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The Impact of the Size of Bribes on Criminal Sanctions:
An Integrated Philosophical and Economic Analysis

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Abstract

This article analyzes the question of how the size of bribes should impact criminal sanctions. In contrast to the commonly held view that punishment should increase with the size of the bribe, we argue to the contrary: that the punishment of the bribee should decrease with the size of the bribe. Our conclusion is based both on a philosophical argument and an economic argument. We argue that all else being equal, as an agent's reservation price for selling public interests decreases, the culpability of the agent willing to receive a bribe increases. In addition, from an economic perspective, the expected social harm of an official acting with a low reservation price for bribes is much greater than one acting with a high reservation price: both the susceptibility of being bribed as well as the potential for social harm is much greater when the reservation price is low.

Keywords: *Bribes; Criminal Sanctions; Culpability; Economic Analysis*

1. Introduction

Should the size of a bribe impact the magnitude of criminal punishment? More precisely, should a larger bribe be met with harsher punishment? In a wide variety of legal systems this is the case, and sanctions are increased with the size of the bribe.[1] This presumed connection between the magnitude of the bribe and the

1. This is the case, for example, in the US, Canada, Spain, and China. In addition, the UN *Convention against Corruption* presumes that the size of the bribe acts as a standard aggravating factor in the determination of sanctions. See *United Nations Convention against Corruption*, UNODC OR, 4th Year, Annex, UN Doc A/58/422 (2003). In the case of the US, the Sentencing Commission *Guidelines Manual* attributes significant weight to the size of a bribe in determining the appropriate criminal sanction. While it classifies the base offense level of bribery at level 14 for bribes under $6,500, which requires a jail period of between 15-21 months, the recommended sanction for bribery increases with the size of bribe, up to a life (!) imprisonment sentence for bribes of over 0.55 billion dollars. See United States Sentencing Commission, *Guidelines Manual*, §2C1.1, §2C1.5(a) (November 2021), online: https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2021/GLMFull.pdf. In Canada, the Canadian *Criminal Code* does not provide a set of detailed sentencing guidelines, and sentencing principles have been developed by courts. See *Criminal Code*, RSC 1985, c C-46. Courts have considered the size of bribes to be an aggravating factor: see Gerry Ferguson, *Global corruption: Law, theory & practice*, 3rd ed (University of Victoria Press, 2019) at 693. For instance, in *R v. Kozitsyn*, Justice Bourque justified a relatively harsh sentence of five months imprisonment and two years of probation on grounds of the significant amounts involved in the bribe

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criminal sanction is further supported by theoretical work that advocates increasing punishment with the size of a bribe, at least with respect to the punishment of the bribee, while few challenge the legal arrangements that attribute such significance to the size of bribes.[2] In this article, we argue for the contrary position: that all else being equal, a larger bribe provides a reason to *reduce* the bribee's punishment. We further argue that there is a significant distinction between bribery and crimes such as theft with respect to the connection between the value the criminal derives from the crime and the appropriate sanction, which we clarify in this article.

Compare two cases of bribery:

Developer Case 1: A developer wants to build a 20-floor high-rise on top of a hill in the middle of the city. The chances that the zoning committee will approve such a project are fairly slim: it has a policy of approving no more than 15 floors and the fact that the building is in a highly visible location reduces the chances that the

(though the sentence was mitigated based on other factors). See *R v Kozitsyn*, 2009 ONCJ 455 at 26 (wherein a police officer was offered a significant percentage of the revenues of a massage parlor in exchange for not issuing the parlor any tickets). In *R v. Gyles*, Justice Wein of the Ontario Superior Court explained the variation in penalties imposed on public officers by referencing the size of bribes. See *R v Gyles*, [2003] OJ No 6249 at para 21. See also Maria Perrotta Berlin, Giancarlo Spagnolo & Bei Qin, "Leniency, Asymmetric Punishment and Corruption: Evidence from China" (2017) Stockholm School of Economics (Institute of Transition Economics) Working Paper No 34; Christine Siew-Pyng Chong & Suresh Narayanan, "The Size and Costs of Bribes in Malaysia: An Analysis Based on Convicted Bribe Givers" (2017) 16:1 Asian Economic Papers 66 at 75; *Malaysian Anti-Corruption Commission Act 2009*; *Criminal Code* (Spain), 2013/281, Article 420; Council of Europe, GRECO, 62nd Sess, Texts Adopted, Eval IV Rep (2013) at 5E; Tilman Hoppe, "Effective sanctions for corruption offenses Specialized anti-corruption courts/panels" (2021) UNDP. The Finnish penal code distinguishes between the crime of "[a]cceptance of a bribe" punishable by up to two years imprisonment and "[a]ggravated acceptance of a bribe" punishable by up to four years imprisonment, *inter alia*, where "the value of the gift or benefit is considerable" (if considered aggravated "when assessed as a whole"). *The Penal Code of Finland*, 1889, c 40, s 1-2. Beyond the formal legal tacking of sanctions to the size of bribes, studies have shown, for example in a study conducted on penalties imposed in bribery cases in the UK, that there is a correlation between the size of the bribe paid and the size of the total financial penalty imposed. See Ernst & Young, "Size of bribes and financial penalties" (2019) 13 UK Bribery Digest at 11. See also Christine Chong Siew Pyng, *The Size and Cost of Bribe Given and Solicited: Analyses Based on Convicted Offenders in Malaysia* (PhD Thesis, Universiti Sains Malaysia, 2017) at 85-86, online: https://core.ac.uk/download/pdf/228095815.pdf (finding a positive correlation in Malaysia between the size of bribes and the criminal sanction imposed on both briber and bribee).

2. See e.g. Susan Rose-Ackerman, "The Law and Economics of Bribery and Extortion" (2010) 6 Annual Review of Law & Social Science 217 at 224 (defending increasing penalties or risk of apprehension with bribe size on an efficiency analysis); Steven R Salbu, "A Delicate Balance: Legislation, Institutional Change and Transnational Bribery" (2000) 33:3 Cornell Int'l LJ 657, pointing to the fact that at the international level, there is almost no enforcement by the DOJ in cases of small bribes: "The cases prosecuted to date, however, are all relatively large-scale bribes, ranging from tens of thousands to millions of dollars. Enforcement for lesser violations is almost non-existent." *Ibid* at 682 [citations omitted]. Salbu also argues that such distinction is desirable from a normative perspective (*ibid* at 688). See also David C Weiss, "The Foreign Corrupt Practices Act, Sec Disgorgement of Profits, and the Evolving International Bribery Regime: Weighing Proportionality, Retribution, and Deterrence" (2009) 30:2 Mich J Intl L 471 (representatively, presuming that proportionality requires adjusting penalties to bribe size, owing to its relation to wrongfulness, though without defending this proposition).

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project will be approved. The developer approaches the chairman of the zoning committee and the two agree that the chairman will make sure the project is approved for a payment of $1000. The briber transfers the funds to the chairman and the chairman approves the project.

Developer Case 2: A developer wants to build a 20-floor high-rise on top of a hill in the middle of the city. The chances that the zoning committee will approve such a project are fairly slim: it has a policy of approving no more than 15 floors and the fact that the building is in a highly visible location reduces the chances that the project will be approved. The developer approaches the chairman of the zoning committee and the two agree that the chairman will make sure the project is approved for a payment of $1M dollars. The briber transfers the funds to the chairman and the chairman approves the project.

Assume a court finds the chairperson guilty in each of the cases based on all the relevant evidence. Should the difference in the size of the bribe justify differential treatment, i.e., differential punishment, in the two cases?

We argue that the size of the bribe should matter, but in the opposite direction than that presumed by many legal systems. We base this argument on both a philosophical argument and an economic argument: Assuming a fixed level of social harm, the lower the price accepted by the bribee, the *higher* their degree of culpability may be, while on many views the magnitude of one's culpability should impact the level of criminal punishment (with greater culpability providing reason to impose greater punishment). This provides at least one reason to question current legal arrangements that unquestioningly raise penalties as the size of the bribe increases. The underlying rationale for aggravated penalties may, however, be purely economic rather than reflective of anything to do with proportionality. We further propose that from an economic perspective, the expected social harm of an official acting with a low reservation price is greater than one acting with a high reservation price, providing an economic argument that supports the proposed philosophical conclusion.

2. Background

To lay out the background necessary for articulating our claim, we begin with a formulation of the basic structure of the crime of bribery, as well as the basic elements relevant to criminal responsibility and the magnitude of punishment. We do not seek to defend either of these background understandings here, but rather take for granted that they are relatively uncontroversial conceptions of these particular and general aspects of criminal law.

A. Bribery—The Basics

There are a wide variety of bribery statutes which vary to a substantial degree. Nonetheless, bribery law appears to have a common core, which understands the crime of bribery to involve the following basic elements:

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(1) a bribee, A, who accepts, or agrees to accept, something of value from a briber, B;
(2) in exchange for A's acting, or agreeing to act, to further some interest of B's;
(3) by violating some duty owed by A arising out of A's office or position.[3]

As such, bribing involves two parties, acting in concert (or at least an intention that they do so), who form (or intend to form) a bilateral agreement wherein something of value is given or offered in exchange for the bribee's acting on (or being influenced by) the interests of the briber.[4]

B. Criminal Punishment—The Basics

The punishment for bribery should, like the punishment of all crimes, be consistent with the general principles of criminal liability and punishment. According to such principles, two central elements that are significant for the determination of liability and punishment include the wrongfulness or harmfulness of the crime and the level of the offender's culpability.[5] The first of these elements involves an evaluation of the gravity of the criminal *act*, primarily with reference to the nature and degree of the harm foreseeably caused or threatened by the crime to some protected social value or interest, while the latter concerns an evaluation of the *offender* in committing the act, their 'subjective fault,' generally reflected by the offender's state of mind (or mens rea) as well as the absence or presence of excusing conditions.[6] While other elements may be relevant, generally, if two crimes are the same in all respects except that one is more wrongful/harmful than the other, this is taken to be reason to increase punishment (according to what is often termed the 'principle of proportionality'). Similarly, if two equally wrongful/harmful crimes are committed (e.g., two homicides), yet one is committed under circumstances that involve greater culpability than the other, or as it is sometimes put, where the offender manifests greater disregard for the relevant interests or socially protected values in their action (e.g., intentional vs. reckless homicide), this too is taken to be a reason to increase punishment (and at times, levels of criminal liability). Many circumstances surrounding crimes are taken

3. This framework is borrowed from Stuart P Green, *Lying, Cheating, and Stealing: A Moral Theory of White Collar Crime* (Oxford University Press, 2007) at 194. See also 18 USC § 201; *Public Bodies Corrupt Practices Act 1889* (UK); *Prevention of Corruption Act 1988* (UK); *Israeli Penal Law*—1977 § 290-95.
4. See Green, *supra* note 3.
5. See e.g. Andrew von Hirsch, "Proportionality in the Philosophy of Punishment" (1992) 16 Crime & Justice 55 at 81-82.
6. See *ibid.* See also Andrew Ashworth & Lucia Zedner, "Prevention and Criminalization: Justifications and Limits" (2012) 15:4 New Criminal L Rev 542 at 544. The Model Penal Code has adopted the term 'culpability' to refer to the mental states required for the commission of an offense. See United States MODEL PENAL CODE §2.02 Explanatory note at 24 (Am L Inst, Official Draft & Revised Commentaries, Pt II, Vol 1, 1980) [MODEL PENAL CODE]. Yet in its broad sense, culpability depends upon further elements that are relevant to the offender's subjective fault (including questions of insanity, duress, etc.). On *mens rea*, see Paul H Robinson, "*Mens Rea*" in Joshua Dressler, ed, *Encyclopedia of Crime and Justice* (Macmillan Reference, 2002) 995.

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to have implications for appropriate degrees of punishment. Thus, for example, where a crime involves abuse, violence, or exploitation not otherwise required for the elements of the offense, this will often be taken to be grounds for increasing punishment.

3. Taxonomy of Bribery

A. Taxonomy

As above, we argue that in the context of punishing bribees for committing the crime of bribery, the size of the bribe should matter, but in the opposite direction than one may intuitively think. Assuming a fixed level of social harm, the *lower* the price accepted (or solicited) by the bribee, the *higher* their degree of culpability may be, generating reason for the law to impose greater punishment in the case of smaller bribes (all else being equal). The bribee willing to cause the given social harm for a low price of $1000 demonstrates, all else being equal, greater culpability than the bribee willing to act in the face of the same social harm for a (minimum) price of $1 M.[7] The social harm that the criminalization of bribery aims to eliminate is the trading of social interests for private interests. The social harm of such trade is decoupled from the benefit the bribee derives from the transaction. The social harm is based on the value of the social interests that are traded, and not on the price the bribee asks for 'trading' the social interest. The social harm of bribery is decoupled from the benefit the bribee receives.

It bears emphasizing that our question—which essentially compares two bribes, one in which the bribe is high, the other in which the bribe is low—holds all else equal: the social harm, the negotiating skills of the receiver of the bribe, as well as considerations relevant to the level of culpability. For example, the value of the relevant sum to the bribee must be accounted for before such a conclusion may be drawn. If one bribee has extensive resources and wealth while the other is impoverished, the sum each is willing to accept will not directly reflect their relevant 'willingness to sell' threshold. The relevant claim is in fact sensitive to the value rather than the sum of the bribe. We thus take the sum of the bribe to be a proxy for value where 'all else is equal,' including the financial position of the relevant bribees, which need not be identical in all respects, but sufficiently similar. Thus, in the following examples and analysis

7. See qualification in the next paragraph regarding the *value* of money. Bribes, of course, need not be monetary: other goods given in exchange for the bribee's acting on the briber's behalf include "offers of future employment, unsecured short-term (and subsequently repaid) loans, restaurant meals and tickets for athletic events, ostensibly valuable (but actually worthless) stock certificates, and even sexual favors." Stuart Green, "What's Wrong With Bribery" in R A Duff & Stuart Green, *Defining Crimes: Essays on The Special Part of the Criminal Law* (Oxford University Press, 2005) 143 at 149. See also Green, *supra* note 3 at 199. For simplicity, his analysis and examples all refer to monetary 'sums', yet this can be translated to accommodate all forms of goods exchanged, though it may be harder to compare the value of these, introducing some complications.

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we proceed on the stipulation that the value of the identical bribes being considered does not differ between bribees, while adjustments to the argued-for conclusion can be made based on further information we have about actual bribees' access to resources.[8]

Further, in many cases, the magnitude of social harm is vague and the size of the bribe may be used as a proxy for the social harm. Consider, for instance, the bribery of an official who approves an aggressive zoning plan. In most cases, it is hard to assess what the socially optimal plan would have been, and what plan would have been adopted, had the official not been bribed. Even if it is possible to obtain such information, it is very complex to quantify the social harm from the approval of the additional housing units which may not even necessarily involve a net loss—the additional units may also generate social benefits. A judge may take into account the size of the bribe in the assessment of the social harm that the bribe caused. One of the factors a receiver of a bribe may take into account when setting the size of the bribe is the social harm that the bribe causes and its moral severity. Thus, a judge or any other individual might attempt to infer the magnitude of the social harm from the price asked by the receiving party.[9]

Yet this is not necessarily the case: one could think of cases in which the magnitude of the social harm is quite clear, and thus the size of the bribe does not imply anything regarding the social harm. For example, consider the following two cases:

> ***National Bank Case 1:*** Bill works as a guard in the safety deposit room of the national bank. In the room, there is a sum of $100M, which has just been printed. John approaches Bill and offers to pay him if he moves to a different area. John and Bill come to an agreement that Bill will move to a different area for a payment of $1000. John hands the payment to Bill, Bill moves to a different area, and John takes the $100M from the safe.

> ***National Bank Case 2:*** Sue works as a guard in the safety deposit room of the national bank. In the room, there is a sum of $100M, which has just been printed. John approaches Sue and offers to pay her if she moves away to a different area. Sue and Bill come to an agreement that Sue will move to a different area for a payment of $1M. John hands the payment to Sue, Sue moves to a different area, and John takes the $100M from the safe.

In these two cases, the difference in the size of the bribes is not a proxy for the social harm. The salient harm involved in the two cases is certain—a loss for the

8. To clarify, we do not mean to imply that this argument holds if all else is not equal. If, for example, owing to the differing positions of the bribees, one's willingness to accept a lower price is reflective of one's relatively dire financial situation and need, rather than one's relative susceptibility to corrupt propositions, the proposed argument in favor of increased penalties will not apply. The argument thus presents an important factor that has received no attention in the law and theory of bribery to date, and which may have a significant impact in important cases. Yet it does not automatically translate into greater penalties for smaller bribes, as other factors must be considered before the implications of the sum of the bribe may be deduced.

9. This can be expected to be the case where a bribe is solicited or where the 'price' is negotiated (rather than merely offered and accepted without the possibility of negotiation).

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government of $100M.[10] Should the sum the bribee receives still impact their legal liability, and if so, in what way? We argue that all else being equal, the bribee with the lower reservation price should be subject to greater punishment, as the culpability in case 1 is greater than that demonstrated in case 2. Since the bribee's reservation price is lower, the willingness to sell is greater and so is the infringement of protected social value as well as the bribee's manifest disregard for such values.

The greater culpability involved might be explained in different ways by different theories of responsibility. On one view, culpability is essentially related to one's level of regard or disregard for the relevant interests or social values protected by the criminal law.[11] When an agent acts inadvertently—for example, when knocking another person off a cliff despite acting conscientiously and carefully—they are not subject to criminal liability because they demonstrate no subjective lack of regard for the person, interests, or values protected by law or by the relevant criminal law offenses (such as homicide and battery, which protect human life, bodily integrity, autonomy, etc.). While one's actions are harmful, the lack of *mens rea* means that the agent did not have the requisite negative subjective attitude towards the relevant interests, which is crucial to the basis and extent of criminal liability, in the absence of which no punishment is in order. Similarly, different levels of disregard for protected interests and values result in different levels of criminal liability or punishment based on the criminal law's principle of culpability. Thus, while two agents may cause the death of another, where one acts purposefully, this will generally result in a higher level of criminal liability and punishment than in a case in which an agent acts recklessly, with foresight that their actions may cause another's death, though grudgingly. The differential levels of culpability in these two cases might be captured in terms of levels of disregard—all else being equal, the former demonstrates greater disregard for human life than the latter, though both manifest willingness to expose others to risk of death. Even where this does not impact the offense for which one is liable, as in the cases of simple or aggravated assault,[12] levels of disregard can directly impact the severity of criminal punishment, dictating that where one acts with greater disregard for the relevant interests (e.g., acting purposely as opposed to recklessly), a higher sanction is in order.

It is a difference in culpability that we argue undergirds the differential levels of punishment that are appropriate to different cases of bribery with different reservation prices. The crime of bribery punishes agents for their willingness to

10. It should be noted that the social harm in this case is not equal to the harm to the government. The funds stolen were transferred to a different pocket, and thus do not represent a pure welfare loss. Yet the social harm may be even greater than the value of the funds. The social harm may be comprised of the loss of trust, damage to banking institutions, etc., caused by the robbery. Even though the social harm cannot be equated with the funds stolen from the national bank, it is easier to convert the stolen amount into the social cost that has resulted, while the sum of the bribe is not helpful in this respect.

11. *Cf* Larry Alexander, Kimberly Kessler Ferzan & Stephen J Morse, *Crime and Culpability: A Theory of Criminal Law* (Cambridge University Press, 2009).

12. See e.g. MODEL PENAL CODE, *supra* note 6 at §211.1.

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distort decision-making for their own private gain. The agent who is willing to sacrifice these goods for a smaller private gain demonstrates greater disregard for the relevant social interests and values protected by the crime of bribery, while the agent who is more difficult to corrupt, and who would not act but for a far greater expected benefit is, we argue, less culpable than their more easily corruptible counterpart.[13] While one might offer a parallel argument about the relevance of an offender's 'reservation price' in other crimes, as will be developed below, this element has distinctive significance in the structure of criminal liability for bribery, which incorporates personal gain into the very elements necessary for the crime to be committed.

B. Potential Concerns

One might worry that the differences in the sizes of the bribes received in these and other cases are actually products of differences in the negotiating skills of the parties involved. One might attempt to attribute the bribe size difference, for example, to Bill's ability to secure a larger portion of the potential benefits than Sue is able to secure. But this need not be the case. Consider the following two examples:

> ***National Bank Case 3:*** Bill works as a guard in the safety deposit room of the national bank. In the room, there is a sum of $100M, which has just been printed. John slips an envelope under Bill's door, inquiring about the guard's asking price for leaving his guarding position. John emphasizes that this is a one-time offer because he can't risk taking any further offers. He states that he is soliciting a single offer from various guards and, if one is sufficiently low, he will deliver an envelope the next day with the required sum to the guard with the lowest offer and expect them to go off-guard. Bill responds that his price is $1000. Given that Bill's offer was the lowest (and may be the only one), the following day, John puts an envelope with $1000 under Bill's door. Bill moves off-guard, and John takes the $100M from the safe.
>
> ***National Bank Case 4:*** Sue works as a guard in the safety deposit room of the national bank. In the room, there is a sum of $100M, which has just been printed. John slips an envelope under Sue's door, inquiring about the guard's asking price for leaving her guarding position. John emphasizes that this is a one-time offer because he can't risk taking any further offers. He states that he is soliciting a single offer from various guards and, if one is sufficiently low, he will deliver an envelope

13. An interesting question arises as to what happens when the public official is willing to corrupt public decision-making for nothing in exchange (i.e., when their reservation price decreases to zero). We thank an anonymous reviewer for raising this question. Notice, however, that in such cases—a paradigm instance of which might be 'favors' (presuming there is no anticipated future exchange)—the relevant wrongness no longer inheres in the official's openness or willingness to be 'bought.' Rather, a different form of corruption is at stake, (i.e. to the extent that one is culpable, culpability will be for a different wrong, e.g. unjust partiality), which is outside the scope of bribery (see Section 2 A), both from a moral and legal perspective. It stands to reason that some cases in which the relevant 'bribe' tends to zero are in fact better understood as favors rather than low-reservation price bribes with high levels of culpability.

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> the next day with the required sum to the guard with the lowest offer and expect them to go off-guard. Sue responds that her price is $1M. Given that Sue was the lowest (and may be the only offer), the following day, John puts a few envelopes with $1M under Sue's door. Sue moves off-guard, and John takes the $100M from the safe.

In both these cases, both Bill and Sue are incentivized to note their true reservation price, as in a closed-envelope auction. Because it is a one-time offer and they actually believe it is a one-time offer, no negotiating takes place and thus the gap in the bribe they receive does not stem from their negotiation skills. The gap is also not affected by strategic assessments of the maximum price John would be willing to pay: because he receives offers from multiple players, the price is not affected by the price he is willing to pay, but by the lowest reservation price offered to him. Similar to an English Auction, our assumption is that under such conditions, the dominant strategy for all participants in such an auction is to note their true reservation price.

Given that in both Case 3 and Case 4 Bill and Sue note their true reservation price, it is possible to infer that Bill's culpability for bribery is greater than Sue's.[14] Bill's willingness to trade social interests for his own private interests is greater than that of Sue's. His action manifests this greater willingness to harm, and thus his greater disregard for the protected social value that the prohibition of bribery is supposed to protect—primarily, the non-commodification of public decisions or social interests.

This raises the question of whether it is the actual sum received that makes the difference or the reservation price. Consider the following case:

> **National Bank Case 5:** Now let us assume that John offers, in a situation similar to that of case 3, a Vickery auction, in which the bribee who proposes the lowest price receives the next-closest proposal. The point of the Vickery auction is to eliminate any strategic considerations, such as the estimation of the proposals others will make when such information is available. The sum that the bribee will receive is not dependent on the sum in their proposal and reinforces the incentive of participants to note their true reservation price. Let us assume that Bill makes his $1000 offer and Sue her $1M offer, and they are the two lowest (or only) proposals. In this case, Bill receives a bribe of $1M, because he receives the second lowest proposal, offered by Sue.

Compare Bill in Case 5 to Sue in Case 4. Both receive a bribe of $1M for an action that generates the same social harm. Is there a difference in the degree of culpability attributable to Sue and to Bill in the two cases? According to our analysis, Bill's culpability is still greater than Sue's, even though they have benefited to the same extent. That is because we know that Bill's reservation price for infringing the public interest was lower than Sue's.

14. Once again, this holds all else being equal, including with respect to the value of money—that is, assuming no great disparity in the value of money for each bribee.

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In reality, it is hard to derive an agent's actual reservation price from the sum of a bribe. In most cases, the actual price the bribee receives is a good indicator of their reservation price, especially if one accounts for factors such as negotiation skills and the direct social harm the bribee will generate.

4. The Distinction Between Bribery and Other Crimes

If we accept that a bribee who accepts a lower price is morally worse than a bribee who only accepts a bribe with a higher price, won't the same logic apply to other crimes where an offender demonstrates willingness to harm or disregard socially protected values for lower benefits? Consider the following two examples:

> ***Murder Case 1:*** Jack is an assassin. John offers him $1,000 to kill Jane. Jack responds that his price is $100,000. John says his $1,000 offer is final. Jack accepts the offer, kills Jane, and receives $1,000.
>
> ***Murder Case 2:*** Jill is an assassin. John offers her $1,000 to kill Jane. Jill responds that her price is $100,000. John says his $1,000 offer is final. Jill rejects the offer. John contacts her again, willing to pay $100,000 for the job. Jill accepts the offer, kills Jane, and receives $100,000.

According to the logic stated above regarding bribes, Jill's culpability is less than Jack's. Is there then reason to punish Jill more leniently than Jack? Should we factor in the degree of personal benefit derived by the transgressor in every crime as a mitigating/aggravating factor: the higher the personal benefit, the lower the (threshold) culpability, justifying a lower punishment?

It is true that to some extent, the proposed logic applies to any criminal act, and thus may be one among many mitigating and aggravating factors that may appropriately impact punishment for a crime. Yet in most crimes, the benefit the offender derives is not an essential part of their criminal action. The socially protected value that the legal prohibition protects is not associated with the benefit to the transgressor. The moral and legal prohibition of murder, for example, protects the value of human life, independent of the benefit to a potential transgressor. The magnitude of the benefit to the transgressor may be an additional external consideration, but it is not a consideration internal to the act of murder.

By contrast, in the case of bribery, the benefit to the bribee is an essential element of the offense. The social harm of bribes is related to the fact that bribees act to promote their private interests. Acting *in exchange* is relevant to the *wrongfulness* of the crime of bribery. A murder from which a murderer does not receive any concrete benefit is still a murder. (Although murderers often act to promote their self-interest, this is not an element of the offense and need not be relevant to the underlying wrongfulness of the act.) A case in which an official does not act to gain any benefit is simply not a bribe, irrespective of whether the official distorted public decision-making. If the agent acts arbitrarily, for example, this is not a matter of corruption; only when they act on the promise that they will recieve some benefit does the wrongfulness required for bribery arise.

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Furthermore, in some cases of bribery, there may be no additional social harm from the official's acceptance of a personal benefit. Take for instance the zoning case in Developer Case 1. The bribee who authorizes zoning rights to the briber may not necessarily cause further harm to society. Providing additional zoning rights may be desirable from a social perspective, and the outcome of the bribe (what the bribee bestows upon the briber) might not necessarily cause further social harm. The social harm is the corruption of the public decision-making process,[15] by pursuing personal benefits (offered by a third party) and not limiting the decision-making process to relevant public considerations. The social harm that the prohibition against bribery primarily aims to eliminate is not distinctively the social harm generated by the outcome of what the bribee gave the briber, but the social harm from the action of the bribe *per se*—the contamination of the decision-making process of public officials by their own private interests. Thus, taking into account whether the bribee has acted to promote their interests through exchange is an essential element of bribery offenses, while one's culpability *for the relevant wrong* captured by the crime of bribery hinges on the question of what might be thought of as one's 'sale price.' In other crimes, such as murder or theft, there is no essential need to take into account the benefit to the wrongdoer. One *may* take into account such considerations but does not categorically *have to* take them into account. It is not the core of the harm or protected value that the prohibitions seek to protect.

One may think that because the existence of a private benefit is essential to the crime of bribery, as the benefit grows, the gravity of the crime increases. If there is no private benefit there is no bribe, and as the private benefit increases in magnitude, the gravity of the crime rises accordingly. This article suggests a different analysis: *ceteris paribus*, as the private benefit to the bribee increases, the culpability of the bribee for the relevant wrong diminishes, decreasing the gravity of the crime.

Even if one accepts our argument that the culpability of the bribee in the case of a low bribe is higher than in that of a high bribe, one may question whether the implication should be to increase the sanction in cases of low bribes. Seemingly, the central impact of that rule would result in bribees with a low reservation price increasing the price of the bribe they accept in order to decrease their expected sanction. Assuming the only impact of our suggested rule would be an increase in the price of bribes, would that make the world any better? Allegedly not. Our reply to such an argument is that it is based on an erroneous economic assumption—that the *only* impact of our regime would be on the amount bribees would accept and collect. But that is not true: if our suggested regime causes bribees to increase the price they are willing to accept, this essentially entails a diminution in the amount of bribes that will take place. A higher price for any commodity reduces the demand for it, and consequently the prevalence of bribery.

15. The values violated may include preserving the trust of the public in officials, integrity of public decision making, and the interests that officials are responsible to promote.

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5. Moral Asymmetry Between Briber and Bribee

Up to this point, we have focused on how the size of a bribe impacts the culpability of the bribee. Yet this analysis does not apply to the briber. An increase in the bribe offer does not diminish the briber's culpability. Quite the contrary. From the perspective of the briber, as they offer a larger bribe, they increase the potential social harm of the offer: a higher offer has the potential to corrupt a larger pool of officials. Not only does the larger bribe offer have the potential to corrupt more officials, but it can also corrupt officials who are relatively more normative and less corruptible, further corrupting public decision-making processes. The greater social harm and the potential corruption of more agents serve to increase the gravity of the action of bribers offering higher bribes. Thus the impact of the size of the bribe on the sanction imposed should not be uniform for both the briber and bribee. While the size of the bribe should be a mitigating factor for the bribee and diminish the sanction imposed on them, it should, all else being equal, increase the sanction imposed on the briber.[16]

One may argue that the asymmetric analysis of the bribee and the briber is not accurate. One may view the evaluation of the seriousness of the action of the briber as tied to the seriousness of the action of the bribee: the moral gravity of the briber's actions is to be viewed in light of the moral corruption they cause the bribee. The briber is the but-for cause for the wrongful action of the bribee, tempting the bribee to perform the wrong. As a consequence, greater culpability of the bribee leads to greater culpability of the briber and vice versa, similar to the case of co-offenders.

6. Moral Analysis of Bribes vs. Economic Analysis of Bribes

In this section, we demonstrate that the proposed argument that, *ceteris paribus*, the sanction should be inversely related to the size of bribe the bribee receives, is congruent with and even supported by the economic analysis of bribes. While some have argued that efficiency concerns should lead to the conclusion that penalties (or alternatively, rates of apprehension) should increase with the size of the bribe,[17] there is

16. Asymmetric treatment of briber and bribee is also justified from an economic perspective. Kaushik Basu has argued for exempting the briber from any legal responsibility for a specific type of bribe: the "harassment [bribe]", in which an agent bribes to receive that to which they are already legally entitled. Kaushik Basu, "Why, for a Class of Bribes, the Act of *Giving* a Bribe should be Treated as Legal" (2011) Ministry of Finance Government of India Working Paper No 1/2001 at 4, online: https://mpra.ub.uni-muenchen.de/50335/. The rationale behind such asymmetric treatment is that the interests of the briber and the bribee will diverge: after paying the bribe, the briber will be willing to cooperate in bringing the briber to justice. Knowing this, the bribee will be deterred from taking a bribe. But see Christoph Engel, Sebastian J Goerg & Gaoneng Yu, "Symmetric vs Asymmetric Punishment Regimes for Bribery" (last modified 10 June 2013), online: *Social Science Research Network,* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1983969. From experimental data, Engel et al found that asymmetric punishment leads to a higher level of execution of bribery deals. It assists in overcoming the enforcement problem of bribe deals: the asymmetric punishment generates a credible threat from the side of the briber, that if the bribee won't deliver the former may take the latter to court.

17. See Green, *supra* note 3.

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reason to think that this is not the right conclusion to draw from an economic analysis. Before developing such an argument, it is worth clarifying that the economic analysis of the connection between the size of a bribe and the magnitude of relevant sanctions, that leads to optimal deterrence is not essential for our central argument: it has no direct effect on the culpability argument which stands at the heart of this article. Nonetheless, it is important to raise the economic analysis that supports the proposed conclusion, not only because it reinforces the culpability argument—providing an additional but distinctive argument that supports the same conclusion—but also because the existing legal treatment of the size component of bribes appears to be driven by economic deterrence considerations. Thus, the economic argument contributes to debunking the prevalent presumption, which is defended on economic grounds, that to the extent that the size of the bribes should matter for penal sanctions, sanctions should be positively correlated with the size of bribes.

In the following, we lay out the potential economic analysis of bribes dialectically to consider the various factors that might impact a correct analysis of how the size of a bribe should impact the magnitude of the bribee's punishment.

A basic premise of the economic analysis of criminal law is that criminals should be made to internalize the external effects of their actions on society.[18] Following the analysis in Section 1 of this article, one may see that the expected social harm of officials who are willing to betray the loyalty they owe to the public for smaller sums is greater than that of officials with high reservation prices. A low reservation price makes it much easier to bribe officials and increase the probability that such a bribe (and corruption of public decision-making) will take place. A high reservation price makes it harder to bribe officials and decreases the probability that a bribe will take place. Accordingly, the potential social harm of bribees with a low reservation price is much greater than the potential social harm of bribees with a high reservation price. Given the economic rationale of internalizing the social harms of one's actions, it also makes sense from an economic perspective to increase penalties imposed on the bribee when the bribe is low and decrease the sanction on the bribee when the bribe is high.

Still, we recognize that the relationship between the moral and economic analysis may be more nuanced. It is true that from an economic perspective, the purpose of criminal law is to ensure that agents internalize the negative external effects of their actions on society, and allegedly, the greater the expected social harm, the greater the expected sanction should be.[19] But as the economic analysis literature has pointed out, there isn't necessarily a need to impose a sanction in accordance with the magnitude of the expected social harm in order to deter

18. See Gary S Becker, "Crime and Punishment: An Economic Approach" (1968) 76:2 J Political Economy 169 at 172-73 (social harm is a key variable in his model for the optimal punishment for crime). See also A Mitchell Polinsky & Steven Shavell, "The Optimal Tradeoff between the Probability and Magnitude of Fines" (1979) 69:5 Am Economic Rev 880 at 880: "If it were costless to 'catch' or 'observe' individuals (or firms) when they engage in an externality creating activity, presumably everyone would be caught and fined an amount equal to the external cost of the activity. This is simply the traditional Pigouvian tax solution."

19. See Becker, *supra* note 18 at 172-73, 201.

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individuals from executing an action which is socially harmful. It is sufficient to impose a sanction in accordance with the *benefit* the wrongdoer expects to receive, independent of the social harm the actions risk or cause.[20] The wrongdoer is not motivated by the magnitude of social harm their actions may be expected to cause, but by the personal benefit they expect to derive from the transgression, independent of the social harm caused. Thus, an expected legal sanction that is of the same magnitude as the wrongdoer's expected benefit from the criminal act will arguably be sufficient for deterrence purposes: given the legal sanction, the wrongdoer will not have anything to gain from the criminal act and can be expected not to commit the crime.

Even though this point is well-taken, at the end of the day, in many optimal deterrence models, criminal sanctions are determined in accordance with the social harm and not the benefit to the wrongdoer.[21] There are a few justifications for preferring the degree of social harm as the key factor to which the sanction should be pegged, rather than the criminal's benefit.[22] First, if one wants to enable efficient transgressions, in which the benefit to the criminal exceeds the social harm, the sanction should be pegged to the social harm. Pegging the sanction to the transgressor's benefit will eliminate efficient transgressions.[23] Second, social harm should be preferred as the key factor for reasons related to marginal deterrence—to incentivize the undeterred transgressor to moderate the harm they cause.[24] If the sanction is pegged to the benefit of the transgressor, they are given no incentive to choose a less harmful act when facing a choice between two non-equally harmful acts that equally benefit them. Thus marginal deterrence is not achieved. Pegging the sanction to the social harm by definition maintains marginal deterrence.[25]

A third justification raised in this context is related to second best justifications: in most cases, we cannot know the level of benefit the criminal derives from their crime. But we do have information regarding the social harm. Thus, even though in theory there may be a lower sanction that would be sufficient to deter criminal action, the only way to ensure that individuals do not engage in actions that are more harmful to society than they are beneficial to the criminal is by making offenders internalize the full social costs of their

20. This approach of focusing on the benefit to the criminal and not the social harm is rooted in Jeremy Bentham's utilitarian principles for punishment: "The value of the punishment must not be less in any case than what is sufficient to outweigh that of the profit of the offence." Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (Courier, 2007) at 179.

21. See Becker, *supra* note 18.

22. See *ibid* at 176.

23. Richard Posner explicitly rejects this notion of 'efficient transgressions.' In his view, any transgressions should be deterred irrespective of the utility an individual may derive from their transgression. This is due to the systematic harm of bypassing market mechanisms. See Richard A Posner, "An Economic Theory of the Criminal Law" (1985) 85 Colum L Rev 1193 at 1196.

24. See Steven Shavell, *Foundations of Economic Analysis of Law* (Belknap Press, 2004) at 519.

25. See *ibid.*

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actions.[26] This particular justification, however, may be weak in the context of the offense of bribery. Even though pegging the level of the sanction to the social harm may be a second-best solution in most criminal sanctions, the case of bribery is different: here, one does not have to settle for the second-best solution. The best solution can be easily achieved. The main reason for anchoring the sanction in the social harm and not the benefit of the wrongdoer in most criminal cases is that the level of benefit derived by the wrongdoer is not easily determined, while the estimation of the social harm is more easily assessable. But the case of bribery is different. It is one of the criminal actions in which the benefit to the wrongdoer (i.e., the bribee) *is* easily assessable: the benefit is the amount (or rather its value) that the bribee is to receive in exchange for the violation. The criminal action of bribery is defined as the giving or offering of something of value to an official to influence their actions. In cases of bribery, the benefit is always clearly defined. As such, from an economic perspective, the sanction should be determined by the first best: the benefit the wrongdoer receives. If the bribee knows that the expected sanction for the bribe is equal to the benefit they receive from the bribe, they will have no incentive to take part in the bribery—they have nothing to gain. For that reason, from an economic perspective, the social harm of bribery is irrelevant to the determination of the sanction. As such, the lower benefit to the bribee does not justify increasing the sanction beyond the benefit to the bribee, even though the social harm of low-price bribes is much greater than that of high-price bribes (holding all else equal). To the contrary: from an economic perspective, the low-price bribes justify a lower sanction than the high-price bribes, even though the social harms they generate is greater. Assuming the optimal sanction is determined by the benefit to the wrongdoer and not the social harm, the higher benefit in the high-price bribe justifies a higher sanction, even though the social harm it causes is lower.

Even though it may seem that the rationale of pegging the sanction to the benefit dominates the economic analysis, leading to the opposite conclusion of that of the culpability analysis, this is not necessarily the case. It is possible to further justify pegging the sanction to the social harm from an economic perspective, despite the arguments laid out above. First, even if it is possible to impose a lower sanction that is equivalent to the size of the benefit, imposing a higher sanction that is equivalent to the social harm is not necessarily suboptimal: it does not generate overdeterrence, in the sense that it deters actions whose benefit exceed their social harms. It is true that according to the principle of marginal deterrence, if one can deter an action with a lower sanction, it is preferable to impose the lower sanction. The principle of marginal deterrence assumes that the sanction itself generates a social cost (including increasing the resistance of transgressors).[27] But this does not have to be the case. In some cases, a higher sanction may only entail a distributive effect

26. See *ibid* at 477: "[T]he rule of sanctions equal to gains is peculiarly vulnerable to judicial error in assessment of gains, and for that reason tends to be inferior to fault-based liability with sanctions equal to harm."

27. See *ibid* at 520-21.

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with no social costs and thus would not be suboptimal.[28] In addition, when there is a range for the optimal sanction, such as in the case we discuss—the range between the benefit to the wrongdoer and the social harm—it may be preferable to opt for the upper part of the range. The sanction is calculated in expected terms, taking into account the average probability of detection.[29] Such calculation may not deter potential wrongdoers in situations in which the probability of detection is low. This serves as an economic justification to stick to the higher end of the range of effective sanctions, even when there is some cost involved in imposing a higher sanction. Thus, the economic analysis of bribery may lead to the similar (surprising) conclusion as that led to by the culpability argument—that sanctions should be inversely related to the size of the bribe.

7. Conclusion

How should the size of a bribe impact criminal sanctions? Our analysis has provided a surprising answer: all other things being equal, the sanction imposed on the bribee should be inversely related to the size of the bribe received. The protected value at the core of the prohibition against bribery is the protection of public decision-making and public interests such that one's manifest willingness to 'sell' public interests for private interests is a measure of the offender's willingness to infringe upon the protected social value. As the reservation price for selling the public interest decreases, the culpability of the agent willing to receive a bribe for the relevant wrong increases, all else being equal. This analysis applies, we suggest, only to the bribee. From the point of view of the briber, there is a reverse relationship between the gravity and the value of the bribe. We have suggested that the philosophical analysis of the size of the bribe can, on certain assumptions, go hand in hand with the economic analysis, though we also propose reasons to question whether this is necessarily the case.

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28. It should be noted that this applies only to monetary sanctions. If the sanction is imprisonment, a higher sanction will not only entail a distributive effect but will have other allocational effects and thus efficiency costs tied to it. Note also that this particular argument can be appealed to by the optimal deterrence view that pegs the sanction to the size of the bribe.

29. See Becker, *supra* note 18.

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