at the 24th National Conference on the Foreign Corrupt Practices Act (Nov. 16, 2010), available at <http://www.justice.gov/criminal/pr/speeches/2010/crm-speech-101116.html>.

280. See, e.g., *supra* Part I.C.2 (discussing transnational private bribery enforcement efforts); Rupp & Fink, *supra* note 91 (“Foreign commercial bribery is not yet a primary focus of U.S. enforcement activity.”).

281. See Henderson & Guida, *supra* note 169, at 553.

282. See Aman, *supra* note 183, at 1697 (“The concept of the globalizing state signifies a state that no longer has a monopoly on the policies it creates and promulgates, but must increasingly cooperate, bargain, and partner with other states and private entities to achieve its goals.”).

283. See Bribery Act, 2010, c. 23, § 1 (U.K.).