
Official and commercial bribery: should they be distinguished?

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In a recent study of how the public views the blameworthiness of various white collar crime-related activity, my collaborator, Matthew Kugler, and I asked our subjects to compare the acts described in two seemingly similar scenarios.¹ In one scenario:

Jones is 'a member of the upper house of the State Legislature, where he serves on an important legislative committee that is choosing the site of a major new state office building'. Larson is 'CEO of a company that owns property adjacent to one of the sites that Jones' committee is considering'. CEO Larson offers Jones, the legislator, \$20,000 in return for Jones' agreeing to vote for the site, and Jones accepts the offer.

In the other scenario:

Heller is 'a board-member of a large private corporation ... currently serving on an important committee within the company that will choose the site of a major new office building that the company plans to build'. Larson is again 'CEO of a company that owns property adjacent to one of the sites that Heller's committee is considering'. Larson offers Heller, the company board member, \$20,000 if Heller votes for the site Larson favours, and Heller accepts the offer.

We asked our subjects: (1) to rate the moral blameworthiness of Jones' and Heller's acts; (2) whether the acts should be treated as criminal; and (3) how severely, if at all, they should be punished.

Under prior law in both the United Kingdom and the United States, the actors in the first scenario (involving acceptance of a payment by a *public official*) would have committed bribery, while the actors in the

* For helpful comments, I am grateful to Peter Alldridge, Jeremy Horder and Mike Koehler.
¹ S. P. Green and M. B. Kugler, 'Public Perceptions of White Collar Crime Culpability: Bribery, Perjury, and Fraud', *Law and Contemporary Problems*, 75 (2012), 33–59.

second scenario (involving acceptance of a payment by a *private* actor) would ordinarily have committed no crime at all. But the law in both jurisdictions has been changing – most dramatically in the newly enacted Bribery Act 2010, which criminalises both official and commercial bribery, and draws no distinction between them. Under US law, the traditional distinction between commercial and official bribery remains sharper, though even here there has been a blurring.

Which approach makes more sense? Should acceptance of a bribe by a private employee even be treated as a crime? Assuming it should, should it be treated as any less serious a crime than acceptance of a bribe by a government official? And what about the *giving* of a bribe to a private employee: how should that be treated in comparison to the giving of a bribe to a government official? In this chapter, I shall argue that accepting or giving a bribe in the commercial context should indeed be a crime, but one that is conceptually separate from accepting and giving a bribe in the government context.

The law of commercial bribery in the United States

American law has traditionally drawn a sharp distinction between official and commercial bribery. Thus, while bribes paid to government officials have always entailed liability for both the donee and donor, bribes paid to employees of a private firm have traditionally involved liability for neither. Over time, however, this sharp division has softened, and there are now numerous statutes at both the federal and state level that make bribery in the commercial sphere a crime, at least in certain limited circumstances.

Federal law

Typical of the traditional approach is 18 USC § 201, the most venerable federal bribery provision, originally enacted in 1962 to consolidate several separate provisions. There are two separate offences contained in section 201: subsection (b) covers ‘bribery’ (punishable by up to fifteen years in prison, a fine of three times the value of the bribe and disqualification from holding federal office), while subsection (c) covers the lesser offence of illegal ‘gratuities’ (punishable by up to two years in prison and a fine). What is important for present purposes is that section 201 is limited to bribes accepted by or given to federal government officials or jurors or witnesses in federal trials and does not generally apply to bribe

recipients who work for private firms.² Even here, however, there is an exception if the private employee occupies a specific position of trust with official federal responsibilities (e.g., employees of a private non-profit corporation that administer a subgrant from a municipality's federal block grant).³

A second major federal anti-corruption statute is 18 USC § 666, which was enacted in 1984 to extend the reach of federal bribery law beyond federal officials, witnesses and jurors, to employees of private firms that receive federal money.⁴ Section 666 makes it a crime for a person to give or accept something of value 'in connection with [a] business', if the 'the entity for which the defendant acted as an agent received more than \$10,000 a year in federal assistance'. It carries a maximum penalty of ten years in prison.

A third important federal anti-corruption provision is the Hobbs Act, 18 USC § 1951, enacted in 1946, as an amendment to the 1934 Anti-Racketeering Act. Although the Act was originally intended to combat racketeering in labour-management disputes, the statute has frequently been used in connection with cases involving public corruption and commercial disputes. The Act criminalises three distinct forms of criminal conduct: (1) robbery; (2) extortion by force, threat or fear; and (3) extortion under colour of official right. Only the third is relevant here. Extortion under colour of official right consists in the offender's use of his official position to extract something of a value from the alleged victim – understood, essentially, as the taking of a bribe. It is punishable by up to twenty years in prison. Like section 201, the Hobbs Act applies only to bribes taken by government officials, though unlike section 201, the Act applies to bribes taken by state and local officials (such as state legislators, city councillors and mayors) as well as federal officials. (Another important difference is that section 201 applies to both bribes and bribers, while the Hobbs Act applies only to bribees.)

A fourth statute is the Foreign Corrupt Practices Act (FCPA), codified in various provisions of 15 USC §§ 78m, 78dd and 78ff. The FCPA was originally enacted in 1977, in the wake of widespread efforts at government reform. Earlier in the decade, the US Securities and Exchange Commission (SEC) had investigated over 400 US companies alleged to have made a total of more than US\$300 million in questionable or illegal

² 18 USC § 201(b)(3) and (4).

³ *Dixon v. United States*, 465 US 482, 496 (1984).

⁴ See generally G. D. Brown, 'Stealth Statute: Corruption, the Spending Power, and the Rise of 18 U.S.C. § 666', *Notre Dame Law Review*, 73 (1998), 247–314.

payments to foreign government officials, politicians and political parties. One leading case involved Lockheed, which paid foreign officials in the Netherlands, Japan and Italy to favour its company's products. Another was the so-called Bananagate scandal, in which Chiquita Brands bribed the president of Honduras to lower its taxes. The Act was enacted despite substantial concern that it would put American businesses at an economic disadvantage in international business.

The FCPA was signed into law in 1977 and amended in 1998 by the International Anti-Bribery Act, which was designed to implement the anti-bribery conventions of the Organisation for Economic Cooperation and Development. The Act makes it a crime to give payments to 'foreign officials' for the purpose of 'obtaining or retaining business for or with, or directing business to, any person', and further mandates corporate record-keeping that would reveal bribe payments.⁵ The Act thus applies to the employees of American companies who *give or offer* bribes to foreign officials, but not to the foreign officials who *accept or solicit* those bribes.⁶ Nor does the Act currently apply to those who give bribes to employees of private companies abroad, though, as we shall see below, there has been talk of amending the statute to do just that.

In the first twenty years of its existence, the FCPA was used relatively infrequently. It was not until the early part of the last decade, 'owing to a combination of factors that scholars still only partially understand', that the US Department of Justice and SEC initiated a dramatic surge in enforcement.⁷ Today, the FCPA is, as one scholar has put it, 'widely regarded as among the most important and fearsome statutes in international business, with fines routinely reaching into the tens or hundreds of millions of dollars'.⁸ Recent FCPA investigations have implicated numerous leading companies, including Maxwell Technologies, Sun Microsystems, Morgan Stanley, Avon, Bridgestone, Aon, Johnson & Johnson, United Parcel Service, Bristol Myers Squibb, Alltel, Alcatel Lucent, Xerox, United Defense Industries, Chiquita Brands, Accenture,

⁵ The statute originally applied only to payments originating inside the United States, but was extended in 1998 to reach bribes originating outside the country as well. Thus, US companies are now liable for the acts of their domestic *and* foreign employees.

⁶ *United States v. Blondek*, 741 F Supp 116, 119–20 (ND Tex. 1990). In other words, the statute applies exclusively to bribers. In that sense, it is the converse of the Hobbs Act.

⁷ A. B. Spalding, 'The Irony of International Business Law: US Progressivism, China's New Laissez-Faire, and their Impact in the Developing World', *UCLA Law Review*, 59 (2011), 354–413.

⁸ Spalding, 'The Irony of International Business Law.'

DaimlerChrysler, Petro-Canada and Eli Lilly.⁹ The result is a statute now celebrated by some as helping to ‘effectuate a worldwide sea change in attitudes toward bribery’, and derided by others as an agent of ‘cultural imperialism’.¹⁰

In addition to federal statutes that criminalise bribes accepted by government employees, there are also several federal statutes that potentially criminalise bribes accepted by private employees. One is the Anti-Kickback Act, 41 USC §§ 51–58, which prohibits both the giving and receiving of ‘kickbacks’ involving contractors under federal contracts. The term ‘kickback’ is defined as any:

money, fee, commission, credit, gift, gratuity, thing of value, or compensation of any kind which is provided, directly or indirectly, to any prime contractor, prime contractor employee, subcontractor, or subcontractor employee for the purpose of improperly obtaining or rewarding favourable treatment in connection with a prime contract, or in connection with a subcontract relating to a prime contract.¹¹

The Act includes a criminal penalty of up to ten years in prison.¹² Like section 666, the Anti-Kickback Act is intended to address the problem of bribes that occur in the context of federal contracts, though unlike section 666, it has no monetary threshold.

Another three federal statutes criminalise commercial bribery by means of incorporating state commercial bribery laws into federal law. For example, the Travel Act 18 USC § 1952, provides that anyone who travels in interstate commerce with the intent to commit, and who commits, ‘any unlawful activity’ is guilty of a federal crime, with ‘unlawful activity’ consisting of a wide range of activity that includes ‘bribery ... in violation of the laws of the State in which committed or of the United States’. Thus, as long as the state in which the actor is operating has a commercial bribery statute, the federal government can rely upon the Travel Act to prosecute him for engaging in commercial bribery.¹³ To date, at least thirty-five states have enacted commercial bribery statutes that could potentially be used by the Department of Justice as the basis

⁹ M. Ryznar and S. Korkor, ‘Anti-Bribery Legislation in the United States and United Kingdom: A Comparative Analysis of Scope and Sentencing’, *Missouri Law Review*, 76 (2011), 415–53, at 415, 417.

¹⁰ Spalding, ‘The Irony of International Business Law’, 18–19. ¹¹ 41 USC § 52.

¹² 41 USC § 54.

¹³ See *United States v. Perrin*, 444 US 37 (1979) (holding that Travel Act applies to bribery in both official and commercial sense).

for a Travel Act prosecution.¹⁴ Nevertheless, prosecutions under the Travel Act for commercial bribery have been extremely rare, presumably because, in comparison with the Hobbs Act, its penalties are relatively lenient (five years imprisonment, as opposed to twenty years under the Hobbs Act, as long as no violence is involved).

To a similar effect are the federal mail and wire fraud statutes, 18 USC §§ 1341, 1343, and 1346. Section 1341 makes it a crime to use the mail to execute a 'scheme or artifice to defraud' or to obtain money or property through false or fraudulent pretences, representations or promises. Section 1343 makes it a crime to use interstate wire communications, such as telephone, Internet, television or radio transmissions, to do the same. Section 1346, in turn, provides that a 'scheme or artifice to defraud' includes a 'scheme or artifice to deprive another of the intangible right of honest services'. And what is a 'scheme to deprive another of the intangible right of honest services'? In its latest pronouncement, the Supreme Court has said that honest services fraud consists essentially of bribery and kickbacks, including bribes paid to employees of private firms.¹⁵ Thus, a private employee who accepts a bribe, and does so by means of the mail or wire communications, could be prosecuted for mail or wire fraud, respectively.

Also incorporating state commercial bribery laws into federal law is the Racketeering Influenced and Corrupt Organizations Act (RICO), 18 USC § 1962 *et seq.*, enacted in 1970 for the purpose of combating the influence of organised crime in interstate and foreign commerce. Despite its stated aims, however, RICO has played a relatively minor role in the battle against organised crime, apparently because of ineffective law enforcement and botched prosecutions.¹⁶ If RICO has had an effect anywhere, it has been in the context of routine criminal fraud prosecutions and private civil suits (much encouraged by its treble damages provisions). RICO makes it a crime to invest in, acquire an interest in, maintain control over or conduct the affairs of, an 'enterprise', by means of a 'pattern' of 'racketeering activity', defined to include a wide range of federal and state proscriptions, including state law commercial bribery

¹⁴ J. J. Ansley *et al.*, 'Commercial Bribery and the New International Norms', *Bloomberg Law Reports* (October 2009), available at: http://works.bepress.com/cgi/viewcontent.cgi?article=1005&context=don_berthiaume&sei-redir=1#search=%22travel%20act%20bribery%22.

¹⁵ *Skilling v. United States*, 561 US (2010).

¹⁶ For a useful history of RICO's early years, see G. E. Lynch, 'RICO: The Crime of Being a Criminal: Part I', *Columbia Law Review*, 87 (1987), 661–764.

law provisions. To date, however, it does not appear that there have been any criminal RICO cases involving allegations of commercial bribery.¹⁷

Finally, there is a wide range of federal laws that have been used to prosecute commercial bribery in a variety of specific industries and practices. For example, there are federal statutes making it a crime to give or receive bribes in connection with bank loans, sporting events, employee benefit and pension plans, investment advising, television quiz shows, alcoholic beverages, labour unions, railroad operations and radio play lists.¹⁸

State law

Beyond those provisions criminalising bribery under federal law there is also a complex collection of corruption and bribery laws that applies in the fifty individual states and the District of Columbia. As in the federal system, the main focus of state bribery enforcement is on bribes taken by governmental officials, including judges, legislators and executive officers. Such statutes are exemplified by (and often modelled on) the Model Penal Code, which is limited to bribes accepted by, or given to, public servants, party officials, voters and those involved in judicial and administrative proceedings.¹⁹

But most states also have on the books a variety of provisions that can be used to prosecute one or another form of commercial bribery. There are two basic models that have been followed. The first, less common kind of statute, applies to bribery occurring in practically any commercial context. For example, section 32 of the Texas Penal Code makes it a felony for a fiduciary, such as an agent, employee, trustee, guardian, lawyer, physician, officer, director, partner or manager, to accept or agree to accept any benefit from another person 'on agreement or understanding that the benefit will influence the conduct of the fiduciary in relation to the affairs of his beneficiary'.²⁰ Similarly, section 180 of the New York Penal Law criminalises both the giving and the receiving of a commercial bribe, defined as a 'benefit [conferred] upon an employee ... without the

¹⁷ G. Heine, B. Huber and T. O. Rose, *Private Commercial Bribery* (Freiburg: International Chamber of Commerce, 2003), p. 517.

¹⁸ For example, 18 USC §§ 212–14 (bank loans); 18 USC § 224 (sporting contests); 18 USC § 1954 (employee pension funds); 27 USC § 205(c) (bribery in alcoholic beverage industry); 29 USC § 186 (bribery of labour representatives); 49 USC § 11907 (bribery of railway employees).

¹⁹ § 240.1. ²⁰ Texas Penal Code, § 32.43.

consent of [his] employer or principal, with intent to influence his conduct in relation to his employer's or principal's affairs'.²¹ The more common state approach, however, is to define commercial bribery more narrowly, to apply to individuals working in specific fields of endeavour, such as common carrier and telegraph company employees, labour officials, bank employees and participants in sporting events.²²

The law of commercial bribery in the United Kingdom

Among the many changes effected by the Bribery Act 2010, one of the most radical is the way commercial bribery is handled. The Act criminalises bribery by setting out a number of 'cases' in which bribery is said to exist. Section 1 describes the conduct of the offeror/briber, and section 2 deals with the conduct of the offeree/bribee. For example, it is a crime if a person 'offers, promises or gives a financial or other advantage to another person', if the offeror intends the advantage to 'reward a person for the improper performance of such a function or activity'. Similarly, it is a crime if one 'requests, agrees to receive or accepts a financial or other advantage intending that, in consequence, a relevant function or activity should be performed improperly'.²³

What is really novel, however, is section 3, which describes the various 'functions and activities' within which bribery can occur. Here the language is strikingly broad. It refers not only to functions of a 'public nature', but also to activities 'connected with a business' (a term defined to include trades and professions), 'performed in the course of a person's employment', or 'performed by or on behalf of a body of persons (whether corporate or unincorporated)'.²⁴ The only other requirement is that that the person performing the function or activity be 'expected to perform it in good faith', or 'impartially' or be 'in a position of trust by virtue of performing it'.²⁵

Although there is not yet reported case law interpreting these provisions, it seems clear that they would apply to a broad range of cases of what has traditionally been understood as commercial bribery. For example, in the hypothetical scenario described at the beginning of this

²¹ NY Penal Law, §§ 180.00, 180.05.

²² For a helpful listing, see *United States v. Perrin*, 444 US 37, 44 nn. 9, 10 (1979) (listing state commercial bribery statutes).

²³ Bribery Act 2010, s. 2. ²⁴ Section 3(2).

²⁵ Section 3(3)–(5). And see Sullivan, Chapter 1, above, at pp. 00–00.

chapter, Larson, the company CEO, offered money to Heller, the corporate board member serving on another firm's building committee, in return for Heller's agreeing to vote for the site favoured by Larson; and Heller accepted the offer. In such a case, both Larson and Heller would be guilty of bribery – Larson for accepting the bribe, and Heller for offering it. Larson was clearly performing a function or activity 'connected to a business' and 'performed in the course of a person's employment', and it seems likely that he was expected to perform the function 'in good faith' and 'impartially', and to be 'in a position of trust by virtue of performing it'. It is also clear that Larson accepted, and Heller gave, a 'financial or other advantage intending that, in consequence, a relevant function or activity should be performed improperly'.

The Bribery Act thus effects a significant change from prior law, which had confined its reach to bribery of members, officers and servants of public bodies.²⁶ To be sure, the old law had extended the reach of bribery law to all 'agents', irrespective of whether the agent was employed or serving in the public or the private sector.²⁷ Despite its language, however, it appears that the 1906 Act was only rarely used in this manner, presumably because the presumption of 'corruptness' created by Prevention of Corruption Act 1916 applied only to gifts given to public officials.²⁸ In essence, this presumption meant that public officials would continue to be held to a 'higher standard' than private employees.²⁹

Given the magnitude of the change effected by the Bribery Act, it is surprising that its framers had relatively little to say about why they decided to include commercial bribery on the same terms as official bribery. The issue is briefly considered in the Law Commission's 2007 Consultation Paper and its 2008 Report, *Reforming Bribery*. According to the Consultation Paper:

the main objection to having separate offences is that it is very difficult to define with sufficient clarity the distinction between public sector and private sector functions. Increasingly, what were formerly public sector functions are sub-contracted out to private companies while public bodies now frequently form joint ventures with private companies.³⁰

²⁶ Public Bodies Corrupt Practices Act 1889.

²⁷ Prevention of Corruption Act 1906; Law Commission, 'Reforming Bribery,' Law Com. CP No. 185, 2007, para. 1.8, p. 3.

²⁸ Prevention of Corruption Act 1916, s. 2.

²⁹ Law Commission, 'Reforming Bribery,' para. 1.13, p. 4.

³⁰ Law Commission, *Reforming Bribery*, para. 1.14, p. 5.

In other words, in the eyes of the Commission, the increasingly blurry line between government and the private sector makes the distinction between official and commercial bribery increasingly irrelevant.

A year later, in its 2008 Report, *Reforming Bribery*, the Commission had not changed its position.³¹ It pointed out that:

it is obviously much more difficult now than it was 100 or more years ago to capture what is meant by 'public bodies'. It may be equally difficult to decide, in relation to a public body, whether someone is a member (or officer, or 'servant') of it, or is alternatively a private person contracted to perform the functions the public body is meant to perform.³²

The Commission went on:

so many more private individuals and organisations are now contracted to provide public services, or to provide services to the private sector that have a 'public interest' element to them. In the private sector, the acceptance of advantages in doing business may be perfectly acceptable in many contexts. How, then, should such people or bodies be treated, if there is to be a separate bribery-related offence focused on the 'public' sector? The fact that there is now so much more private sector provision of goods and services in the public interest, makes it hard to argue that no one should ever accept advantages in any form, simply because what they do involves a public service dimension.³³

Thus, based primarily on the supposed difficulty of distinguishing between official bribery and commercial bribery, the Commission, and ultimately Parliament, settled on a single undifferentiated definition of bribery, one which did not distinguish between bribery in the public and private sector. Under the new scheme, either type of bribery would subject the offender to the possibility of as much as ten years in prison and a fine.³⁴

There is, however, a certain ambiguity in the Commission's rationale. Was it saying: (1) that the distinction between official and commercial bribery might still matter in the abstract, but, given the recent blurring between the public and private sectors, simply cannot be maintained in

³¹ As a consultant to the Law Commission, I tried to get the Commission to think more about this issue, by submitting a comment that objected to treating official and commercial bribery as equivalent without further discussion, but, alas, my objection seems to have had little effect.

³² Law Commission, *Reforming Bribery, Reforming Bribery: Report*, Law Com. No. 313 (London: The Stationery Office, 2008), para. 3.19, p. 19.

³³ Paragraph 3.216, p. 58 (footnote omitted). ³⁴ Bribery Act 2010, s. 11.

practice; (2) that even if the distinction could be maintained in practice, it would not matter in the abstract because there is no normative difference between the two kinds of bribery; or (3) that even if the distinction mattered in theory or in practice, it is not a distinction that needs to be maintained in the Bribery Act itself; whatever differences there are between official and commercial bribery can be worked out by prosecutors and judges in the exercise of their discretion to prosecute and to sentence, respectively.

Is the distinction between official and commercial bribery worth preserving?

In the previous section, we observed a dramatic shift in UK law, and a somewhat less significant shift in US law, towards the criminalisation of commercial bribery.³⁵ The question now is whether this shift makes sense. Should commercial bribery be treated as a crime; and, if so, should it and official bribery be treated as distinct? We begin by considering an empirical study that tested people's attitudes towards the two kinds of offence. We then look at the merits of non-differentiation from a conceptual and policy standpoint.

Empirical study of public attitudes concerning bribery

As part of a larger project on public attitudes regarding various issues in white collar crime, my collaborator, Matthew Kugler, and I conducted an empirical study that examined how the 'man in the street' views the relative blameworthiness of various bribery-related acts.³⁶

Procedure followed

The study (described in more detail in our previous article) involved fifty-two participants (all Americans: fifteen male, thirty-seven female) recruited from Amazon's Mechanical Turk service. Data from three were discarded due to abnormally fast completion times (< ½ the median) or incorrectly answering a question intended to screen inattentive participants.

³⁵ Something similar can be observed in a host of other jurisdictions as well. See Heine *et al.*, *Private Commercial Bribery* (surveying Czech Republic, France, Germany, Italy, Japan, Korea, the Netherlands, Poland, Spain, Sweden and Switzerland, in addition to the United States and England and Wales).

³⁶ Green and Kugler, 'Public Perceptions of White Collar Crime Seriousness'.

Of the remaining forty-nine (fifteen male, thirty-four female), the median age was thirty-three. Fifty-one per cent of participants had college degrees. Participants were also asked a range of questions about their political orientation, faith in various public institutions, and beliefs regarding the extent to which the world is a competitive place.³⁷

The basic procedure consisted of giving participants a core 'story' with multiple possible 'endings' and asking them to make distinctions, if any, where relevant. After each scenario, participants were asked three questions. First, they were asked to rate the moral blameworthiness of the described act on a scale ranging from 1 (not at all blameworthy) to 7 (very blameworthy). Secondly, they were asked whether the act should be treated as criminal (yes/no). Thirdly, they were asked how severely, if at all, the person should be punished on a scale ranging from 1 (no punishment) to 7 (severely punished).

Basic demographics (age, sex, occupation, educational attainment and state of residence) were collected at the end of the study. Participants were also asked whether they had ever run for public office, held a position of responsibility at a larger firm, worked at a company with a gifts policy, been involved in lobbying or given money to a political candidate.

Among other issues, we wanted to know how our subjects would regard a bribe paid to a government official in comparison to a bribe paid to a business person. As described in the introduction to the chapter, several of the scenarios were intended to test this distinction. In one scenario, an offer of money was accepted by a member of the state legislature in return for his agreeing to vote for a building being placed at a particular location. In the other scenario, the offer of money was accepted by a board member of a large private corporation who would be voting on a similar issue. In both cases, the amount of money offered was the same. Alternative scenarios also involved 'gratuities' being given to a retiring official and to an official with no plans to retire.

Results of the study

An overwhelming majority of subjects regarded both cases of receiving a bribe as blameworthy and deserving of significant punishment (see Table 2.1). But the case involving official bribery was rated as more

³⁷ C. G. Sibley and J. Duckitt, 'Big-Five Personality, Social Worldviews, and Ideological Attitudes: Further Tests of a Dual Process Cognitive-Motivational Model', *Journal of Social Psychology*, 149 (2009), 545-61.

Table 2.1 *Ratings of public versus private scenarios in terms of blameworthiness, deserved punishment and percentage of the sample criminalising the activity*

| | Blameworthiness | Punishment | Per cent Criminalising |
|--------------------------------------|--------------------------|--------------------------|------------------------|
| Payment accepted by public official | 6.67 _a (1.05) | 5.90 _a (1.37) | 95.9% _a |
| Payment accepted by private employee | 6.06 _a (1.72) | 4.88 _a (1.88) | 79.6% _b |

For each variable, numbers sharing subscripts are not significantly different from each other.

Standard deviations are in parentheses. Blameworthiness and punishment scores are on scales ranging from 1 to 7.

blameworthy than that involving commercial bribery. When the bribe was accepted by the public official, almost 96 per cent of respondents said that it should be treated as a crime. When the bribe was accepted by the board member of a large company, nearly 80 per cent of our subjects said that this should be treated as a crime – less than in the context of official bribery, but still substantial. With respect to blameworthiness judgments and amount of punishment recommended, we found a similar pattern. Acceptance of a bribe by a public official was rated as 6.67 on the blameworthiness scale, while acceptance of a bribe by a private employee was rated as 6.06.³⁸ And with respect to punishment deserved, official bribery was rated as 5.90, while commercial bribery was rated as 4.88.

³⁸ The individual differences analysis for this study created separate composites for the private and the public bribee cases, combining the bribery and gratuity cases for each. Two individual difference factors emerged as significant. When the receiver of funds was a private official, a participant who had worked at a company that had a gift policy was more likely to criminalise the private official's actions ($\beta = 0.27, p = 0.05$) and rate them as blameworthy ($\beta = 0.36, p < 0.05$) and assign higher punishments ($\beta = 0.37, p < 0.05$). Participants high in competitive world beliefs, a measure of support for social Darwinist dog-eat-dog attitudes, were somewhat less likely to criminalise a private official accepting money ($\beta = 0.27, p = 0.05$), but there was no effect on the other measures. When the receiver of funds was a public official, the same two factors were relevant. Again, if the participant had worked at a company that had a gift policy, they were more likely to criminalise the official's actions ($\beta = 0.32, p < 0.05$) and rate them as highly blameworthy ($\beta = 0.34, p < 0.05$). If the participant was high in competitive world beliefs, they were

Why citizens' intuitions matter

The question being tested in the empirical study was whether people's intuitions about the blameworthiness of different forms of bribery are consistent or inconsistent with how such offences are treated by modern law. What citizens think about such issues matters, as I have discussed elsewhere, for a number of reasons.³⁹

Most scholars agree that society's ability to enforce compliance with the law lies less in the power to impose sanctions than it does in the norms by which people direct their lives. Generally, people refrain from committing crimes not because they fear sanctions if they do, but because they believe it is morally wrong to do so.⁴⁰ Thus, it is important that the law be consistent with moral norms. As Paul Robinson and John Darley have put it:

The criminal justice system's power to stigmatise depends on the legal codes having moral credibility in the community. The law needs to have earned a reputation for accurately representing what violations do and do not deserve moral condemnation from the community's point of view. This reputation will be undercut if liability and punishment rules deviate from a community's shared intuitions of justice.⁴¹

Where the criminal law is viewed as offering a reliable statement of what the community regards as wrongful citizens are more likely to follow its lead in cases which are unclear. When criminal codes deviate from the norms of the community, citizens may be less likely to cooperate with or acquiesce to the system's demands.⁴²

again less likely to criminalise the official's actions ($\beta = 0.39, p < 0.01$) or rate them as highly blameworthy ($\beta = 0.39, p < 0.01$). There were no effects of either factor on punishment for the public official.

³⁹ The discussion in this section borrows from Green and Kugler, 'Public Perceptions of White Collar Crime Seriousness', and S. P. Green, *Thirteen Ways to Steal a Bicycle: Theft Law in the Information Age* (Cambridge, MA: Harvard University Press, 2012).

⁴⁰ See, e.g., T. Tyler, *Why People Obey the Law* (New Haven, CT: Yale University Press, 1990).

⁴¹ P. H. Robinson and J. M. Darley, 'Intuitions of Justice: Implications for Criminal Law and Justice Policy', *Southern California Law Review*, 81 (2007), 1–67, at 21. See also P. H. Robinson and J. M. Darley, *Justice, Liability, and Blame: Community Views and the Criminal Law* (Boulder, CO: Westview Press, 1995); P. H. Robinson and J. M. Darley, 'Testing Competing Theories of Justification', *North Carolina Law Review*, 76 (1998), 1095–143; J. M. Darley *et al.*, 'Community Standards for Defining Attempt: Inconsistencies with the Model Penal Code', *American Behavioral Scientist*, 39 (1996), 405–20.

⁴² E. Mullen and J. Nadler, 'Moral Spillovers: The Effect of Moral Mandate Violations on Deviant Behavior', *Journal of Experimental Social Psychology*, 44 (2008), 1239–45;

It is not merely the case that social norms play a role in shaping the criminal law. The criminal law also plays an important role in informing, shaping and reinforcing societal norms. Children and adults learn what is wrong in part from what the law says is wrong. Where the law deviates too far from existing norms, its instructive function is impaired as well.

Maintaining consistency between the law and social norms is important not only in connection with deciding *which* conduct should or should not be criminalised; it is also vital in deciding *how much* to punish. If the legal system imposes more, or less, punishment on some crimes than citizens believe is deserved, the system seems unfair; it loses its credibility, and ultimately its effectiveness.

What is ultimately at stake here is what Andrew Ashworth has called the 'principle of fair labelling' – the idea that 'widely felt distinctions between kinds of offences and degrees of wrongdoing are respected and signalled by the law, and that offences should be divided and labelled so as to represent fairly the nature and magnitude of the law-breaking.'⁴³ As Ashworth puts it, 'one of the basic aims of the criminal law is to ensure a proportionate response to law-breaking, thereby assisting the law's educative or declaratory function in sustaining and reinforcing social standards'.⁴⁴ Where people consistently regard two or more types of conduct as different in terms of blameworthiness, the law ought to reflect those differences. Other things being equal, it ought to punish the more blameworthy act more severely and the less blameworthy act less severely.

All of these considerations would seem to apply in the case of bribery. If the law treats some kinds of bribery more, or less, harshly than people believe they should be treated, it seems unjust and out of step, and likely is to lose some of its moral authority and effectiveness.

I should be clear, however, about what I believe is, and is not, the value of studying community attitudes regarding crime seriousness.⁴⁵ First, I do not mean to suggest that the criminal law should always follow popular opinion, or that people's moral intuitions are necessarily

J. Nadler, 'Flouting the Law', *Texas Law Review*, 83 (2005), 1399–441; Robinson and Darley, 'Intuitions of Justice', p. 23; W. Stuntz, 'Self-Defeating Crimes', *Virginia Law Review*, 86 (2000), 1871–900.

⁴³ A. Ashworth, *Principles of Criminal Law*, 4th edn (Oxford University Press, 2003), pp. 89–90. For a critique, see J. Chalmers and F. Leverick, 'Fair Labelling in Criminal Law', *Modern Law Review*, 71 (2008), 217–46.

⁴⁴ Ashworth, *Principles of Criminal Law*, p. 90.

⁴⁵ This paragraph borrows from my book, *Thirteen Ways to Steal a Bicycle*.

correct.⁴⁶ Secondly, I do not mean to imply that empirical studies of this sort should provide a substitute for serious normative reflection about deontological desert.⁴⁷ Thirdly, I acknowledge that giving subjects relatively brief descriptions of fictional crimes and asking them to make blameworthy judgments is not the only, and perhaps not even the most accurate, way to assess their views regarding the relative blameworthiness of criminal acts.⁴⁸ Fourthly, while I do believe that the prohibition of at least certain kinds of bribes is probably universal, I make no claim that the distinction between official and commercial bribery is also universal.⁴⁹ Rather, I view empirical studies regarding community views of crime seriousness as a *supplement* to normative analysis, a way for the analyst (in this case, me) to check the validity of his or her own intuitions, and as a means for assessing the likely effectiveness of offence grading.

The dangers of over-particularism

To say that the law should, to some degree, reflect widely felt distinctions between kinds of wrongdoing is not to deny the potential for *over-particularism*. As James Chalmers and Fiona Leverick have argued, ‘not only does [very specific crime labelling] over-complicate the law, running the risk of needless arguments about the appropriate charge in respect of indisputably criminal conduct, it also runs the risk that novel conduct will not be covered at all because offences have been drawn up with too high a degree of specificity.’⁵⁰ For example, it could be the case that mutually exclusive statutes criminalising official and commercial bribery

⁴⁶ Cf. A. J. Kolber, ‘How to Improve Empirical Desert’, *Brooklyn Law Review*, 75 (2009), 433–61, at 436 (even if a large majority of people believed that ‘it is immoral to permit people of the same sex to marry each other, we might resist the idea that such intuitions alone, even if they represent a consensus view, provide *any* moral support for prohibiting same-sex marriage’).

⁴⁷ Cf. M. Sigler, ‘The Methodology of Desert’, *Arizona State Law Journal*, 42 (2011), 1173–202; C. Slobogin, ‘Is Justice Just Us? Using Social Science to Inform Substantive Criminal Law’, *Journal of Criminal Law & Criminology*, 87 (1996), 315–33; K. W. Simons, ‘The Relevance of Community Values to Just Deserts: Criminal Law, Punishment Rationales, and Democracy’, *Hofstra Law Review*, 28 (2000), 635–66 (all criticising empirical desert approach on this ground).

⁴⁸ Cf. Kolber, ‘How to Improve Empirical Desert’, pp. 441–3 (criticising the work of Paul Robinson on this ground).

⁴⁹ Cf. Z. R. Calo, ‘Empirical Desert and the Moral Economy of Punishment’, *Arizona State Law Journal*, 42 (2011), 1123–40, at 1136–7 (discussing the relationship between empirical desert and universal moral judgments).

⁵⁰ Chalmers and Leverick, ‘Fair Labelling in Criminal Law’, p. 239.

statutes would create a situation in which a defendant charged with one offence could avoid conviction by arguing that he had actually committed a different offence. Something similar was said to have occurred under the common law of theft, where a defendant charged with, say, embezzlement, could avoid conviction by showing that he had actually committed false pretences, or vice versa.⁵¹ The solution of twentieth-century law reformers was to treat most previously distinct forms of theft as undifferentiated and, in effect, to leave it to sentencing courts to sort out which kinds of theft should be punished more or less severely.

The Bribery Act has followed a similar approach, making no distinction between official and commercial bribery, though presumably leaving to prosecutors and judges (at sentencing) the discretion to do so. As I have argued with respect to theft law itself, however, I am sceptical that such legislative levelling is necessary or appropriate. Given the reduction in indeterminate sentencing and increased reliance on strict sentencing guidelines that have occurred in the United States and to a somewhat lesser extent in the United Kingdom, it seems unlikely that courts will have the discretion to make the kinds of distinction that arguably need to be made. And, even if judges and prosecutors could differentiate in ways that Parliament has chosen not to, this would not resolve the basic issue: namely, whether there is a moral difference between commercial and official bribery; and, if so, is that difference, balanced against concerns about the law's administrability, sufficient to justify treating them as separate offences?

Conceptual and policy analysis

What explains the fact that, while a large number of respondents believed that both official bribery and commercial bribery should be treated as a crime, most people also believed that official bribery was the more serious offence? Were they right? To answer that question, it is necessary to examine the moral content of official and commercial bribery, as well as some of the policy concerns that underlie the criminalisation of such practices. We begin by considering the moral content of bribe-accepting, and then turn to the moral content of bribe-giving.

⁵¹ This problem is dealt with at length in Green, *Thirteen Ways to Steal a Bicycle*.

Accepting a bribe

As I have explained in earlier work, the acceptance of a bribe involves, at its core, the misuse of the bribee's position for personal gain.⁵² It reflects a kind of disloyalty: rather than serving the interests of the principal to whom he owes a fiduciary duty, the bribee serves his own interests instead.

Consider again the hypotheticals used in the empirical study: in both, money was given by CEO Larson 'under the table' in return for a favourable vote on the siting of a new office building. In one case, the bribe was taken by a state legislator (Jones). In the other, the bribe was taken by a board member of a private corporation (Heller). Both Jones and Heller put their own interests before those of their principals: in Jones' case, before those of his constituents, his public office and the community at large; in Heller's case, before those of his firm, its management and its shareholders.

The question, then, is whether breach of a duty to a public office is any more (or less) harmful or wrongful than, or qualitatively different from, breach of a duty to a private employer.

In an age in which corporate entities have a greater reach into our lives than ever before, there is no reason to assume that the corrupt decisions of company employees will necessarily cause less harm than the corrupt decisions of public officials. Indeed, a corrupt decision made by a bribe-taking executive of a Fortune 500 company might adversely affect the lives of many more victims than a corrupt decision made by a bribe-taking judge, city councillor or even a member of Congress. The real question, then, is whether, *ceteris paribus*, the wrongs and harms of official bribery differ qualitatively from those of commercial bribery.

Bribery, in both the public and commercial sphere, is said to 'corrupt' political and commercial life by inviting inappropriate grounds for decision-making.⁵³ It makes the decision-maker unable or unwilling to determine what is in the best interest of his principal. (This is not to say that every act of bribery will necessarily lead to any actual bad decisions: a legislator or judge, corporate executive or department store buyer can be bribed into making the same, objectively 'correct' decision she would

⁵² See S. P. Green, *Lying, Cheating, and Stealing: A Moral Theory of White Collar Crime* (Oxford University Press, 2006), pp. 193–211.

⁵³ See generally A. J. Heidenheimer, M. Johnson and V. T. LeVine (eds), *Political Corruption: A Handbook* (New Brunswick, NJ: Transaction Publishers, 1989).

have made absent the bribe. All that is required is that the decision-making process itself be corrupted by the payment of the bribe.⁵⁴⁾

But beyond that similarity there are significant differences. Those who hold public office have duties that are qualitatively different from those held by employees of private firms. In a democracy, they typically hold their jobs either because they were directly chosen by the people or because they were appointed by, and serve at the pleasure of, those who were popularly elected. They are frequently charged with ‘serving’, ‘protecting’, ‘preserving’ or ‘defending’ the public interest, and doing so ‘truly’ and ‘faithfully’. To accept a bribe is to violate that trust, to betray one’s office and the polity, to commit a kind of ‘treason’.⁵⁵ Public officials, at whatever level they function, are charged with representing and working on behalf of the public good. They are supposed to represent all their constituents, not just those who pay them money under the table. When public officials accept bribes, they undermine a process in which all their constituents theoretically have an interest. For example, in the hypothetical described above, Jones’ constituents had the right to expect their legislator to decide how to vote on the site of the building based on his assessment of what was in the best interest of those constituents or perhaps of society at large.

Bribes in the private sphere reflect a quite different dynamic. Private employees who accept bribes also violate a trust, but it is a trust owed to a private firm, to their superiors, colleagues, customers or shareholders. No matter how large their companies might be, and how many ‘victims’ their conduct might ultimately affect, such employees are engaged in a process that is at its core a private one. Their internal decision-making procedures are not governed by public law in the same way that public officials’ decision-making procedures are. Private company officials ordinarily have no obligation to the general public other than that specifically imposed on them by law.

Customers who buy goods from a private firm have no right to expect that the company makes its decisions about the products and services it sells in any particular way, or to expect that the company’s decisions have been made in their best interest. As long as the company does not misrepresent the products it is selling, or violate laws concerning safety, public health or other regulatory matters, it has not violated any legal

⁵⁴ The issue is dealt with in more detail in Green, *Lying, Cheating, and Stealing*, pp. 205–7.

⁵⁵ See D. H. Lowenstein, ‘Political Bribery and the Intermediate Theory of Politics’, *UCLA Law Review*, 32 (1985), 784–850, at 806.

duty in selling a lower quality product. If the company is to be punished for its inferior product or service, it is the market that will do the punishing. Nor do customers normally have any legitimate expectation regarding the 'process' by which the company makes its decisions. Even shareholders of the firm have no right to assume that the company will make its decisions in a certain way, unless such procedures have been specified.

Whether a private employee is expected to perform his duties 'impartially' (in the language of section 3(4) of the Bribery Act) will depend on the norms of the particular industry in which he works. For example, David Mills and Robert Weisberg, citing Jonathan Klick, have suggested that in dealings between auto repair shops and the insurance industry, commercial bribes and kickbacks are sometimes viewed as akin to 'performance bonds' in the sense that they operate to ensure the continuing quality of the work being performed.⁵⁶ Imagine that an insurance company recommended particular auto repair shops to its policyholders seeking to have insured work performed. If the insurance company received an upfront payment or a discount, but paid above-market prices as the repair shops proved the high quality of their work, a performance bond would be created. If the shop failed to continue providing high quality service, then the insurance company would presumably steer its policyholders elsewhere and the repair shop would lose its bond. Although the performance bond would be fostering above-market pricing, it would nevertheless create competition among repair shops to provide the best service. It might thereby provide better protection from low-quality repairs than the prohibition on steering itself.⁵⁷

⁵⁶ D. Mills and R. Weisberg, 'Corrupting the Harm Requirement in White Collar Crime', *Stanford Law Review*, 60 (2008), 1371–445, at 1413 (citing J. Klick, 'Performance of Bond Pooling: An Efficiency Argument for Insurance Steering', unpublished manuscript, 2004).

⁵⁷ Mills and Weisberg, 'Corrupting the Harm Requirement in White Collar Crime', pp. 1413–14. Something similar, they say, occurs with respect to 'soft dollar' arrangements in the institutional financial services industry. *Ibid.* p. 1414 (citing S. Horan and D. B. Johnsen, 'Does Soft Dollar Brokerage Benefit Portfolio Investors: Agency Problem or Solution?', *George Mason Law & Economics Research Paper No. 04–50*, March (2004), available at SSRN: <http://ssrn.com/abstract=615281> or doi:10.2139/ssrn.615281. According to Mills and Weisberg, soft dollars are essentially a kickback from a broker to a portfolio manager, and, as in the case of the insurance industry, can serve as a kind of performance bond that ensures the quality of brokerage service. For the contrary view that commercial bribery has no 'redeeming pro-competitive attributes', see F. A. Gevurtz, 'Commercial Bribery and the Sherman Act: The Case for Per Se Illegality', *University of Miami Law Review*, 42 (1987), 365–400, at 393.

In the case of public employees, it is hard to imagine that such practices would be tolerated. Whatever benefits they confer upon the public through the exercise of their duties is supposed to be done on the basis of some impartial and objective criteria, determined in accordance with law or the public interest, rather than on the basis of their own personal enrichment. The idea that public officials might provide better 'service' in return for payment under the table is anathema to the idea of good government. Government is not, in the normal course of affairs, a competitive industry. In the American context, local town councils typically have a monopoly over trash pick-up, law enforcement, public schools and public parks; state governments have a monopoly over state parks and state courts; the federal government has a monopoly over national defence, social security, customs and immigration. It is simply implausible to suggest that money paid to a congressman or judge could somehow function as a 'performance bond' to ensure high-quality performance. (This is not to say that there are not cultures in which it is common practice for citizens to give 'grease payments' to, say, police officers or customs agents in return for special treatment. But, at least in Western democracies, which tend to put a high value on legality, procedural regularity, equal treatment and transparency, such practices are highly disfavoured.)

Finally, it should be noted that the argument offered here in some respects parallels an argument made by Peter Alldrige, though it follows from a very different premise.⁵⁸ Alldrige argues that the problem with bribery derives not from a breach of trust, but rather from the deleterious effects of corruption on the proper functioning of governments and markets. According to this account, bribery in the private sphere 'distorts[s] the operation of a legitimate market', whereas bribery in the public sphere creates 'a market in things that should never be sold'.⁵⁹ (For this reason, Alldrige has also been critical of the Law Commission's tendency to conflate public and private bribery.) Elsewhere, I have explained why I prefer a breach-of-trust-based account of bribery to a market-based one.⁶⁰ Nevertheless, Alldrige's idea that there is

⁵⁸ P. Alldrige, 'The Law Relating to Free Lunches', *Company Lawyer*, 23 (2002), 264–73, at 267.

⁵⁹ Alldrige, 'The Law Relating to Free Lunches'.

⁶⁰ See Green, *Lying, Cheating, and Stealing*, p. 196 n. 13; S. P. Green, 'Broadening the Scope of Criminal Law Scholarship', *Criminal Justice Ethics*, 20 (2001), 55–62.

something *qualitatively* different about dealing in government and private services is very much consistent with my own views.

Blurring the public–private distinction

Even if the distinction between bribery in the public sphere and bribery in the private sphere were accepted in the abstract, it might still be contended that the distinction does not reflect the reality of modern life in the industrialised world today, in which public and private functions have been blurred. The argument, I take it, is not that the public–private distinction is meaningless or irrelevant in theory (though a long line of legal realists and critical legal scholars have come close to arguing just that⁶¹), but rather that the distinction has become so hazy in practice that it is no longer worth preserving. According to this view, the Heller and Jones scenarios themselves would be regarded as artificial in that they draw an unrepresentative picture of the spheres in which bribery actually takes place.

As noted above, it is the belief that public and private have become thoroughly blurred that was a major motivation behind the Law Commission's decision to do away with the distinction between commercial and public bribery. Similar concerns have also been expressed in the context of the FCPA. For example, in June 2011, the House Judiciary Committee's Subcommittee on Crime, Terrorism, and Homeland Security held a hearing on the reform of the FCPA. During the hearing, the Chair of the Committee, Representative James Sensenbrenner, pressed Greg Andres, the Justice Department official whose office oversees FCPA enforcement, about confusion with respect to the question of what constitutes a 'public official' under the Act.⁶² Sensenbrenner asked: '[would] the Department approve an amendment to the Foreign Corrupt Practices Act to use the statute on bribing somebody in a commercial contract to apply to any type of bribery and forget about this debate on who a foreign official is, because bribery is bribery?'⁶³ Anders responded

⁶¹ The *locus classicus* is R. L. Hale, 'Coercion and Distribution in a Supposedly Non-Coercive State', *Political Science Quarterly*, 38 (1923), 470–94.

⁶² Foreign Corrupt Practice Act: Hearing before the Subcommittee on Crime, Terrorism, and Homeland Security of the Committee on the Judiciary, House of Representatives, 112th Congress, First Session (14 June 2011), Serial No. 112-47, available at: http://judiciary.house.gov/hearings/hear_06142011.html. Thanks to Mike Koehler for bringing these proceedings to my attention.

⁶³ Foreign Corrupt Practice Act: Hearing before the Subcommittee on Crime, Terrorism, and Homeland Security, p. 75.

that, 'obviously the Department is more than willing to work with Congress on any possible changes', to which Sensenbrenner replied, 'Okay. Well, the invitation is there, and we are going to be drafting a bill.'⁶⁴

Certainly, recent years have seen a significant trend in this direction. Functions that were once thought of as exclusively governmental – such as operating prisons, schools, the post office and various utilities – have increasingly been taken over by private entities. Meanwhile, functions once viewed as exclusively private – such as banking and insurance – have in many instances become 'nationalised', or at least subject to extensive government involvement. And there is a host of positions that truly straddle the line, such as political party leaders (who may hold no public office themselves, but who clearly have influence over public officials), and private trustees of government employee pension funds.⁶⁵

The extent to which the public and private have been blurred is, of course, an empirical question that could not be resolved without extensive research. My own sense is that the claim of blurring has been overstated. In a significant percentage of cases, we should still be able to say quite clearly whether the recipient of a given bribe is a public actor or a private actor. And where bribees are acting in a purely private capacity, I see no reason to subject them to the same legal standard as bribees acting in a public capacity. For example, in the scenario used in the empirical study, Heller was a board member of a large private corporation, while Jones was a member of the state legislature. Both took bribes in return for agreeing to vote for the briber's favoured location for the building. The effects of their votes on the community at large would presumably be similar. But the character of the bribes is quite different. Jones has betrayed the public trust in a way that Heller simply has not.

And what of those cases in which we genuinely cannot distinguish between public and private? It seems to me reasonable to say that, where private firms take on significant public functions, they should be regarded as 'public' for the purposes of bribery law. For example, in the *Dixson* case, a private social services corporation was given the responsibility of administering a federal housing and urban development programme. Officers of the corporation, responsible for the expenditure of federal funds, were alleged to have used their positions to extract

⁶⁴ Foreign Corrupt Practice Act: Hearing before the Subcommittee on Crime, Terrorism, and Homeland Security, p. 75.

⁶⁵ Mills and Weisberg, 'Corrupting the Harm Requirement in White Collar Crime', p. 1401.

kickbacks from contractors seeking to work on housing rehabilitation projects.⁶⁶ Inasmuch as the employees of the firm were performing in a 'governmental' capacity, it makes sense to say that they were acting in a 'public' capacity and that, in taking kickbacks, they breached a duty they had to the public at large.

The converse, however, is not true. Where government officials act in 'proprietary'-type roles, it does not follow that the bribes they accept should thereby be treated as private. A government official who works for an agency that buys or sells scrap metal, or provides health care, or runs a railroad is still a government official. He still has a duty to the public, and there is no reason to exempt him from the special obligations that such officials have.

Giving a bribe

Having considered the distinction between official and commercial bribery on the bribe-*acceptance* side, we now need to consider the distinction between official and commercial bribery on the bribe-*giving* side. Before we do that, however, we need to consider the difference between bribe-taking and bribe-giving more generally.

Most of the leading statutes in the United States and the United Kingdom treat the giving and acceptance of a bribe as equivalent. (There are, however, exceptions: as we saw above, under the FCPA only the giving of a bribe is actionable, while under the Hobbs Act only the acceptance of a bribe is.) Does it make sense to treat bribe-giving and bribe-taking in this manner?

In the empirical study described above, after subjects were asked for their views on various scenarios involving the acceptance of a bribe by a government official, they were then asked for their views on the official's bribe-giving. (We did not ask subjects about the wrongfulness of a bribe given to a private employee.) The differences were not as significant as we had anticipated. Almost all of our subjects said that both the acceptance of a bribe by, and the offering of a bribe to, a public official should be treated as a crime, though acceptance was viewed as slightly more blameworthy and deserving of greater punishment than giving (see Table 2.2).⁶⁷

⁶⁶ *Dixon v. United States*, 465 US 482 (1984).

⁶⁷ An earlier study by the National White Collar Crime Center had also addressed this issue, asking respondents to compare the seriousness of a bribe accepted by a public official to a bribe offered by a private citizen. Seventy-four per cent of respondents said it was more

Table 2.2 *Ratings of accepting versus giving bribe scenarios in terms of blameworthiness, deserved punishment and percentage of the sample criminalising the activity*

| | Blameworthiness | Punishment | Per cent Criminalising |
|-------------------------------------|--------------------------|--------------------------|------------------------|
| Payment accepted by public official | 6.67 _a (1.05) | 5.90 _a (1.37) | 95.9% _a |
| Payment given to public official | 6.45(1.32) _a | 5.57 _a (1.73) | 93.9% _a |

For each variable, numbers sharing subscripts are not significantly different from each other.

Standard deviations are in parentheses. Blameworthiness and punishment scores are on scales ranging from 1 to 7.

The results were somewhat surprising. We had thought that our subjects would perceive a more decisive difference between accepting and giving a bribe. As previously suggested, soliciting or accepting a bribe seems to involve a kind of disloyalty. Both public officials and private employees are supposed to work in the best interests of their constituents or institutions, rather than in the interest of third parties who tempt them. Offering or giving a bribe, by contrast, seems to involve a very different dynamic: in contrast to the bribee, the briber normally has no duty of loyalty to violate.

So why was the offering of a bribe viewed as blameworthy and deserving of criminal punishment by so a high percentage of respondents? I can think of two possible explanations. The first is that the briber was seen as inducing the bribee to be disloyal. As such, he was acting as an accomplice: influencing, encouraging or persuading another to do wrong. What is unclear is whether, other things being equal, inducing another to do a wrongful act should be regarded as more or less wrongful than doing the wrongful act oneself.⁶⁸ One can certainly imagine a reading of the scenario in which the bribe-offerer

serious for a public official to accept a bribe; 12 per cent said it was more serious for a private citizen to give a bribe; and 12 per cent said they were equally serious. National White Collar Crime Center, *National Public Survey on White Collar Crime* (Fairmont, VA: National White Collar Crime Center, 2000), p. 13.

⁶⁸ I address the issue in Green, *Lying, Cheating, and Stealing*, p. 203.

was seen as a more active, and therefore more blameworthy, player than the relatively passive bribe-taker.

A second possibility is that the offering of a bribe involves a kind of unfair competition or 'cheating'. In the typical case, the briber is seeking to obtain an unfair advantage over his non-bribe-paying 'competitors'. For example, a defence contractor gives a bribe to a procurement officer with the understanding that his bid will be viewed more favourably than his competitors' bids, despite the fact that it is no better in terms of quality, price or other material qualities. A gambler gives a bribe to a referee with the understanding that the referee will use his position to help the gambler's favoured team win the game. By seeking and obtaining an unfair advantage over his competitors, the briber in each case does them harm and wrong.

The question here, though, is whether we should treat those who 'cheat' in the public sphere (by giving a bribe to a congressperson or procurement officer) the same as those who 'cheat' in the commercial context (by giving a bribe to a basketball referee or department store buyer). It seems to me that, in the ordinary case, there is an important difference – one that parallels the difference in the context of accepting a bribe. A constituent who gives his congressperson a bribe for the purpose of inducing her to vote for legislation he favours is wronging not just his political adversaries, but also the political process and perhaps his fellow citizens. Rather than working through legitimate channels to rally public opinion and persuade the legislator of the correctness of his views on the merits, the briber of a public official attempts to short-circuit the process, to the detriment of the public at large. By contrast, the salesman who gives a bribe to the department store buyer presents a quite different profile. He is harming not the political process, but, rather, the market process. Rather than competing, as he should, on the basis of quality and price, he is attempting to circumvent the market by means of a bribe. As for the government contractor who bribes the procurement official at the Defence Department, and in many ways resembles the wholesaler who bribes the department store buyer, he nevertheless undermines a governmental process in which the broader public has a significant interest.

My claim is not that one form of bribe-giving is necessarily more wrongful or harmful than the other. My claim is simply that these acts involve quite distinct kinds of harm and wrong, and that under the principle of fair labelling the law should therefore treat them as distinct offences.

Conclusion

For most of its long history, 'bribery' meant official bribery: it was a crime for a judge or a legislator to accept money in return for an official act, but not for a private employee to do the same.⁶⁹ In recent years, prohibitions on commercial bribery have become increasingly widespread. There is a growing recognition that bribery in the business sphere impedes good decision-making, wastes resources, harms consumers and creates anti-competitive conditions. It makes sense to treat commercial bribery as a crime. But it is a crime the moral and political character of which justifies it being treated as distinct from official bribery.

⁶⁹ For an interesting, if somewhat idiosyncratic, treatment of official bribery from an historical perspective, see J. T. Noonan, Jr., *Bribes: The Intellectual History of a Moral Idea* (Berkeley, CA: University of California Press, 1984). In more than 800 pages of historical analysis, Noonan has virtually nothing to say about commercial bribery.