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ARTICLES

BRIBERY

JOHN T. NOONAN, JR.*

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My subject is the concept of the bribe. Its development will be set out both in moral and in legal terms, the two of them shading into one another.

THE MORAL DEVELOPMENT OF BRIBERY

The major moral ideas of our Western tradition are derived from several sources: from divine instruction and divine example and from reason reflecting upon human experience. Development of these ideas occurs through an elaboration of the basic insight. The elaboration is an expansion of consciousness at several levels. At one level, the expansion moves toward conceptual "purity." This kind of expansion may or may not have a solid practical basis. At another level, expansion occurs as a result of human experience. In the following examples, you will see these elements of elaboration at work.

The Ancient Near East is where our moral ideas originated. In the Ancient Near East the concept of the bribe did not exist. The bribe was not known. When people related to each other outside of the family or the tribe, they related to powerful strangers. If one wanted to meet a powerful stranger without a hostile reaction, one was required to bring an offering. To go empty-handed to a powerful stranger was unthinkable. Peace required a gift. The aim was reciprocity.

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One came with something to give. One expected something in return. Reciprocity was the rule. It was unnatural to depart from reciprocity.

To give an example of the ethic that prevailed in this kind of civilization, consider a story from Mesopotamia about 1500 B.C., "The Poor Man of Nippur." The man's name is Gimil Ninurta. He wants to rise in the world. All he has is a goat. He takes the goat and visits the mayor of Nippur. The mayor at once asks, "What is your problem that you bring me an offering?" The mayor accepts the goat, but he is a poor reciprocator. He has a feast and gives Gimil Ninurta only stale beer and a bone of the goat and has him thrown out. As the story continues, Gimil Ninurta acquires a fortune through other means. He comes back in disguise as a royal emissary and tricks the mayor and finally has the mayor beaten. The whole point of the story is that the mayor was a bad reciprocator and was justly rewarded for his bad reciprocation. The mayor did not know what he was supposed to do when he received an offering. There is no sense in this story that there was anything wrong in trying to influence the mayor with a present. The story hinges on the churlish behavior of the mayor in failing to reciprocate.

Glimmerings of an idea of something different were apparent at about the same time in Egypt. In Egypt, Books of the Dead were provided to royalty and nobles with illustrations to instruct them on their passage into the next world. In a Book for a nobleman named Ani, one of the great illustrations shows him going to the Judgment Hall. In the first scene Ani's hands are filled with gifts. Ani is at the entrance of the Judgment Hall. In the second scene Ani's soul is being weighed on scales. The gifts are over at one side. The gifts are not in the hands of the judging god, a subtle indication that the moment of judging is not the moment at which gifts are to be presented. In the third scene Ani's soul has been weighed and been found to balance with truth and so he has been admitted and received by Osiris. In this last scene he presents the gifts to Osiris. The scenario, one supposes, is based on the court etiquette of Egypt. Gifts were not presented to the judge at the instant of decision. But if the decision was favorable to the petitioner, the petitioner gave gifts to the judge. The beginning of a different approach from that prevalent in the past can be seen.

In definitive form, as far as our culture goes, the break in the pattern occurred in the Hebrew Bible. A very powerful force was necessary to break the ordinary relationship of

reciprocity. That powerful force is the example of God. Most significantly, the image of God as example in relation to gifts is presented in Deuteronomy 10:17-18, where the people of Israel are told "the Lord your God is God of gods and Lord of lords; the great, mighty and terrible God, who does not lift up faces and who does not take *shohad*, but secures justice to widows and orphans." *Shohad* is an ambiguous Hebrew word, best translated as "offering." God, Deuteronomy tells the people of Israel, does not take offering. The context of the statement is provided by the accompanying declaration that God does not lift up faces. The expression means reaching out one's hand to the face of another for whom one is going surety. God does not go surety for another in judgment; that is, God does not identify himself with a litigant and so he does not take offerings in judgment.

The image of God was used as a model for the judges of Israel. They were told to imitate God and in judgment not to lift up faces and not to take offering. This message was presented within the context of the religion of Israel, where in fact there was a great deal of gift-giving to God. The concept of God as the receiver of gifts coexists with the notion that God as judge does not take offering. The picture is mixed and complicated. The paradigm of a judge in taking offering is weakened by the total context. The message translates as a bending of the rule of reciprocity rather than a breaking of the rule. Only in the very specific context of judgment is the rule of reciprocity questioned or discarded.

Nothing in the Hebrew Bible condemns the gift-giver. In a number of texts the person who does give a gift to secure official influence is praised. Nowhere in the Hebrew Bible are there sanctions for giving or receiving offerings except as to a judge in which case there is the sanction of conscience—a sanction of great weight but different from any material sanction. Nowhere in the Hebrew Bible is there an example of anyone being caught, tried and punished for taking bribes. Moreover, no one's material interests are enlisted in the effort to prevent bribery. No class of persons has an interest in preventing bribery, detecting it, or even avoiding it. The idea of the bribe is presented as bad, God is given as an example, there is divine example and instruction, but the idea is at such a level of abstraction that one suspects that the anti-bribery rule could not have often been observed.

The next step in this formation of the concept of the bribe occurred in Roman civilization where Hebrew ideal was joined to Roman experience. The Romans had the same ba-

sic insight that the Hebrews had—that in giving judgment one is acting for God or the gods and that one's judgment should not be influenced by a bribe from the person seeking the judgment. What the Romans did which the Jews did not was to enlist the professional interest of a class of orators whose business was to argue cases and whose profession would have been meaningless if the cases could have been decided by the highest bidder. Without the concept that bribes to judges are something to be avoided, the whole Roman system of law would have been a marketplace. For the first time, at least in Western tradition, a class was constituted which was professionally opposed to giving offerings to judges.

When the Christians appeared in the Roman Empire, they inherited the Hebrew idea and the Roman professional practice. They added to what they had received. First, they accepted the idea that the briber as well as the bribee was doing something wrong. This notion appeared in the specific context of an attempt to purchase the Spirit. The story is told in Acts 8:9-24. Simon Magus wants to buy the Spirit of Simon Peter. Simon Peter repudiates the attempt with some of the harshest words in the New Testament: "You and your money go to hell!" It is a stunning repudiation of the person who wants to buy something that seems to be good and should be for sale. With this repudiation of the wrongful offeror goes a teaching that there are some things that cannot be purchased. In the view of the Christians, the Spirit cannot be purchased. Market reciprocity is wrong in relation to the Spirit.

The teaching of the episode in Acts received a general form in the saying of Jesus in the Gospel of Matthew: "You have received freely. Give freely." This saying established a new law of reciprocity. The rule is raised to a higher level. The recipient of a free gift is told to give freely. The teaching relates to an even more fundamental theme in Christianity—the meaning of redemption. The Christian teaching on redemption, reciprocity, non-saleability, and the wrongfulness of offering to obtain what is not for sale—these are additions that fill out the concept of bribery derived from the Hebrew Bible and Roman legal practice.

Brought together by the Fathers of the Church, most notably Saint Augustine, these notions became the ideas of Roman Christian civilization. The ideas then encountered the new peoples who come into Europe, the barbarians—the Germanic, Celtic and Hungarian peoples who entered Europe from the fifth century to the tenth century. The new

peoples had never heard of such ideas. Their way of relating to powerful strangers was the old way—to come with a gift, expect reciprocation, avoid war. Clashes occurred between the Jewish, Roman and Christian ideals and the ordinary practices of the new peoples. The barbarians were surprised. They could not believe that this was the way things were done. In general it was not the way things were done among them. While the Roman traditions were perpetuated by the monks and sometimes lived by saints, on the whole the old-fashioned way of reciprocity prevailed.

The next major moment in the evolution of the bribe occurred in the eleventh century when European civilization revived. The Christian ideals were now being systematically inculcated. A new Europe was being formed. Wave after wave of reform occurred. One of the great battle cries of the reformers focused on the elimination of bribery, especially in the Church. For the first time a specific concept of bribery was formed within the Church. The word "simony" was coined, based on the story of Simon Magus. The practice of buying the Spirit was treated as a serious sin. Simony was stamped as heresy. The reformers pitched their hopes on the papacy as the institution that would eliminate it.

Simony was a subspecies of bribery. Some theological writers advanced the proposition that justice itself is spiritual. If one attempts to purchase justice, one commits the sin of simony, just as if one were attempting to buy the grace of ordination in the Church. The campaign against simony broadened into a general realization that it was a serious sin for Christians to sell or to buy justice.

The process of reform went on for over five centuries. The papacy, once the leader in stamping out corruption, became corrupt itself. The last wave—the Reformation—attacked simony in the Church and particularly in the papacy. By this time the ideal excluding reciprocity in certain transactions was accepted everywhere. No one contested that non-reciprocation in certain contexts is right. Grace could not be sold in the Church. Justice could not be sold in the courts. The European mind was formed. A concept had been ingrained.

The greatest single embodiment of the tradition was formed by Dante in *The Divine Comedy*. In *The Divine Comedy* the sin to which the greatest attention is given—the sin which takes up 3-1/3 of the 33 cantos of the Inferno—is the sin of bribery, both ecclesiastical and secular. Dante indeed puts the secular bribe-takers in a lower position in hell than

the ecclesiastical bribe-takers. As Dante uses the physical sufferings of the sinners as signs of the real nature of their sin, the bribe-takers live in pouches. They are so busy that they are scarcely ever seen. At times their backs appear but not their faces. They are compared to frogs and otters. They live in a sticky, viscous pitch that covers them. The dirt covers them because they are bribe-takers. Describing the city of Lucca, Dante provides the single most succinct definition of a bribe: Lucca is "where No becomes Yes for money." The definition is comprehensive. An intense spiritual hatred of bribery animates Dante's depiction.

The anti-bribery tradition—the Christian tradition—gained the mind of Europe. Probably its strongest embodiment in English can be found in Shakespeare. The anti-bribery tradition is an ironic undercurrent in *The Merchant of Venice*. It reaches full resonance in the play that turns on notions of bribery, *Measure for Measure*. Shakespeare does for English-speaking readers what Dante did for European literature in general.

THE LEGAL DEVELOPMENT OF BRIBERY

To shift now from the moral development of the concept of bribery to its legal development, I have found no instance in English literature or English legal practice in which a bribe-taking judge was actually tried, convicted and punished prior to Francis Bacon in 1621. The ideal was there, but application of the actual sanction was certainly rare.

Bacon's trial and conviction constituted a great turning point. One of the most literate and intelligent people in England, the Lord High Chancellor was convicted of taking bribes. He was brought down by his rival, Sir Edward Coke. Wits in England had been saying "This bacon is too hot for this cook," but in the end, Coke got Bacon. He organized the prosecution, achieved Bacon's indictment by the House of Commons and kept the pressure on until the House of Lords convicted him.

Bacon's defense was "Everybody does it." It was a defense that was not accepted. It was a defense that was not acceptable when the higher moral consciousness of the age—a consciousness often expressed by Bacon himself in his own essays—regarded bribe taking by a judge as evil.

It turned out on examination that Bacon had a lawful income of 3,000 pounds a year (one of the highest in England in an age when 30 pounds a year was an ordinary income). In

bribes he was taking somewhere between 12,000 and 16,000 pounds a year from litigants in chancery. A regular machine existed to sell chancery judgments, to pay the Chancellor and his henchmen, and to use lawyers as bagmen. Bacon had a whole system working to produce bribes.

Bacon's conviction is the only recorded instance of an English secular judge being convicted of bribe-taking. It was a turning point. Apparently it was such a shocking and traumatic event that English judges from that day until this have had a just reputation for honesty in office. It was a signal moment in the history of the concept of the bribe that it was applied against such a powerful official.

Up to this point almost all the legal focus had been on bribe-taking by judges. It took a major intellectual effort to extend the idea beyond judges. It took such an effort because the Biblical paradigm was that of God as judge. God was not presented by the Bible as an administrator nor as a member of a legislature. It was hard to extend the paradigm to administrators and to legislators. Reflection eventually achieved the extension.

The diary of Samuel Pepys is illustrative. Sixty years after Bacon, he was the highest civil administrator in the British Navy, the highest person in the Navy not in a political post. He is regarded by many as the founder of the modern British Navy and even of the modern British civil service. He was also a bribe-taker on a grand scale and is perhaps unique among bribe-takers in recording his bribes.

Pepys had a salary of 350 pounds a year. He started his office possessing 25 pounds. Seven years later he had 7,000 pounds put away. In his diary Pepys shows a dim consciousness that what he is doing is wrong. He records the bribes with a sense of semi-guilt. Here is Pepys' diary for April 3, 1663:

Thence, going out of Whitehall I met Captain Grove who did give me a letter, directed to myself from himself. I discerned money to be in it and took it, knowing as I found it to be, the proceeds from the place I have got him—to have the taking up of vessels for Tangiers. But I did not open it until I came home to my office and there I broke it open, not looking into it until all the money was out, that I might say, "I saw no money in the paper" if ever I should be questioned about it. There was a piece of gold and four pounds in silver.

That is the consciousness of a high civil servant of the period. He knows that he has to cover himself. He is contented with a fig leaf for cover.

The idea expanded slowly in England. The high point for attempted enforcement in the civil service was the trial of Warren Hastings in the eighteenth century. Edmund Burke led the prosecution against Hastings for his bribe-taking as Governor General of Bengal. The House of Lords could not bring itself to convict him. The standards laid down by Burke nonetheless became the standards honored and, to a substantial extent, observed by later civil servants of the British Empire.

The Constitution of the United States puts bribery along with treason as one of the two specific crimes justifying the impeachment of the President. From the beginning, the United States had a legal tradition that bribery on the part of judges was wrong.

But it took a long while to establish anything as to legislators. Throughout the nineteenth century, state legislators were notoriously corrupt. Not until 1853 was any statute enacted making it a crime for a congressman to accept a bribe. The statute was not enforced for the remainder of the century, although there was a political penalty to pay. In the aftermath of the Civil War the Republican leadership of the House was found, in the famous Credit Mobilier Affair, to have been bribed by the promoters of the Union Pacific Railroad. A political price was exacted. The Republicans suffered at the polls for their involvement. But speaking as a legal realist, one may say that there was no criminal law against bribery on the part of the President, Vice President, members of the Cabinet, federal judges, Senators or Congressmen. Throughout the nineteenth century, no criminal sanction existed as to bribe-taking in any of these positions; the worst penalty was retirement from office.

Lincoln Steffens, a journalist who was an expert on bribery at the beginning of the twentieth century, chronicled the story of American corruption that he found then present throughout the country. Time after time he found bribery was how business worked. Every American enterprise got its franchises or licenses from state or city governments by paying off officeholders. Bribery was a way of life in this country.

In the course of this century, that way of life began to change. The first signs of change occurred in the 1920s after the crash and the Great Depression. Then, for the first time, a Cabinet officer was sent to jail for taking a bribe—Albert

Bacon Fall, convicted of taking bribes in the Teapot Dome Affair. In the 1930s a high federal judge, the chief judge of the Court of Appeals for the Second Circuit, Martin Manton, was found to have taken bribes almost as systematically as Francis Bacon. He had been taking bribes for at least ten years and had taken them from a variety of businesses, including the American Tobacco Company. Nothing was done about his bribe-taking until 1939 when he was prosecuted and convicted and sent to prison. Another judge, J. Warren Davis, a Court of Appeals judge in the Third Circuit, was prosecuted but acquitted by a jury. In civil proceedings to set aside some of his decisions, it was judicially determined that he had been bribed by Chevron and Shell Oil. From the careers of these high federal judges it is plain that well into the 1930s American business was willing to pay off federal judges and that some federal judges were willing to be paid off.

That Fall and Manton were actually sent to jail were straws in the wind that American consciousness on bribery was changing. The real expansion of the criminal law has occurred only in the last 25 years. Between 1961 and 1986 there has been an amazing change in the enforcement of criminal law against bribery.

In this period, two things have happened. One has been an immense expansion of statutory law against bribery. The other has been an immense expansion in the prosecution of bribery. For the first time in history, there have been many serious prosecutions carried out either under the bribery laws or under related statutes that reach bribery. That approach has reached its height in the United States with the statutes against wire fraud, mail fraud, income tax evasion, conspiracy and racketeering being used as major tools to reach bribe-takers.

As a result of the combination of statutes and prosecution, a development has occurred that would have amazed earlier stages of our civilization. Several thousand American officeholders have been prosecuted and sent to jail for taking bribes. Five governors have been sent to prison for taking bribes. Federal judges have been convicted of taking bribes. For the first time in history, a Senator and six Congressmen have been convicted of taking bribes. The American standard has now by statute been made effective throughout the world by enactment of the Foreign Corrupt Practices Act.

ELABORATION OF THE CONCEPT OF THE BRIBE: THE FUTURE

Through the combination of divine example and instruction and the enlistment of professional interest, particularly that of lawyers, there has evolved an elaboration of the concept of the bribe. That elaboration has been partly in the direction of purity, and it has partly been based on hard experience.

How seriously will the concept of the bribe be taken in the future? Substantial reasons exist for objecting to the present emphasis the concept is receiving. When the standards are applied outside the United States, familiar arguments are raised to support the objections: "Everybody does it in that country" and "It has to be done." Of course, along with these slogans goes the implication that if everybody does it and you have to do it, it really cannot be wrong. Then the thought is advanced, "After all, life is shot through with reciprocities. You cannot eliminate them all. Why eliminate this particular type of reciprocity you call a bribe?"

In fact it is difficult to draw a line between what is a good reciprocity and what is a bad one. The most striking example in the American context is the campaign contribution. Most people who have written about campaign contributions have had difficulty showing the difference between a campaign contribution and a bribe.

Finally, a common cry is "After all, what harm does a bribe do?" Economically the effect may be trivial. The bribe may not cause as much economic harm as waste or as bureaucratic delay. Why not accept bribery as a fairly small cost of doing business in countries where it is a way of life?

These are some of the objections advanced to the present criminal law on bribery. A reply is possible. The arguments that "Everybody does it" and "It is necessary to do it" are not persuasive arguments on a moral level. No moral progress would ever occur if those arguments were good moral arguments. Every part of the world once practiced slavery. Slavery was thought essential to the maintenance of civilization. If the argument had held that slavery was necessary in every culture that practiced it, the advance would never have been made to the moral level which repudiated slavery.

The argument that "It does no harm or only trivial harm" is morally obtuse. This kind of argument often surfaces in the area of sexual morals. It is an argument that implicitly assumes that the only recognizable harm is that which can be quantified. In this case, the assumption as to quantifi-

cation makes the arguments two-faced. Bribery cannot be quantified and so no one can say that it does no harm or only trivial harm. Data does not exist to support the claim made. More fundamentally, to rest the argument on quantified data is to reduce the moral argument to too narrow limits. The argument based on economic harm totally overlooks the central importance of fidelity in office. Thinking in crude economic terms of quantity overlooks the essential: civilized governments depend on the keeping of trust in office.

The difficulty of making distinctions is the most challenging objection. The difficulty can be made only by an understanding of the spectrum. There is a pure gift and a pure bribe. In between there is a substantial gray area. One can distinguish shades of gray only by knowing the white and the black. Black is a bribe, white is a gift, and in between there are a number of things that lean one way or another and where exact discrimination can be achieved only by positive law.

Christianity makes possible an appreciation of the spectrum. At the black end, a bribe is secret, shameful, manipulative. The briber regards the person he bribes as a thing. In the pure bribe, the briber has no thought of identifying with the recipient. At the white end of the spectrum is the gift. Christians understand the gift through the Redemption. The pure gift is openly given. It is not shameful. Above all, it is an expression of love. It is an effort on the part of the donor to identify with the donee. The only completely pure gift, perhaps, is the Redemption, where God identifies with human beings. In the light of the pure gift we can understand the range along the spectrum.

The concept of the bribe has a future. The concept may not live in the way it now lives, enforced by the criminal law, but it is likely that the concept will be observed and developed among persons who partake of the Jewish and Christian traditions. The concept depends for us on the example presented in the Hebrew Bible of God as one who does not take offerings to influence his decision. It depends on the ideal presented in the New Testament that what you have received freely you must give freely. On the level of earthly interest, the concept is fundamental to a sound understanding of politics, for a bribe is a breach of the fidelity that alone distinguishes public office from raw power.

