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

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THE TWO FACES OF BRIBERY:
INTERNATIONAL CORRUPTION PATHWAYS
MEET CONFLICTING LEGISLATIVE REGIMES

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, a crime outlawed in virtually every jurisdiction in the world. Both parties could face heavy prison sentences and fines for engaging in this corrupt act.

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

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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”).


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.\footnote{See Barbara Huber, Supranational Measures, in Private Commercial Bribery 559, 564 (Gunter Heine et al. eds., 2003) (discussing rates of private bribery criminalization).} 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.\footnote{See infra Part I.C.2 (analyzing private bribery penalties).}

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.\footnote{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”).} 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.\footnote{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).} 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.\footnote{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”).} 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.\footnote{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.”).}

worldwide.\textsuperscript{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.\textsuperscript{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.\textsuperscript{13} In many countries the criminal law either plays a minor or no role in addressing private bribery, leaving the corrupt conduct effectively unsanctioned.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.


\textsuperscript{12} See infra Part I.B.2.


\textsuperscript{14} See Gunter Heine, Comparative Analysis, in Private Commercial Bribery, supra note 4, at 603, 634.

\textsuperscript{15} See infra notes 110–11 (describing public and private bribery criminalization trends).

\textsuperscript{16} See infra Part I.C.2 (describing enforcement trends).

\textsuperscript{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. Given that corrupt practices are naturally shrouded in secrecy, their prevalence and economic impact are notoriously difficult to measure, but approximations do exist. The World Economic Forum estimates that worldwide corruption costs more than $2.6 trillion annually, roughly five percent of global gross domestic product (“GDP”). 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.

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. 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...”

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a brighter future.” 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.”

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. 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. 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. 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.

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. Legislators and scholars conceptually divide the offense into active and passive forms. The term

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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.”).


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

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. 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. 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. 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.

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. Scholars have thoroughly catalogued its attendant harms to the public order and to international markets. 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. 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. 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 Lakhanvi 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”).


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).


investment into countries that host bribery, lower a host country’s tax base, and positively correlate with reduced economic development. 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.

2. A Strong International Consensus Exists to Deter Public Bribery

Virtually all countries outlaw the bribery of domestic public officials, and a growing subset criminalizes the bribery of foreign public officials. 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,” ignited a global anti-corruption movement to combat public bribery worldwide. The anti-bribery measures of international organizations, such as the 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (“OECD Convention”) and the 1999 Council of Europe Criminal Law Convention on Corruption (“Council of Europe Convention”), significantly facilitated the creation and development of transnational bribery laws by requiring signatory countries to criminalize bribery involving foreign public officials. 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.”

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

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


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


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)).


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 bribe 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 company” 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

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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 MNS. 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.


63. *Id.* at *4–*5.
bribed agent’s fiduciary duty of loyalty. A universal facet of contract law recognizes that agents owe a general duty of loyalty in relation to their principals’ affairs or business, and agents violate this duty and thereby harm their principals when they accept bribes in their role as agents. These principals also face substantial economic losses when their agents accept bribes. 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. 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. 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. This method of unfair competition may severely disadvantage industry competitors, potentially forcing them from the marketplace 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 355, 365 (“Commercial 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.”).


70. See Gevurtz, supra note 8 at 384.

71. See Jaroslav Fenýk, 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.\textsuperscript{72} In addition, research findings demonstrate that private bribery’s anti-competitive effects harm consumers through higher prices and poorer quality goods and services.\textsuperscript{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.”\textsuperscript{74} Consumers bear the final cost of private bribery through an “undue surtax” on the goods and services affected by the bribery.\textsuperscript{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.\textsuperscript{76}

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

While virtually all jurisdictions criminalize some form of public bribery,\textsuperscript{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.\textsuperscript{78} Numerous countries with relatively powerful national economies,

\textsuperscript{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.”).

\textsuperscript{73} See Gevirtz, 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.”).

\textsuperscript{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).

\textsuperscript{75} Luigi Foffani & Roberto Acquaroli, Italy, in PRIVATE COMMERCIAL BRIBERY, supra note 4, at 149, 153.

\textsuperscript{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).

\textsuperscript{77} See supra note 2 and accompanying text.

\textsuperscript{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

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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).


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.


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.”).

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.”

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

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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-252d3dce8eed/Presentation/PublicationAttachment/5af5ff4-0264-42f2-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).


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

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. This approach leads countries to focus on domestic private bribery violations to the exclusion of private bribery conduct with international aspects. 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. As a result, "in foreign business transactions [the prosecutorial] practice seems to follow the maxim: 'When in Rome, do as the Romans do.'"

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


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.FileSystem/files/Publication/e3ca4c34-431c-4e69-9ca9-010008b28b26/Presentation/PublicationAttachment/2e7a1cc4-22b6-4327-84e0-0434b2ea7417/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

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, viii (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. 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. 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 state . . . .

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. 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).

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-
stance of private bribery. 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. Legislatures, courts, scholars, and international organizations 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.” Such viewpoints ignore the corrupt nature of these practices and the practical harms that flow from them. In short, “[t]he common thread that runs through common law and statutory formulations of [public and private bribery] is the element of corruption.”

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.
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”).
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. 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. 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.” 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. 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. From this relationship emerges a political contract, where the public agent works to benefit the public, and the public compensates the agent in return. 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. The facilitating third party briber correspondingly seeks to benefit by influencing the public agent to breach the fiduciary duties.

Fiduciary duty violations also form the crux of private bribery agreements. 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/web-content/oak023337.pdf (“Public officials have a duty of loyalty to their constituents.”).


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.”).


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

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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.”).


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.
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. 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. 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.

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.” The global citizen largely understands the dangers inherent in bribing domestic public officials, and international consciousness of foreign public bribery and its harms continues to grow.

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


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


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,\textsuperscript{170} but a number of policy makers, legal scholars, and business people worldwide appear to misunderstand grossly the nature of these harmful effects.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{175} This view fails to recognize the ways in which private bribery simultaneously harms a range of public and private sector interests\textsuperscript{176} and reinforces an overall “what’s

\begin{thebibliography}{99}
\bibitem{Boles} See Boles, supra note 53, at 153-58 (explaining harmful effects of private bribery); Gevurtz, supra note 8, at 373–87 (same); \textit{Bribery in Commercial Relationships}, supra note 73, at 1248 (same).
\bibitem{Woods} See John P. Woods, \textit{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).
\bibitem{Eser} See Eser, supra note 111, at vii (detailing the traditional view that private bribery is simply a form of disloyalty to one’s employer).
\bibitem{Kunz} Karl-Ludwig Kunz, Nadja Capus & Philipp Keller, \textit{Switzerland, in Private Commercial Bribery}, supra note 4, at 435, 471.
\bibitem{Searby} 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. \textit{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

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

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.
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.
more efficiently than the government.\textsuperscript{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."\textsuperscript{192}

Privatization programs are flourishing internationally,\textsuperscript{193} with many governments operating under the premise that the private sector should conduct as much public business as possible.\textsuperscript{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."\textsuperscript{195} Supporters tout the movement as a method for developing national markets and facilitating economic growth.\textsuperscript{196} For instance, the International Monetary Fund and the World Bank actively encourage developing countries to employ privatization methods,\textsuperscript{197} as such methods purportedly strengthen national economies by attracting foreign capital and promoting foreign investment.\textsuperscript{198}

The process of "reinventing government as leaner and meaner" through privatization has effectively expanded the scope of private sector activity across the world.\textsuperscript{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,

\textsuperscript{191} Titolo, supra note 184, at 494.

\textsuperscript{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 paves the way for private contractors to abuse their discretion, evade oversight, and generate unanticipated cost overruns").

\textsuperscript{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.").

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


\textsuperscript{198} See Azubuike, supra note 183, at 68.

\textsuperscript{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. Privatization morphs this traditional border by embedding private entities in governance, causing “the boundaries between the public and private sectors [to] become pervasively blurred.” 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.

As a result of privatization, private entities now exercise public power throughout the world and supplant many functions of local and national government. 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.” 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. 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.”

2. Privatization Obfuscates 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. When private actors perform public functions, traditional distinctions between public and private erode,
as “[n]ew forms of governmental activities, developing within the growing scope of the privatization, change the reality of state actions.” 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.” 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.

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-


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. 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.” 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. 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

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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.”).


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 worldwide 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 addressed through civil law and self-regulation); Boniﬁassi, 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.\footnote{226. See Bribery & Corruption, supra note 224.} 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.\footnote{227. OECD, OECD Working Group on Bribery 2011 Annual Report 7 (2012), available at http://www.oecd.org/daf/anti-bribery/AntiBriberyAnnRep2011.pdf.} According to Angel Gurria, the OECD Secretary-General, the Convention “sets the highest and toughest standards for fighting bribery in business,”\footnote{228. Id. at 2.} 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.”\footnote{229. OECD Review, supra note 209, at 11. Accord Rohlfsen, supra note 99, at 156–57 (discussing the OECD Working Group’s treatment of private bribery).}

Third, the collective body of criminal laws in many countries traditionally has been more oriented toward protecting the public sphere.\footnote{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).} “[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.”\footnote{231. Tak, supra note 58, at 280 (emphasis omitted).} 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 counterpart has engaged in private bribery as part of the deal.\footnote{232. Id.} 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.\footnote{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).}

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.\footnote{234. See Gevurtz, supra note 8, at 365 (discussing the prevalence of private bribery).} 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.\footnote{235. Sullivan, supra note 151, at 60.} News of private bribery occurrences and explanations of the
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.\textsuperscript{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.\textsuperscript{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,\textsuperscript{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.\textsuperscript{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.\textsuperscript{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,\textsuperscript{241} and a similar survey showed over sixty percent of polled companies relaying that they have been recently harmed by private bribery.\textsuperscript{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.\textsuperscript{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.

\textsuperscript{236} See supra Part I.C.2.
\textsuperscript{237} See Bonifassi, supra note 17, at 109.
\textsuperscript{238} See supra Part II.B.
\textsuperscript{239} See supra Part II.B.
\textsuperscript{240} See supra Part II.B.
\textsuperscript{242} See Burckhardt & Borsodi, supra note 57, at 213 (discussing survey results).
\textsuperscript{243} See supra Part II.B.
across nations. 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. 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." 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. 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. 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."

Private bribery criminalization also ensures respect for fair competition across societies. The private bribery arrangement gives the briber an unfair competitive advantage by removing from consideration goods and services offered by the briber’s competitors. Such action can harshly disadvantage the briber’s industry competitors and, on a larger scale, distort the routine functions of domestic and international markets. 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.

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.
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.
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 privatization 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.”).


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

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. 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.” 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.

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. By coupling together public and private bribery prohibitions into one comprehensive bribery statute, the Act has generated significant public discussion among legal professionals and the general public more broadly, 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 . . . ”).


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


274. Rose, supra note 221, at 1.


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.


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.”).