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Book Review

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BOOK REVIEW

BRIBES. By *John T. Noonan, Jr.* New York: MacMillian Publishing Co. 1984. Pp. xxiii, 838. $29.95.

*Reviewed by G. Robert Blakey**

> You shall not take shohadh (offering), which makes the clear-eyed blind and the words of the just crooked. Ex. 23:8

It may be said of Dean Roscoe Pound that he read everything and forgot nothing.[1] The same cannot be said of Professor John T. Noonan, Jr. of the University of California, Berkeley, that is, unless the subjects of usury,[2] contraception,[3] abortion,[4] marriage,[5] and now bribery, are excepted. In these areas, at least, anyone familiar with Noonan's prodigious scholarship ought to concede that he has *apparently* read everything and forgotten little.

I cannot vouch for the literature of usury, contraception, abortion, or marriage, but I am familiar enough with a substantial portion of the body of literature on corruption to say of Noonan that he has examined most of the pertinent literature on the subject, made sense out of it, and told us what we need to know.

Bribes is a massive book, more than that which may be taken in in an evening's browsing. Noonan begins his book with a discussion of bribery in Ancient Egypt and then examines the role of bribes in Mesopotamia, Greece, Rome, England, and finally, in the United States with a topic as current as ABSCAM. Strictly speaking, *Bribes* is not a history of the practice of bribery or the efforts of various societies to regulate it through law. Too much is omitted

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1 Although Pound's scholarship was indeed renowned, its character was not always seen as a virtue. Harold Laski, with biting sarcasm, once observed that if, in an essay on jurisprudence, "Pound found it necessary to say that the bathroom had made large developments in America" he would put in references "to the *Sanitary News*, to the *Plumber Journal* and to the Commerce Department's report on the increased manufacture of lead-less glaze together with a note to the effect that there was a Czech thesis on the sociological significance of the American Bathroom which he had not seen." 2 HOLMES-LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI 1916-1935 1377 (M. Howe ed. 1953). Laski's criticism seems to reflect more on Laski than Pound.

2 J. NOONAN, BANK AND THE EARLY SCHOLASTIC ANALYSIS OF USURY (1951).

3 J. NOONAN, THE CHURCH AND CONTRACEPTION; THE ISSUES AT STAKE (1967); J. NOONAN, CONTRACEPTION; A HISTORY OF ITS TREATMENT BY THE CATHOLIC THEOLOGIANS AND CANONISTS (1965).

4 J. NOONAN, A PRIVATE CHOICE; ABORTION IN AMERICA IN THE SEVENTIES (1979); THE MORALITY OF ABORTION; LEGAL AND HISTORICAL PERSPECTIVES (J. Noonan ed. 1970).

5 J. NOONAN, POWER TO DISSOLVE; LAWYERS AND MARRIAGES IN THE COURTS OF THE ROMAN CURIA (1972).

(*e.g.* contemporary corruption in countries such as Mexico) to call *Bribes* a history. Instead, Noonan has written about the *idea* of bribery and, in so doing, he considered a vast amount of historical and other data about corruption, an aspect of the human condition that has been a feature of every society.[6]

Indeed, what history—and Noonan—does tell us is that it is not always possible to distinguish between various kinds of transactions. The line, for example, between campaign contributions and bribery shades from white through gray to black. "Often a society," Noonan writes, "has at least four definitions of a bribe—that of the more advanced moralists; that of the law as written; that of the law as in any degree enforced; [and] that of common practice" (p. xii). For Americans, however, bribery has always been a matter of fundamental concern. Along with treason, counterfeiting, and piracy, it is one of the four crimes mentioned by name in the Constitution.[7] Americans, too, as children of those who made the Western moral tradition, have much to learn from a study of the development of the idea of bribery through history.

In September 1776, for example, John Adams complained that a certain gun powder supplier had been granted an "exorbitant" contract by the Continental Congress.[8] The supplier, "without any risk at all, will make a clear profit of 12,000 pounds at least," Adams declared.[9] What bothered this Founding Father was the identity of

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6 It is a common practice to lament the corruption of our day. Generally, that lament will include a reference to Rome. *See generally* Rapoport, *The Corrupt State: The Case of Rome Reconsidered*, 16 POL. STUD. 411-32 (1968). Livy, the Roman historian, is often quoted: "Rome was originally, when poor and small, a unique example of austere virtue; then it corrupted, it rotted, it slowly absorbed vices." *Id.* at 429 (quoting 1 T. LIVY, HISTORY OF ROME i (1854)).

Wisely, Noonan avoids use of this reference and eschews the whole subject. *See* BRIBES at xii ("There are no existing sets of figures by which one could conclude that the Roman Empire, for example, was more or less corrupt than the British Empire or the United States. . . . [I]t is . . . illusory . . . [to make] comparative [judgments]."). *See also Public Officials for Sale: Now a Crack-down*, U.S. NEWS & WORLD REP. Feb. 28, 1977, at 36 (quoting acting Deputy Attorney General, Richard L. Thornburgh: "There's no way to tell whether we have more corruption than we had 100 years ago. But there's no question that the efforts to prosecute those who betray public office are at a higher pitch than ever before.").

7 U.S. CONST. art. I § 6 (treason); § 8 (counterfeiting and piracy); art. II § 4 (treason and bribery); art. III § 3 (treason); art. IV § 2 (treason). Strangely, Noonan notes only bribery, BRIBES at xvi. Like Homer, has Noonan nodded?

8 G. AMICK, THE AMERICAN WAY OF GRAFT: A REPORT BY THE CENTER FOR ANALYSIS OF PUBLIC ISSUES 4 (1976).

9 *Id.* Little has apparently changed. *See* N.Y. Times, May 14, 1985, at 1, col. 6, (G.E. admits false billing on minuteman missle contract); *id.* May 22, 1985, at 1, col. 6, (From 1961 to 1977 Adm. Hyman Rickover received $67,628.30 of gratuities and gifts from the General Dynamics Corp.); *id.* May 23, 1985, at 36, col. 5, (Adm. Rickover: "No gratuity or favor ever affected any decision I made."). Rickover's defense echoed that of Vice President Spiro T. Agnew, *see* BRIBES at 581; R. COHEN AND JULES WITCOVER, A HEARTBEAT AWAY 349 (1974) (Spiro T. Agnew: "I deny that the payments in any way influenced my official actions."), and that of Sir Francis Bacon, Lord Chancellor of England, impeached for taking

the favored firm: namely, the trading house of Willing, Morris & Co. Both Mr. Willing and Mr. Morris, it seems, were members of the so-called Secret Committee of the Congress, which had authorized the contract. But was corruption involved? Or was it what we would call today a matter involving merely a "conflict of interest"? History does not tell us.

Noonan offers us fifteen specific points to consider about the idea of bribery.[10] First, bribery, "[a] socially disapproved inducement of official action meant to be gratuitously exercised," is ancient, almost as ancient as the invention in Egypt of scales, the symbol of "the idea of objective judgment."[11]

Second, the history of "bribery" may be divided into discernible epochs. Reciprocity began as the rule (3000 B.C. to 1000 A.D.). Slowly, the anti-reciprocity (anti-bribery) ideal developed in religious, literary, and legal expression and became dominant (1000 A.D. to 1550 A.D.). As far as English speaking people are concerned, the sixteenth century marked the ascendency of the ideal as the norm in religious books, literature, and the law.[12] Americans,

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bribes, *see* BRIBES at 357 (Francis Bacon: "I gave little regard."). Vice President Agnew was eventually successfully sued under a constructive trust, accounting and breach of fiduciary duty theory. Agnew v. State, 51 Md. App. 614, 446 A.2d 425 (1982).

10 BRIBES at xx-xxiii.

11 *Id.* at xx.

12 The definition of bribery, in gist if not in words, has little changed since Sir Edward Coke described it as:

> a great misprision, when any man in judicial place takes any fee or pension, robe, or livery, gift, reward or brocage of any person, that hath to do before him any way, for doing his office, or by colour of his office . . . unlesse it be of meat and drink, and that of small value, upon divers, and grievous punishments.

3 E. COKE, INSTITUTES OF THE LAWS OF ENGLAND 144 (9th ed. 1817). The word bribery, he noted, "commeth of the French word briber, which signifieth to devoure, or eat greedily, applyed to the devouring of a corrupt judge . . . ." *Id.* Bribery is a misprision, "for that it is neither treason, nor felony; and it is a great misprision, for that it is ever accompanied with perjury." *Id.* at 146. The offense originally was applicable only to judges. In fact, the judicial oath expressly bound the judges not to take any gift from any person who had a plea pending before them, *e.g.*, Burrough of Bodmin, 20 L.T.R. 989, 991 (1869) (Willes, J.) (*Bodmin Case*), or any "other person concerned in the administration of justice." 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 139 (Tucker ed. 1803). Coke later differentiated bribery and extortion by occupation. "[B]ribery is only committed by him, that hath judiciall place, and extortion may be committed both by him that hath a judiciall place, or by him that hath a ministeriall office." E. COKE, *supra* at 147. The crime, a common law misdemeanor, was, however, gradually extended to include all public officials, whether elected or appointed. *See* 1 W. RUSSELL, ON CRIME 429 (Turner ed. 1958). The purpose, of course, was to promote integrity in the public service. *See* 1 J. BISHOP, COMMENTARIES ON THE CRIMINAL LAW 411 (2d ed. 1858); 2 J. BISHOP, COMMENTARIES ON THE CRIMINAL LAW 62 (2d ed. 1859).

Both the receiver and the offerer of a bribe were subject to fine and imprisonment. Even if a bribe was rejected, the offer was punishable. *See* E. COKE, *supra* at 147. Bribery could also be committed "not only when a suit dependeth" on it, but also when a judge did anything under color of office, though there was no suit at all. Illustrative is the case of Sir Francis Bacon who pleaded guilty to corruption for "many exhorbitant and sordid briber-

as inheritors of English ideals, applied the idea and then expanded it until it has now been asserted as an American norm around the world. Finally, the rest of the Western moral tradition makes at least verbal acknowledgement of the anti-bribery ideal.

Third, bribes are, with insignificant exceptions, universally condemned. That is, certain, but not necessarily all, reciprocities with officials are disapproved.

Fourth, a powerful counter-current runs against the tide. Apparently, normal human expectations include the giving of gifts to powerful strangers. Initially, that counter-current was seen in that the concept of the "bribe" was limited to judges. Others were

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ies." *Id.* If the bribe was in the form of a letter, the offeror was indictable both in the country where he deposited the offer, as well as in the jurisdiction where it was received. *See* 1 J. BISHOP, *supra* at 591; 2 J. BISHOP, *supra* at 63.

Punishment varied according to the importance of the official who was bribed. The bribery of judges "hath been always looked upon" as a heinous offense. W. BLACKSTONE, *supra* at 139-40. During the 12th century, the punishment for all "judges and officers of the king, convicted of bribery" was the forfeiture of treble the bribe, punishment at the King's will, and discharge from the King's service forever. *Id.* By the 17th and 18th centuries, a conviction for bribery brought a forfeiture of office, a fine, and imprisonment. *See* 1 W. HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 314 (6th ed. 1777).

The crime embracery, or attempt to influence a jury, was separate from the offense of bribery, and punishable under statutes as early as the 14th century by fine and imprisonment. W. BLACKSTONE, *supra* at 140. As for the juror who was bribed, Blackstone reports the punishment was "perpetual infamy, imprisonment for a year, and forfeiture of the tenfold value." *Id.* The proscribed act of influencing jurors was not limited to promising them money; it could also consist of "menacing them" or "instructing them in the cause beforehand." *See* W. HAWKINS, *supra* at 549.

The corruption of public elections and electors, though not of as "high and aggravated nature" as judicial corruption, 2 J. BISHOP, *supra* at 63, was also punishable as a misdemeanor. According to Blackstone, both the offeror and receiver of the bribe were fined 500 pounds, and they were forever disabled from voting and holding any office. *See* W. BLACKSTONE, *supra* at 179. Before his conviction, however, it was possible for the offender to vindicate himself by bringing about the conviction of another offender. W. HAWKINS, *supra* at 315.

Bribery of public officials is now a statutory offense in the federal law. 18 U.S.C. § 201 (1982). Bribery of federal judges has been recognized as a statutory offense since 1790. Act of April 30, 1790, REV. STAT. § 5449, 5499 (1875). Bribery of other federal officials was prohibited by statute in 1853. Act of Feb. 26, 1853, REV. STAT. § 5451, 5501 (1875).

Federal jurisdiction to punish corruption of federal officers lies because it is a matter that is of a distinctively federal concern. *See* Schwartz, *Federal Criminal Jurisdiction and Prosecutors' Discretion*, 13 LAW & CONTEMP. PROBS. 64, 66 (1948).

Under certain circumstances, federal statutes also prohibit corruption of state and local government officials. The federal government has exercised its power to prohibit corruption where it involves travel in interstate commerce, or the use of any facility for transportation and communication in interstate commerce, 18 U.S.C. § 1341 (1982) (mail fraud), and 18 U.S.C. § 1952 (1982) (the Travel Act), where it "affects" interstate commerce, 18 U.S.C. § 1951 (1982) (Hobbs Act), and 18 U.S.C.§ 1961-1968 (1982) (Racketeer Influenced and Corrupt Organizations Act), or where corruption is involved in the commission of another offense over which federal jurisdiction exists. *See* 18 U.S.C. § 1511 (1982) (prohibiting official corruption where used to aid gambling).

All states also prohibit bribery and similar forms of public corruption. The statutes on bribery, extortion and graft are collected in G. R. BLAKEY & R. GOLDSTOCK, OFFICIAL CORRUPTION: BACKGROUND MATERIALS 217-53 (1977).

outside of the proscription. A reluctance was also found to condemn the giver as well as the taker. Accordingly, the full scope of the condemnation of breach of trust has been filled out only slowly.

Fifth, the concept of the "bribe" has its origins in religious teachings. Ultimately, it was Scripture, accepted as divine revelation, that inculcated an ideal of impartial judgment.

Sixth, religion, nevertheless, has about it a profound ambivalence in its teaching about reciprocity. Religion can in fact be seen as "bribery" on a grand scale, including the very notion of the Redeeming Sacrifice.

Seventh, that ambivalence is itself reflected in the social acceptance of forms of reciprocity. Europe, for example, knew both the sin of simony (a payment to obtain a spiritual favor) and the approved act of *contributio* (a contribution to obtain an indulgence). Americans, too, know bribes (crimes) and campaign contributions (a legitimate form of campaign financing).[13]

Eighth, Western culture has in fact developed a fundamental distinction between a gift, which is bottomed in an expression of love, and bribery, which is rooted in the desire to corrupt fidelity.

Ninth, nothing of value known to man has not been transferred as a bribe at one time or another.

Tenth, bribers and bribees may not be conveniently classified. Nor does any conventional "explanation" of crime—poverty, passion, mental disease, or viciousness—encompass all examples.

Eleventh, the "bribe" is ideologically neutral.

Twelfth, law enforcement in the area of bribery has always been a function of prosecutorial discretion, and today, in America, it is a national enterprise.[14]

Thirteenth, the sanctions for bribery have been more often moral than legal, guilt before God and shame before man, usually including loss of political power in the second case. Only in pres-

13 *See* BRIBES at 643-46 (discussing prosecution of Sen. Daniel Brewster of Maryland in United States v. Brewster, 408 U.S. 521 (1971)).

14 Witness the 1970's: a "President left office in disgrace; a Vice-president was convicted of abuse of position; and a Supreme Court Justice resigned under a cloud of suspicion." G. R. BLAKEY & R. GOLDSTOCK, *supra* note 12, at 2. In turn, two cabinet officers, two U.S. Senators, eight Congressmen, a federal judge, five governors and lieut. governors, several state judges (44) and various and assorted mayors (43), state legislators (60), and sheriffs and police officials (266) were indicted or convicted. *Id.* Then came ABSCAM, which cost $800,000, involved more than 100 FBI agents in five cities, and resulted in the exposure of eight national legislators and at least two dozen lesser officials. *The FBI Stings Congress*, TIME, Feb. 18, 1980, at 10. The overall statistics on the corruption uncovered by the current federal program are impressive. From 1975 federal (1901), state (605), and local (2094) officials as well as others (2306) have been federally indicted, while 6,906 convictions (federal, 1734; state, 456; local, 1674; others, 1958) have been obtained. Other (1949) trials are pending. U.S. Department of Justice, *Report to Congress on the Activities and Operations of the Public Integrity Section for 1984* 32 (1984).

ent memory has the application of criminal sanctions to highly placed bribetakers become other than rare.

Fourteenth, those most attentive to the anti-bribery ideal have been prosecutors, politicians, and journalists; psychoanalysts and theologians have been largely—and strangely—silent.

Fifteenth, material harm flowing from bribery is hard to demonstrate. Its harm instead is moral—the subversion of trust in public office, a trust that distinguishes office from power alone.

Noonan's essay finally concludes with a masterful analysis of the arguments for and against the anti-bribery ideal. Like Justice Cardozo,[15] he first reviews five basic arguments against his position, but states them so powerfully that it is difficult to see how he can possibly conclude against them. A summary does them an injustice, as does a summary of their equally powerful refutation. They must be not only digested from the original, but savored in that form to be fully appreciated. The arguments against the ideal:

1. Everybody does it.
2. It is necessary to do it.
3. Accepted reciprocities are indistinguishable.
4. The moral ideal is enforced immorally.
5. The material effect is trivial or undemonstrated.

The refutations of the arguments:

1. Everybody cannot be shown to do it, but even if that were so, "is" must *not* be confused with "ought" (Everybody "did" slavery, too).

2. It is only *thought* to be necessary. In fact, it has *not* been shown to be necessary (Neither Gulf nor Lockheed are now foundering after having foresworn foreign corrupt practices).

3. Reductionism obliterates the distinctions on which *all* morality depends, not merely that supportive of the bribery ideal (The difficulty of drawing lines in gray areas must not be used to deny that black differs from white).

4. *All* moral ideals may be open to the objection that they are enforced immorally, but the appeal to the immorality of means cannot ultimately defeat a morality of ends without its own self-destruction.

5. The common good of a society does not consist solely in material possessions, but also in shared ideals of which trust is crucial, and it cannot be maintained where fidelity is compromised.

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15 Judge Learned Hand described Justice Cardozo:

> He never disguised the difficulties, as lazy judges do who win the game by sweeping all the chessmen off the table: like John Stuart Mill, he would often begin by stating the other side better than its advocate had stated it himself.

THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND 131 (I. Dilliard ed. 1960).

Noonan concludes his discussion with the following statements:

> [T]he shame of the briber and the bribee are true indicia of violation of the human good; the acceptance in practice of plutocratic rule is abhorrent; the trust reposed in government is inherent in public office, which becomes raw power without it; and the divine paradigm is real. . . . The movement to restrict by law many forms of the reciprocal exchange with officeholders incorporates the thrust of a dominate moral ideal. The conventions that give concreteness to the idea of the bribe will be refined and made responsible to the needs satisfied by human trust and human conformity to God's example.[16]

I can only agree.[17]

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16 BRIBES at 705-06. Noonan echoes President Theodore Roosevelt, who observed:

> There can be no crime more serious than bribery. Under our form of Government all authority is vested in the people and by them delegated to those who represent them in official capacity. There can be no offense heavier than that of him in whom such a sacred trust has been reposed, who sells it for his own gain; and no less heavy is the offense of the bribe giver. He is worse than the thief, for the thief robs the individual, while the corrupt official plunders an entire city or State. He is as wicked as the murderer, for the murderer may only take one life against the law, while the corrupt official and the man who corrupts the offical alike aim at the assassination of the commonwealth itself. Government of the people, by the people, for the people will perish from the face of the earth if bribery is tolerated. The givers and takers of bribes stand on an evil pre-eminence of infamy.

IX PRESIDENTIAL MESSAGES AND STATE PAPERS 3048 (J. Muller ed. 1917).

17 But I cannot agree entirely; Noonan suggests that ABSCAM "went too far." BRIBES at 699. He discusses ABSCAM in detail in BRIBES at 604-19. He is, in my judgment, mistaken.

Bribery is a crime without a complaining witness. Accordingly, only three ways exist to investigate it successfully: *turn* a participant, *bug* a participant, or *be* a participant. ABSCAM constitutes an example of the third method.

The Senate comprehensively investigated ABSCAM. The Select Committee to Study Undercover activities of Components of the Department of Justice wisely concluded that "undercover operations . . . [had] . . . substantially contributed to the detection, investigation, and prosecution of criminal activity, especially organized crime and consensual crimes such as narcotics trafficking, [and] fencing of stolen property . . . [S]ome use of the undercover technique is indispensable to the achievement of effective law enforcement." S. REP. No. 97-682, 97th Cong. 2d Sess. 11 (1982). Nevertheless, while it called for new legislation to assure an "optimal balance between effective law enforcement and the preservation and nurturing of civil liberties," *id.* at 13, it did not find that ABSCAM went "too far."

None of the defendants in the ABSCAM prosecutions has been successful in overturning his conviction on appeal. *See, e.g.*, United States v. Weisz, 718 F.2d 413, 417 n.7, 440 (D.C. Cir. 1983) (citing major cases). Neither juries nor judges have found that ABSCAM went "too far."

I cannot help but agree with the Senate Committee that carefully looked into all of the issues raised, the juries that heard the evidence, and the courts of appeals that applied to it our basic legal and constitutional standards. ABSCAM did not "go too far."

Indeed, I would go further. *Turning* a participant undermines trust by turning one person against another; and it produces evidence the reliability of which is inherently suspect. *Bugging* a participant, unknown to those involved, necessarily invades privacy. *Being* a participant, however, neither undermines that kind of trust, produces inherently suspect

evidence, nor invades privacy. It is the least objectionable of the three methods, each of which, if carefully supervised, is essential to making our society not only free, but faithful.

I do not conclude, therefore, that ABSCAM went "too far." Instead, I find it to be a praiseworthy example of "prosecut[ing] the rich not merely the penniless; strong-armed men as well as those who are powerless." BRIBES at 20 (citing Job 36:19).

For a perceptive series of essays on ABSCAM, see ABSCAM ETHICS: MORAL ISSUES AND DECEPTION IN LAW ENFORCEMENT (G. Caplan ed. 1983).