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REVIEW

For God, for Country, or for Me?


Reviewed by Daniel Hays Lowenstein‡

It is surely no accident that the title of John Noonan’s most recent book is Bribes, and not Bribery. In an earlier book, Persons and Masks of the Law, Noonan criticized the legal community for being preoccupied with legal rules and doctrines, and therefore paying too little attention to “the persons in whose minds and in whose interaction the rules have lived—to the persons whose difficulties have occasioned the articulation of the rule, to the lawyers who have tried the case, to the judges who have decided it.”¹ In particular, he singled out the legal historians for failing to provide a “counterbalance to the analytical approach.”² It is therefore consistent with his overall scholarly program for Noonan to approach his most recent subject with emphasis upon the concrete instance (Bribes) as opposed to the abstraction (Bribery).

Persons and Masks dealt with an assortment of important legal controversies. It emphasized the backgrounds, motivations, and actions of the individuals involved, but did not purport to be ambitious enough in scope to demonstrate the general value or viability of Noonan’s proposed methodology for legal research and writing. Now Noonan has written Bribes, a supremely ambitious work. He has set out to write the history of the practice and prosecution of bribery from the beginning of western civilization down to the present, using the methodology he laid down in Persons and Masks.³ The history of bribery is told primarily by an examination of many of its most prominent instances, in literature as well as in history.

Part I of this Review Essay articulates the paradigm of reciprocity

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‡ Professor of Law, University of California, Los Angeles. A.B. 1964, Yale College; LL.B. 1967, Harvard Law School.
2. Id. at 7.
3. Since Noonan considers the moral, political, and social aspects of bribes at least as much as their legal aspects, Bribes represents an extension of the program he advocated in Persons and Masks beyond the consideration of legal problems and legal history.

1479
within which Noonan sets forth his study of bribery, and suggests a competing paradigm—"stewardship"—the absence of which creates some problems in Noonan's analysis. Part II attempts to summarize Noonan's rich historical account. Part III criticizes a small number of instances in which Noonan's judgment seems to lapse, and attempts to demonstrate that these lapses are related to broader difficulties with Noonan's approach. Part IV considers Noonan's treatment of a specific and topical problem, campaign contributions. Part V discusses the problem of finding standards that can provide a basis for a specific definition of bribery.

Noonan's weaknesses—infrequent but nevertheless serious lapses of judgment, and an incomplete view of the subject that leads him into serious analytical difficulties on some important issues—lend themselves well to exposure and dissection in a book review. The unfortunate result is that a disproportionate amount of what follows will take the form of negative criticism, and may create the mistaken impression that the book is being given a mediocre evaluation.

To the contrary, *Bribes* is a major contribution, especially to a field as neglected as bribery. Many of its greatest virtues—Noonan's remarkable erudition, the richness and subtlety of his historical account, his consistent fairness, and his fine command of the narrative art—are difficult to demonstrate within the medium of a book review. You must read this book to appreciate its accomplishments.

### I

#### BRIBERY AND RECIPROCITY

Noonan begins his history of bribes with the story of "The Poor Man of Nippur," celebrated among specialists in Akkadian literature and dating from around 1500 B.C. (p. 4). Gimil-Ninurta, the poor man of the title, seeks favor from the mayor of Nippur, a town in Mesopotamia, by giving the mayor a goat. He does not receive the favored treatment he expects, and when he complains, he is beaten at the order of the mayor. Later, Gimil-Ninurta goes to the king and in exchange for a mina of gold he is permitted to use the royal chariot for the day. He then returns to Nippur, where the chariot enables him to pose as a high official in the service of the king. Under this guise he falsely accuses the mayor of theft, gives the mayor three beatings, and receives a gift of two minas from the mayor in placation.

The Nippur story is an excellent starting place because it points to what is probably the central difficulty in the concept of bribery. *Bribes*,
whatever else they may be, are a form of mutually beneficial exchange, or reciprocity. Reciprocity is normally desirable, a cornerstone of human relationships in economic, social, political, and personal matters. As Noonan writes, condemnation of bribery “is a concept running counter to normal expectations in approaching a powerful stranger” (p. xx). The normality of reciprocity is reflected in “The Poor Man of Nippur.” The story does not condemn Gimil-Ninurta for offering a gift to an official in contemplation of beneficial treatment, but rather condemns the mayor for failing to keep his end of the implied bargain.

Closely related to reciprocity is gratitude. Reciprocal relationships are more secure and more efficient if they are not entirely formal or adversarial, and if the mutual benefits can be exchanged voluntarily, even in the absence of prior agreement. Gratitude makes this more likely. And from gratitude it is but a short step to friendship and love. Although specific reciprocity with a friend or loved one may be repugnant to the relationship, at a higher level friendship and love are themselves reciprocal relationships.

Having a concept of bribery, then, means identifying as immoral or criminal a subset of transactions and relationships within a set that, generally speaking, is fundamentally beneficial to mankind, both functionally and intrinsically. Apparently no such subset had been carved out in ancient Mesopotamia. In the tale of “The Poor Man of Nippur,” the only crime lay in failing to carry out the bargain that later ages would come to regard as corrupt.

When one looks at bribery in this light, as Noonan does, two broad and important questions immediately come to mind. First, how and why did western civilization come to label and condemn a class of mutually beneficial exchanges as bribery? This question is central to Noonan’s book. His approach to it is masterful, and his answer complex and rich.

The second question is what substantive content should be attributed to the concept of bribery in any given place and time (such as the United States in the late twentieth century). Much in Bribes is useful in thinking about this question, but Noonan rarely confronts the question directly and, as I shall argue, his perspective either omits or does not place sufficient emphasis on political-functional aspects of bribery that are essential for sound normative thinking about the subject.

Although Noonan is right to identify the historical and conceptual problems associated with bribery as originating in the fact that it is a form of reciprocity, he neglects another consideration that offsets the natural inclination to reciprocity and thus provides a potential or perhaps

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inevitable stimulus to the development of a concept of bribery. Noonan’s paradigm of reciprocity, and the related phenomena of gratitude, friendship, and love, all concern individuals acting either in their own interests or spontaneously adopting as their own the interests of others. As society becomes larger, more complex, and more technologically advanced, legal, political, and other institutional arrangements necessarily arise in which individuals ("stewards") are obliged to act in the interests of others ("beneficiaries"). The interests of the beneficiaries, controlled by the steward, may conflict with the interests of third persons. If the beneficiaries were acting for themselves, any deals they worked out with the third persons presumably would be mutually beneficial. It is because the third persons can or must deal with the steward that reciprocity may lose its benevolent character. The danger, of course, is that the third persons will offer benefits for the steward rather than for the beneficiaries. The very fact that a steward-beneficiary relationship exists, however, suggests a source of resistance to the reciprocity paradigm. First, the beneficiaries, acting in their self-interest, are likely to demand that restraints be imposed on the stewards. Second, whatever ethical, legal, political, social, or economic values gave rise to the stewardship obligation in the first place may be invoked to impose restraints. There is, then, a paradigm of stewardship, almost as basic to any non-primitive society as the reciprocity paradigm, that can provide a foothold for the development of an antibribery ethic.

Noonan’s failure to place the “stewardship” paradigm at the core of his analysis in counterpoise to the reciprocity paradigm may have some distorting effect on his historical account. For example, he is intent on showing that religion was the central inspiration for the western antibribery tradition (p. xx), and he demonstrates that many of the antibribery ideas in fact derived from religious sources. But consideration of the stewardship paradigm might have caused him to question whether religion was a necessary source of the development of an antibribery ethic. Perhaps such a development was inevitable in any event, as a result of pressures from beneficiaries of stewardship arrangements.

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6. A seemingly related, but actually quite different limitation on the beneficence of reciprocity is the economists’ concept of “externalities.” An externality occurs when reciprocal arrangements impose effects on third persons not parties to the arrangements. Economic analysis can attempt to describe the consequences of various types of externalities, but it can say nothing about when a reciprocal arrangement violates an obligation owed to a third person. Obligations are ethical, social, and political phenomena.

7. One way to test Noonan’s hypothesis would be to consider the extent to which, if at all, an antibribery ethic has developed in non-Western societies, and the extent to which it has derived from a conception of divine justice. To take a single example, Article V of the code of Shotoku Taishi, a basic document in the unification and early history of Japan, is an injunction against gluttony and covetousness, directed primarily to those who judge suits. See G. SANSOM, JAPAN: A SHORT
The failure to couple the reciprocity paradigm with a stewardship paradigm has a more serious consequence for the normative analysis of bribery. The stewardship paradigm shows that the prohibition of bribery serves the purpose of protecting persons who are affected by but are not parties to the reciprocal arrangements declared corrupt. The stewardship paradigm thus focuses attention on what the interests of the beneficiaries are and what set of ethical or legal obligations imposed on the stewards will best serve those interests in the long run.

In addition to whatever specific third persons may be involved in a given situation (the opposing litigant in a case of bribing a judge, for example), in a democracy the interest that is most generally and importantly protected by the concept of bribery is the public interest in the integrity of the political process. In order to give substance to the terms "public interest" and "integrity of the political process," it is necessary to have a coherent and more or less specific conception of politics. It is not easy to formulate such a conception in a way that helps answer normative questions about bribery, but it is impossible to answer such questions satisfactorily in any other way.

Noonan has a good deal to say about politics, and what he has to say is usually subtle and sound. But he does not attempt to analyze questions about what should count as bribery by asking more general questions about what kinds of things should influence public officials or how the political system ought to operate. As will be shown, the consequence is that his discussion of normative issues involving bribery is often inadequately grounded.

Prior to this and other criticisms, the next Part will summarize Noonan's remarkable historical account that constitutes the body of Bribes.

II
THE ANTIBRIBERY TRADITION

A. The Ancient Period

For Noonan, "The Poor Man of Nippur" represents the starting point, the world in which the ethic of reciprocity is unquestioned and unqualified. Noonan claims that the history of bribery is composed of "discernible epochs" (p. xx). The first epoch, beginning in Egypt and other ancient near-eastern societies and lasting until 1000 A.D., is one of...
struggle between the “norms of reciprocation” and the emergent antibribery ethic (p. xx).

In the ancient near east, judges had a special obligation to provide justice to the poor, who were unable to bring gifts. However, even this limited qualification of reciprocation had its roots in the reciprocity ethic. The poor were stand-ins for the gods; in return for the judicial favor allotted by the judges to the poor, the judges would receive rewards from the gods (pp. 6-7).

These tentative steps of the ancient near east “would have been so many broken shards” had it not been for the Hebrew Scripture (p. 14). The Old Testament, by placing great importance on the law and judgment of God, created a model of impartial justice for human judges.

The Old Testament message on reciprocity was complex and ambiguous, however. In parts of the Old Testament, as well as in the ancient religions, the relationship with God was one of reciprocity. Offerings to God were still common, and many stories in the Old Testament seem to regard reciprocities between subject and ruler or between man and God as normal and acceptable (pp. 27-29). The very word for bribe in the Hebrew of the Old Testament, shohadh, was ambiguous, as it also meant an innocent gift (pp. 25-27).

On the other hand, from the eighth century B.C. on, condemnation of the receipt of gifts by judges appears increasingly in the Biblical texts (p. 15). The Book of Job in particular breaks new ground, because it suggests a God of such power that the very idea of His engaging in reciprocal relations with humans becomes impossible (pp. 19-22). Noonan concludes that “the paradox . . . dominates.” “Unreconciled and in tension,” reciprocity coexists in the Old Testament with a divine paradigm of impartial justice (p. 30).

An additional defect of the antibribery ethic as it appeared in the Old Testament was the lack of sanctions. Enforcement of bribery prohibitions is necessarily difficult, because bribetakers typically are officers likely to command wealth and power (p. 23). In order for a prohibition to be enforceable, there must be a class with a professional interest in the quality of judging.

Apparently, the first society with such a class was the Rome of Cicero. For the first time, at least so far as judicial offices were concerned,

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9. As modern writers have observed, those with wealth and power can avoid punishment for corrupt activities not only by avoiding or defeating prosecution, but by influencing the definition of offenses so that their own activities are not covered. See L. BERG, H. HAHN, & J. SCHMIDHAUSER, CORRUPTION IN THE AMERICAN POLITICAL SYSTEM 6 (1976); A. ETZIONI, CAPITAL CORRUPTION 18 (1984).

10. In his account of several of Cicero’s cases, culminating in the prosecution of Gaius Verres, whom Noonan refers to simply as “Hog,” Noonan presents the first of many character portraits and extended narratives (pp. 31-54).
the antibribery ethic was backed up by the threat of enforcement. Nevertheless, there was still strong tension between the ethic of reciprocity and the new ethic that insisted on nonreciprocity in some governmental processes. It was not regarded as shameful for voters to accept gifts from candidates. Noonan’s explanation is that there was no divine prerogative or paradigm of uninfluenced voting, as there was with judging (p. 41). Nor was there regulation of reciprocities in connection with legislation.11

Noonan turns next to the early Christian period. The New Testament contains no direct treatment of bribery, but many of its stories imply that some sales and purchases are impermissible. Most significant is the story of Simon the magician, who upon observing Peter and John “laying hands” upon converts, offers to pay money to be given the same power. He is castigated by Peter for thinking “that the gift of God might be possessed through money” (p. 56). This incident may represent the first time that the offeror of a bribe was stigmatized. The Old Testament had condemned only the bribetaker (p. 57).

Augustine receives considerable attention, not only because he was the “premier moralist of the West” (p. 85), but because he was “seasoned by experience and burdened by responsibility for action” (p. xv).12 Augustine had major administrative responsibilities, was actively engaged in controversy, and was himself the target of a serious bribery accusation.13 Whether because he had the benefit of practical experience or not, Augustine saw more deeply into the problem of bribery than any commentator before and most since. He saw that even in the absence of an overt bribe offer, a judge could be corrupted by fear of powerful litigants or a desire for praise (pp. 83-84). Preaching at a time when the antibribery ethic was better articulated and more firmly institutionalized than it had ever been before or would be for at least another half-millennium (pp. 97, 113), Augustine saw some of the subtleties that would render the problem of bribery to a large degree intractable even today.

B. The Middle Ages

The tribes that settled in Western Europe after the fall of Rome did

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11. Cicero’s views on whether such reciprocities were improper apparently depended on the side he was on in the particular controversy (pp. 42-43). Although the reader may therefore ease into a feeling of comfortable superiority to Cicero, I shall argue below that all of us are influenced by similar considerations in formulating our views on bribery and corruption. See infra text accompanying notes 69-70.

12. By and large, Noonan lives up to his promise to rely primarily on such experienced observers (p. xv), except that his strong bias toward theology results in a great deal of reporting and analysis of writers who, so far as Noonan tells us, have no special qualifications under the experience criterion.

13. Noonan cites some modern historians who have given credence to the accusation, but concludes that “[n]o evidence whatsoever supports the charge” (p. 87).
not have the antibribery tradition that is needed to resist the rule of reciprocity. Only some monks and bishops carried on the tradition. Between the sixth and eleventh centuries, the ideal of nonreciprocity was preserved with a struggle and occasionally exemplified, but seldom enforced (pp. 114-15).

The antibribery ethic recovered its vigor between the eleventh and sixteenth centuries (pp. 139-310). The main arena in which this occurred was the Church, where bribery was generally referred to under the name "simony." From 1050-1170 a reform position on bribery was defined that set the standards for ecclesiastical administration for 500 years (p. 140), and that became a battleground in the struggles that culminated in the Protestant Reformation and the Catholic Counter Reformation (p. 303).

Every medieval theologian, famous or obscure, seems to occupy Noonan's stage for a page or two, and Noonan painstakingly traces the nuances and contrasts in each writer's approach to bribery and simony. Although Noonan here departs from his usual concentration on writers with important practical governmental experience, he is probably most at home in these chapters and, on the whole, they may represent the best scholarship in the book. Moreover, amidst the dry theology are many oases. An example is taken from Jacques de Vitry, a thirteenth-century preacher:

[A] 'poor little woman' was not able to get her right from a notoriously venal judge. She was told, 'Unless his hands are oiled, you will never obtain justice.' She obtained grease from a pig and began to oil the judge's hand in the courtroom. 'Woman, what are you doing?' he exclaimed. 'Lord, it was said to me that unless I oiled your hands, I could not get justice from you.' The judge blushed and was covered with confusion that his ways should be so well-known (p. 179).

The same medieval earthiness is found in this bit of reasoning by the better known medieval theologian, Jan Hus:

Old Nick (Lucifer) may say that the pope grants a benefice without any demands being made and that he takes the appointee's money later, so there is no trafficking. 'But Hodek the baker or Huda the vegetable woman would answer Old Nick that when he has bread for sale and someone comes in and in silence lays the money on the counter, either before or after taking the bread, Hodek or Huda concludes that the customer bought the bread' (p. 292).

There are other, more substantial rewards for the reader who will plow through these chapters on the Middle Ages and Reformation. For example, an account of Pope Innocent III, an effective reformer who stands condemned by the high standards he himself advocated, is balanced and sensitive (pp. 202-05). And Noonan's section on Dante is perhaps the single finest passage in the entire book. Dante, like Augustine,
was accused, wrongly according to Noonan, of bribery. Noonan counterpoises Dante's own experience against an interpretive account of the passages in the Inferno dealing with damned souls guilty of bribery, in a manner that is eloquent, illuminating, and moving (pp. 239-63).

C. England, 1500-1800

From the sixteenth century on, Noonan’s geographic coverage narrows. He considers events in England from the sixteenth through eighteenth centuries, and then limits himself to the United States, beginning with the revolutionary period.

The first chapter in Noonan’s section on England is devoted largely to Shakespeare (pp. 319-33). This extended discussion is unfortunate, because Shakespeare did not make a major contribution to the antibribery tradition, and Noonan, in his efforts to show otherwise, is led to the unlikely conclusion that Portia, in The Merchant of Venice, is the prototype of a corrupt judge. Chapters follow giving extended treatment, respectively, to Francis Bacon, Samuel Pepys, and Warren Hastings, the governor-general of Bengal who was prosecuted in Parliament by Edmund Burke. These are strong chapters, presenting Noonan’s most extended narratives covering a relatively modern period.

Bacon, Pepys, and Hastings are all condemned, but each in different terms and with sensitive qualification. Bacon “was at all events no Hog, no orator’s creation without redeeming characteristics; but a man who fell” (p. 359). Pepys was a “grafter,” but one who, “though lie committed adultery, loved his wife, and . . . though he was in the pay of the Navy’s suppliers and the king’s contractors, loved the Navy and served the king” (p. 387). Hastings appears as much the worst of the three, as suggested by the name Noonan gives to the chapter describing his case, “Hog Two.” Yet even Hastings, though “corrupt and cruel and dishonest,” was not so “in his every move” (p. 415). He was “a man devoted

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14. A significant linguistic development occurred in sixteenth century England. Previously, the words used to describe bribes also could be used to describe innocent gifts. The word “bribe,” which had found its way into English by the mid-sixteenth century, was the first word in western history to denote unambiguously a gift that was regarded as corrupt (p. 313). As Noonan notes, an “immense difference existed psychologically between saying, ‘You give him an offering,’ where the offering could be either a corrupt inducement or gift acceptable to God, and saying, ‘You give him a bribe’” (p. 316).

15. See infra, Part III.

16. Bacon was prosecuted by Edward Coke. It is an interesting bit of trivia that the two most celebrated corruption trials in English history were prosecuted by men as distinguished as Coke and Burke.

17. Gaius Verres, prosecuted by Cicero, was Hog One. Lyndon Johnson is Hog Three (p. 560). This last designation is based on R. CARO, THE YEARS OF LYNDON JOHNSON: THE PATH TO POWER (1982). Later, Noonan says Caro’s account must stand as an accusation only, since the “defendant” has no opportunity to answer or confess (p. 563).
to his wife, generous to his relatives, kind to his dependents, admired by many of the English in India, trusted by many stockholders of the Company, on good terms with a variety of Indians, a friend of peers, above all a ruler who had some political successes to his credit” (pp. 414-15).

In a sense these chapters provide the purest test of Noonan’s manifesto as declared in Persons and Masks. Noonan relies heavily on the three narratives to carry the story of bribery over a period of two centuries in England. Aside from the intrinsic value of the narratives and the historical research they reflect, the narratives generate important insights. One example is the perceptive manner in which Noonan shows, in the Bacon and Hastings cases, how a complex of mixed and changing political motives can further or restrict a corruption prosecution. Another is the manner in which, in the discussion of Pepys and the extensive excerpts from Pepys’ diary that Noonan provides, the sheer tawdriness of the crime of bribery is powerfully conveyed. Indeed, although this is not a point that Noonan makes much of explicitly, the tawdry aspect of bribery runs throughout the book, and exemplifies how an important quality of a phenomenon can become apparent by detailed concrete consideration of instances.

Nevertheless, these chapters also demonstrate the weakness, or at least the incompleteness, of Noonan’s approach. Developments that occur over a long period of time, especially doctrinal or conceptual developments, tend to get inadequate treatment.

For example, the most important legal change affecting bribery in England during the seventeenth and eighteenth centuries was the extension of the concept to government officials outside the judiciary. The limitation of bribery to the judiciary was a feature not only of English law but also of political thought through the middle of the seventeenth century. Hobbes, for example, permitted the hiring of “friends” with

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18. For example, Noonan shows how the prosecution of Bacon was the climax of a long-standing rivalry between Bacon and Coke (pp. 342-50). Initially, when Coke opposed Bacon in connection with the bribery charges, Bacon was able to incite King James’ anger against Coke. This move forced Coke to take the “only course” for self-protection, a “full-scale” and ultimately successful attack on Bacon (p. 344).

19. A typical example is Pepys’ entry for February 11, 1664 (pp. 368-69). A Mr. Falconer brings a silver cup worth three or four pounds for Pepys’ wife “for the courtesy I did him the other day.” Pepys is “almost sorry for this present,” because he would have preferred to receive a summer invitation to Falconer’s estate at Woolwich. The sense of tawdriness arises from the cumulative impact of dozens of such entries.

20. In contrast, the conceptual developments relating to simony in the Middle Ages receive exquisite treatment. But in his chapters on the Middle Ages, Noonan does not adhere nearly as closely to the method of Persons and Masks as in the English chapters. In the earlier chapters, Noonan’s discussion of innumerable theologians assures that the conceptual aspects of bribery receive considerable attention. In fairness, Noonan never contended that the concrete should displace the conceptual, merely that it should receive greater consideration than is common in legal scholarship and legal history.
money in a legislative assembly because sometimes "justice cannot be had without money; and every man may think his own cause just, till it be heard, and judged."21 Yet a judge who gave even a just sentence was not a "just judge" if he did so "for a reward."22

Noonan's explanation of why the concept of bribery was limited to judicial acts is that it arose out of the great antibribery tradition he has described, the origins of which lay in the paradigm of divine justice in the religions of the ancient near east, including the Old and the New Testaments.23 Although it had been applied to administrative matters by church reformers in the Middle Ages, it had never had a strong foothold in secular affairs except with respect to judicial matters. The hard question for Noonan is not why bribery was limited to the judiciary in the sixteenth and seventeenth centuries, but why it was effectively extended to the executive and legislative branches in the eighteenth and nineteenth. Noonan mentions some of the major events that brought about the change (e.g. p. 390 & n.35), but he does not attempt to explain why the change came about.

Noonan having abstained, the explanation must await the attention of some other competent historian. The most promising line of inquiry may be to draw on the stewardship paradigm I have described earlier and to look for an association between the extension of the concept of bribery and the development of the sense that the institutions of government exist to serve the interests of the greater public. Under feudalism, what we would today regard as public law was private. In Pollock and Maitland's words, "jurisdiction is property, office is property, the kingship itself is property."24 In such a setting there can be no concept of bribery. But as the concept grows that power is administered for public ends and not for the private benefit of the officeholder, protection of the public interest requires antibribery measures. Undoubtedly, a proper study of the extension of the concept of bribery in Anglo-American law and politics would produce a much more complex answer. To the extent the answer would include the growth of the idea of the public interest, Noonan's avoidance of the question may reflect the absence of the stewardship paradigm in his consideration of bribery, which causes him to slight the social and political functions served by an antibribery prohibition.

22. Id. at 168. Hobbes also regarded jurors as subject to penalty if they failed to follow the judge's instructions because they were "corrupted by reward," id. at 184, and regarded the receipt of money to give false judgment or false testimony as an especially serious crime. Id. at 200.
23. Thus, Noonan explains why Pepys' prospects of avoiding prosecution when he was under investigation were better than Bacon's had been: "Pepys was a bureaucrat, not a judge; the basic paradigm of justice was not at issue" (p. 381).
A final point should be made regarding Noonan’s chapters on England. Although the chapters are largely devoted to Bacon, Pepys, and Hastings, there is some treatment of speculative writers of the seventeenth century. Which two English writers does Noonan choose to represent this period? Thomas Hobbes? John Locke? Neither is mentioned, despite the fact that at least Hobbes, as we have seen, had a number of interesting things to say on the subject. The two writers Noonan discusses are a pair of theologians, William Ames and Richard Baxter.

The fact that the coverage of Bribes reflects its author’s idiosyncrasies lends the book a great deal of its charm and interest. Noonan’s prime interests are frankly theological and moral. Corruption is a central concern of both, so Noonan’s predilections serve him well, to a point. But bribery is also, and perhaps preeminently, a political matter. Noonan’s emphasis on the thought of theologians and moralists, prominent and obscure alike, to the exclusion of secular systematic thinkers is one of the book’s limitations. Except for Augustine and Thomas Aquinas, the writers who would appear in a course in introductory philosophy or political theory—Plato, Aristotle, Machiavelli, Descartes, Hobbes, Locke, Hume, Kant, Hegel, the utilitarians, Marx, and all the twentieth century philosophers—are mentioned only in passing or not at all.

D. The United States

More than a third of Noonan’s book is devoted to the history of bribes in the United States, dating from the revolutionary period to the present. Noonan includes most of the celebrated scandals in our history: the Yazoo land scandal, Credit Mobilier, and Teapot Dome, and many of the more recent ones, including Abscam and Lockheed. He also traces the antibribery ethic in American letters, treating novelists such as Mark Twain, Henry Adams, and Robert Penn Warren, as well as diarists, muckraking journalists, and others.

Noonan’s broadest historical point is that in the late nineteenth and early twentieth centuries, antibribery sentiment ran high in America. This sentiment sometimes was translated into criminal legislation, but except for occasional explosive scandals such as Credit Mobilier and Teapot Dome, the legislation rarely was enforced. Even in the big scandals, political sanctions were much more likely than criminal punishment. Nonetheless, “the tinkering with statutes could be seen as psychological preparation for hard enforcement” (p. 578).

Three major developments suggest that a new epoch in the history of bribes may have begun in the 1960’s: (1) the new, active role of federal
prosecutors and courts in prosecuting state and local as well as federal officials for bribery; (2) the new concern over the corrupting effects of campaign contributions; and (3) the extension of American bribery concepts to control the conduct of businesses overseas, which may herald the internationalization of what is already the strongest enforcement of the antibribery ethic in the history of the West.

There is a central ambiguity underlying Noonan's American chapters. One is often not quite sure of Noonan's attitude toward the trends he is describing, and one sometimes suspects him of having it both ways. Often his tone suggests that we, or the zealots among us, are carrying a good thing to great excess.26 At other times he seems detached from but rather admiring of the muckrakers who were stoking the antibribery fires.27 At still other times, Noonan seems to be more zealous than any of the "citizen censors" or prosecutors he writes about. How else can one characterize a man who condemns as guilty of corruption Shakespeare's Portia, James Monroe, John Quincy Adams, Henry Clay, and Abraham Lincoln? The next section considers and rejects Noonan's reasons for reaching many of these remarkable judgments.

III
NOONAN AS CITIZEN CENSOR

A character in one of Robertson Davies' books makes the following comment:

Moral judgements belong to God, and it is part of God's mercy that we do not have to undertake that heavy part of His work, even when the judgement concerns ourselves.28

Davies' character does not speak for John Noonan, who attacks the task of judging the characters in his book, real and fictional alike, with relish. Although he says in the Introduction that his purpose is not to give verdicts, he admits that "we are so constituted by nature to be judg-

26. For example:
Whatever social causes account for it, [beginning in the 1960's] the pursuit of bribery became a national enterprise in the United States. Watergate is the consequence not the cause of this phenomenon. In the Orwellian prophecy for the year 1984, sexual Puritanism is the rule, enforced by electronics. In the actual America of 1984, it is the purity of political reciprocities that is enforced by wire taps, tape recordings, and television cameras. (p. xxii).

27. Noonan writes:
The most striking feature, on the whole, about the accusations was the intensity of interest they held for the accusers. Not for them the pallid pokings of the topic engaged in by formal academic analysis. For the censors, the accusations were page one news, magazine cover stories, subjects of burning personal indignation, central themes of their books. For them, whether or not a man took a bribe was of crucial concern. (p. 563).

mentally" and that the urge to judge guilt or innocence is "irresistible" (p. xii).

Whether or not Noonan ought to have tried harder to resist the compulsion to render moral verdicts, his judgments usually are fair and sound. As the close of the previous section suggests, however, there are striking exceptions. This section sharply criticizes certain of Noonan's judgments, not because they are representative of the book as a whole, but because they are significant in themselves, and their analysis will cast light on broader themes and difficulties, some of which are close to the heart of Bribes.

A. Portia

Noonan's interpretation of The Merchant of Venice centers around his view that Portia is thoroughly corrupt (pp. 322-24). His charges against her, together with reasons for rejecting those charges, are as follows:

1. She "cheats in arranging the music" to guide Bassanio to choose the casket that enables him to marry her (p. 323). Although some critics have read the casket scene this way, the textual support for Noonan's assertion is weak. The most that can be said for it is that it is a possible directorial choice.

2. When she acts, in effect, as judge in the trial between Shylock and Antonio, she "has an interest affecting her integrity" (p. 323). It is true that Portia is in a position of conflict of interest, but Noonan


30. I must disclose the fact that the character Noonan vilifies is the very character after whom the Lowenstein family beagle is named. I cannot pretend to be entirely objective with the family honor at stake. However, I am grateful to Noonan for giving me this opportunity to correct the misimpression, abroad in some circles, that our dog was named after a brand of automobile!

31. It rests primarily on the fact that the first lines of the song that is sung while Bassanio is deliberating—

_Tell me where is fancy bred_  
Or in the heart, or in the head?  
—both rhyme with "lead," which is the correct casket. W. Shakespeare, supra note 29, act III, scene ii, 63-64. There is considerable textual evidence to the contrary, such as Portia's apparently sincere nervousness immediately before Bassanio makes his selection. See id., at act III, scene ii, 108-14. For strong statements of the opposing views, compare A. Bloom, Shakespeare's Politics 26 (1964) (Portia cheats), with H. Granville-Barker, Prefaces To Shakespeare 339 n.5 (Princeton ed. 1978) (Portia does not cheat).

32. The term "conflict of interest" is anachronistic for Shakespeare's time, but not the concept. The Merchant of Venice was written only a decade or so before Coke decided Dr. Bonham's Case, 8 Co. Rep. 118a, 77 Eng. Rep. 652 (1610), holding that "no one ought to be judge in his own case." Portia herself articulates the same principle when she says, "To offend and judge are distinct offices, And of opposed natures." W. Shakespeare, supra note 29, act II, scene ix, 60-61.

Portia's conflict of interest arises because Bassanio, her husband, is a close friend of Antonio. Noonan is wrong to suggest that she and Bassanio stood to gain 3,000 ducats from her verdict, and
should know better than to suggest that conflict of interest is equivalent to bribery (p. 323). After allowing for the conventions of comedy and the dramatic and thematic gains that result from Portia's adoption of the judicial disguise, this charge is not serious.

3. She is willing to accept a gift from a successful litigant after the trial is over (p. 323). This charge is confused factually and is also anachronistic.

4. She gains a manipulative advantage within her marriage by arranging the ring trick (pp. 323-24). In making this charge, Noonan overlooks the seriousness of Portia's intent, and the thematic importance of the ring incident (p. 323).

5. Although she "delivers a homily on the need of all for mercy," she issues a "completely merciless" sentence on Shylock, and thus shows that she lacks a "tender conscience" (p. 324). Whether or not Shylock's punishment is harsh, Noonan's criticism is based on the misperception that Portia is the voice of mercy against law, Shylock supposedly representing law. In fact, Portia stands for law throughout the play. The attempted murder statute Shylock has violated is a capital offense. Portia announces sentence and commends Shylock to the mercy of the Duke and Antonio, who under the statute are the only ones empowered to render mercy.

6. Finally, Portia's verdict was "legal quibbling," as she used the "law . . . to confound the law" (p. 324). This charge is probably widely accepted, but it is wrong. It is worth devoting some space to explaining why, because the explanation shows both that Shakespeare's understand-

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33. For a well-known account of the differences, see ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, CONFLICT OF INTEREST AND FEDERAL SERVICE 18-20 (1960).

34. The charge is factually confused, because Portia can hardly be blamed, as Noonan seems to do, for having been offered and refusing 3,000 ducats. It is true that she asks for and accepts Bassanio's ring, but she does so not to enrich herself, but with the purpose, carried out in the final act, of returning it to the donor.

35. See infra note 47.

36. This has been the subject of a voluminous scholarly debate. See, e.g., Barnet, Introduction, in TWENTIETH CENTURY INTERPRETATIONS OF THE MERCHANT OF VENICE 1, 7 (1970); Lewalski, Biblical Allusion and Allegory in The Merchant of Venice, Id. at 33, 50-51.

ing of law in this play is more profound than is sometimes recognized, and that Noonan's spectacular misreading of *The Merchant of Venice* is related to the more subtle problems found elsewhere in *Bribes*.

The view that Portia's verdict is a mere trick is consistent with Noonan's previously noted view of *The Merchant of Venice*, that the structure of the play opposes Shylock, who stands for law, against Portia, who stands for mercy. The trial scene is then interpreted as the victory of mercy over law, in which case the violence Portia is supposed to have done to the law by her "trick" is consistent with the overall structure.

A better view of the play sees the struggle between Shylock and Portia as one between competing conceptions of law. Shylock looks at the surface, and assumes that the law is mechanical, literal, and clear. Portia looks more deeply. She is capable of out-Shylocking Shylock when it comes to literal interpretation, but she has the broader range of skills that an outstanding lawyer or judge requires. She knows that the contract before her, while it must be honored, cannot be read in isolation from the rest of the body of laws. Most importantly, she understands that the law is an instrument that serves deeper social ends, and that for law to function justly it must not exalt either its technicalities and conventions or its social ends, but instead must reconcile the two. To do this in concrete cases requires intelligence and imagination, qualities that Portia displays in abundance.

By the time of the trial scene, Portia has already been established as standing for law in connection with the incident of the caskets. In her first scene she expresses the hardship she suffers because of the restriction on her freedom to marry imposed by her father's will, but she declares her commitment to comply, come what may. She honors her promise, and receives her reward when the man she loves, Bassanio, correctly solves the riddle of the caskets (p. 324).

In the trial, the law upon which Shylock stands is the requirement that commercial agreements be strictly enforced. Portia and Antonio, as well as Shylock, affirm this principle:

> For the commodity that strangers have  
> With us in Venice, if it be denied,  
> Will much impeach the justice of the state,

38. My reading of the play is heavily influenced by Benston, *Portia, the Law, and the Tripartite Structure of The Merchant of Venice*, 30 *SHAKESPEARE Q.* 367 (1979).

39. The opposing legal views of Portia and Shylock are an instance of the contrast between internal essences and false exteriors. This contrast is a major theme of *The Merchant of Venice*. See W. SHAKESPEARE, supra note 29, act I, scene iii, 95-99; id. at act II, scene vii, 65-69; id. at act II, scene ix, 24-29; id. at act II, scene ix, 40-42; id. at act III, scene ii, 73-101.

40. Her sense of hardship is expressed at id. act I, scene ii, 25-26. She makes her commitment at id. act I, scene ii, 105-07.
Since that the trade and profit of the city
Consisteth of all nations.41

Another often-overlooked point about the trial scene is that immedi-
ately before Portia's disguised entrance, the Duke has declared his will-
ingness to dismiss the court rather than permit Shylock to carve his
pound of flesh from Antonio's body.42 When Portia arrives, the situation
is not simply that Antonio needs to be saved from the remorseless applica-
tion of the law, but also that the law, whose importance to the state has
been emphasized, needs to be saved from being set aside in order to spare
Antonio.

Portia makes it clear at once that the proceedings will be governed
by the law alone.43 Her most famous speech is indeed an eloquent plea
for mercy, but nowhere does she suggest that mercy should displace the
law.44 She does suggest, but in terms Shylock cannot understand, that
her conception of the law is much broader than his.

For the intent and purpose of the law
Hath full relation to the penalty,
Which here appeareth due upon the bond.45

Shylock, believing that she means the law endorses whatever penalty

41. *Id.* at act III, scene iii, 27-31 (Antonio), and see in the trial scene itself, *id.* act IV, scene i,
38-39, 101-02 (Shylock), 217-21 (Portia). See also *Id.* act III, scene ii, 277-79.
42. *Id.* at act IV, scene i, 104-07.
43. *Id.* at act IV, scene i, 176-78. Later, Portia harshly rejects a proposal put forth,
significantly, by Bassanio, that she set aside the law and, "To do a great right, do a little wrong." *Id.*
at act IV, scene i, 214-18.
44. It is worth noticing the lines that precede Portia's mercy speech:
PORTIA: Do you confess the bond?
ANTONIO: I do.
PORTIA: Then must the Jew be merciful.
SHYLOCK: On what compulsion must I? Tell me that.
PORTIA: The quality of mercy is not strained....
*Id.* at act IV, scene i, 180-83.

There is an air of paradox about the close conjunction of Portia's two seemingly contradictory
statements, "Thee must the Jew be merciful," and "The quality of mercy is not strained." The most
obvious resolution of the paradox is that the contradiction arises because of Shylock's characteristi-
cally limited understanding of Portia's use of "must." For Shylock, there is but one source of comp-
pulsion, the commands of the law, together with the power, whether divine or worldly, that stands
behind the commands. He therefore cannot understand Portia's meaning, that he "must" be
merciful because the demands of morality, compassion, and common sense must spontaneously elicit
mercy from any normal human being in Shylock's situation.

There is, however, a hidden irony in Portia's lines, and a genuine paradox. Although only
Portia sees it, Shylock is engaged in a course of attempted murder, which, as Portia will reveal later,
is a capital offense. See *id.* at act IV, scene i, 345-62. Shylock "must" be mercifult—must give up his
enterprise of killing Antonio—or he will be subject to the severest sanction of the law. Portia's
statements about mercy are much more than statements of the law, but they are in addition to any-
thing else, a precise statement of the paradoxical legal situation in which Shylock has placed
himself. To save himself from punishment lie "must" be merciful. Yet that mercy cannot be
"strained," both because in that case it would not be mercy, and because if he spares Antonio out of
fear for his own life, as he later does, lie will not avoid punishment.
45. *Id.* at act IV, scene i, 246-48.
may appear in the bond, responds, "Tis very true." But the "relation" between the law and the penalty need not be simply that the former automatically incorporates the latter. Portia's true meaning, incomprehensible to the literal Shylock, is the much more reasonable idea that the intent and purpose of the law varies depending on the nature of the penalty set forth in the bond.

Shylock, having insisted throughout on a literal reading of the bond, has no rejoinder when Portia, equally literally, interprets the bond to prohibit the spilling of a single drop of blood or the taking of the slightest bit more or less than exactly one pound of flesh. But while the cleverness of Portia in thus "trapping" Shylock has been universally acknowledged, many critics have assumed that Portia descends to Shylock's level by her literal reading of the contract. This is the "legal quibbling," the use of the law "to confound the law," that so disturbs Noonan.

Although Portia's reading of the bond is as literal as Shylock's, her interpretation is not on his level. There is all the difference in the world. Shylock's literal interpretation ignores and is opposed to the "intent and purpose of the law," and therefore is not only literal but mechanical and narrow. Portia's interpretation respects and is consistent with the true commercial purposes of the law, which the Duke had been ready to set aside, and it is harmonious with the criminal law, whose overriding purpose is the protection of the lives of citizens.

Portia, then, has not "bent" the law, or played a "trick," or "confounded" the law with its own techniques to save Antonio in the name of mercy. She has served the law in the highest possible fashion, by reconciling its letter and its spirit. And she has saved the law from those who, feeling the heat of the moment and the pressure of good intentions, would have set it aside. Portia, who has resisted the strong temptation to set aside the seemingly oppressive terms of her father's will, refuses to let the Venetians break their obligations to obey the law. Antonio's life is saved not out of mercy or despite the law, but because it is the deepest purpose of the law to protect the lives of innocent citizens.

46. See supra text accompanying note 43. The legitimate ends of the law, repeatedly affirmed by characters in the play, are the commercial ends of international traders, on whom the economy of the state depends. Shylock renounces these ends when he refuses three times to accept his principal in satisfaction of the bond. His self-declared motive is "a lodged hate and a certain loathing." W. SHAKESPEARE, supra note 29, act IV, scene i, 60. His purpose, which he has made as clear as can be, is the death of Antonio, a citizen of Venice. Such an end, violative of natural law and, as Portia will soon reveal, of the statutes of Venice, is not within the category of rights the commercial law was intended to protect.

47. Portia stands for law also in the incident of the rings, which is thus importantly integrated thematically into the play as a whole and not, as Noonan suggests, a mere manipulation for advantage within a marriage. The Venetian Christians are depicted as failing to understand the full import of their commitments and being willing to break those commitments under pressure. Antonio establishes this pattern in Act I when he foolishly signs Shylock's "merry" bond. W.
Why does Noonan go so far astray in his discussion of The Merchant of Venice? It is no doubt a strong temptation for anyone writing a topical history such as Bribes to find traces of his subject where they do not exist, and that temptation must be especially great in the case of Shakespeare, who seems to have dealt with nearly every aspect of human affairs with such great insight and sensitivity. But there may be a deeper reason for Noonan’s lack of sympathy for Portia. Portia’s strength is her understanding of the law at all levels, in particular the functional level. She alone can solve the problem because she alone fixes her eye on the broader purposes the laws before her were intended to serve.

It is precisely at the level of the functional—the setting forth and application of a conception of the social and political purposes the antibribery ethic is intended to serve—that the only fundamental weakness of Bribes is located. This flaw becomes clearer in the case of Abraham Lincoln, the subject of Noonan’s other spectacularly wrong-headed judgment.

B. Lincoln and Logrolling

Noonan’s charge against Abraham Lincoln is that he used corrupt means to gather sufficient Congressional votes to pass the thirteenth amendment, ending slavery in the United States. Noonan professes some doubts regarding the factual justification of the charges that were made, but does not express doubt that if the facts alleged were true, the case for Lincoln’s corruption as a moral matter, though probably not as a legal matter, would be established (p. 695).

And what were the allegedly corrupt methods used by Lincoln? Essentially, logrolling. According to one accuser, the kinds of requests that were granted to influence Congressional votes were these:

One Democrat wanted ‘a place’ for his brother in New York; another was told that an election contest in the next Congress ‘would depend entirely on his vote in the impending thirteenth amendment’; a third was

...
a lawyer representing a railroad in Pennsylvania threatened by legislation pending in the Senate . . . (pp. 456-57).

Another of the accusers expressed doubt that money was given to wavering members of Congress, but asserted that the Democrats were "won over through the process of logrolling" (p. 457).

Lincoln is accused then, of exchanging political favors, specifically including offering reelection support, concessions on unrelated legislation, and patronage, in exchange for favorable votes on the antislavery amendment. The facts may be in doubt, but the premise of Noonan's discussion is that all such exchanges are bribes, at least morally. Apparently, Noonan regards the wrongfulness of such deals as so obvious that it may be assumed without argument.

The stewardship paradigm, described earlier, suggests a functional approach to determining what kind of conduct should be regarded as corrupt. Under such an approach we would ask whether, on the whole, prohibition of the kind of exchanges Lincoln may have engaged in would serve the interests of the public in a democratic society. It seems incredible to imply, as Noonan does, that an agreement by the President to support a Member of Congress' reelection efforts in exchange for the Member's vote on an important piece of legislation could be regarded as corrupt. The functional approach precludes such a conclusion, since democratic principles presuppose that support for an incumbent will depend on his performance in office.48 Similarly, compromise on legislation is generally regarded not as corrupt but as necessary in our system if legislative business is to be accomplished at all. And although compromises that extend across otherwise unrelated items of legislation may have some adverse consequences, it is not at all obvious that they are harmful on balance.49 Even an offer of patronage in exchange for a vote cannot be assumed to have been corrupt without some explanation of what principles are being applied. Patronage was a much more widely accepted practice in Lincoln's time than at present, but even now a President's appointments are made with an eye to satisfying various interest groups, in order to attract the support or avoid the opposition of these groups to the President's program. Is the effort of a President to appoint a "balanced" cabinet corrupt? If not, some explanation is needed of why Lincoln's behavior is worse.

Noonan also condemns John Quincy Adams and Henry Clay for a kind of logrolling transaction, although one of a different nature. The incident arose out of the 1824 presidential election, in which Andrew Jackson won a plurality but not a majority of electoral votes, and Adams

48. See Lowenstein, supra note 8, at 809-11.
ran second. The choosing of the President was therefore up to the House of Representatives, in which Clay had great influence. Clay threw his support to Adams, who as President appointed Clay Secretary of State. Noonan does not assert that an explicit deal was made between Adams and Clay, but says “even historians sympathetic to Adams” have concluded there was an unstated “meeting of the minds” (p. 449). The roster of historians sympathetic to Adams does not include Noonan, who is apparently incredulous that even in the privacy of his diary Adams did not “admit fault or accuse himself of any mental sin” (p. 449).

Here, as in the case of Lincoln, Noonan is scrupulous in his factual judgments, but he assumes without argument that if in fact there was a meeting of the minds, the deal was corrupt. Perhaps the Adams-Clay case can be distinguished from the Lincoln case on the ground that the benefits being exchanged on both sides were high public positions for the principals, whereas Lincoln was bargaining for a public policy objective. In rebuttal it could be contended that the distinction is a false one, since the reason for pursuing public office may be to carry out certain public policies, and contrariwise, officials may pursue public policies as a means of furthering their careers. Aside from whether Noonan’s assessment of Adams and Clay, or even of Lincoln, might be justified, Noonan himself makes no attempt to do so. More importantly, because of his avoidance of a functional approach to bribery, he provides no analytic framework that could guide the search for a justification.

Perhaps, therefore, it is not surprising that Noonan is inconsistent on the question of logrolling. Consider his treatment of an encounter between Theodore Roosevelt and Lincoln Steffens. Steffens, by his own account, got Roosevelt to admit to making appointments in exchange for votes he needed in Congress. Steffens accused Roosevelt of bribery, and Roosevelt denied the charge. Noonan’s comment:

Literally and in terms of the law on the books, [what law?] Steffens was right. Politically and in terms of the law as applied, Roosevelt was right; and who was right morally depended on whose morals were taken as the measure (p. 533).

Why this sudden moral agnosticism from Noonan? If Quincy Adams and Lincoln were blameworthy for engaging in this sort of conduct, why not Theodore Roosevelt? Later, Noonan mentions the fact that most American bribery statutes are not limited to pecuniary benefits provided to public officials. He jumps from this fact to the conclusion that “on its face” such a statute covers all exchanges of official favors,

50. Noonan says Steffens recalled his conversation with Roosevelt “in an idealized form reminiscent of John of Salisbury’s report on his conversation with Adrian IV” (p. 533). From any other author such a remark would be outlandish, but from Noonan it is merely an eccentricity, and a charming one at that.
and remarks, apparently critically, that these statutes "extended the bribery rule deeply into political life" (p. 580).  

The problem here is Noonan's failure to develop a conception of how the American political process does and ought to work, against which conduct such as logrolling and other political dealmaking can be judged. The question of whether and when political benefits provided to officials in exchange for favorable official actions constitute bribes or ought to constitute bribes is an extraordinarily difficult one, with no easy solution. The problem is not that Noonan has no answer, or that his answer is inadequate. Within less than fifty pages he takes positions of condemnation of such conduct, agnosticism, and apparent disapproval of statutes that may restrict such conduct. Noonan never directly confronts the issue, and he cannot so long as he wishes to view bribery as exclusively a moral issue. Political analysis is required.

IV
CAMPAIGN CONTRIBUTIONS

In this and the following section, Noonan's difficulties with the political dimension of bribery will be explored further through consideration of two issues. The first is the specific and topical question of campaign contributions: When are they bribes, and how do they differ from bribes when they are not? The second is the more general and somewhat nebulous question of relativism: To what extent can we or should we apply our own standards when considering bribery in societies of other times or places? These are difficult questions for anyone to answer, Noonan included. His particular difficulties stem from his unwillingness to confront basic normative questions about the political process.

No one can consider bribery or corruption in contemporary American politics without considering campaign contributions. Noonan recognizes this. No subject in Bribes receives more conceptual discussion than campaign contributions, suggesting that Noonan has given the matter considerable thought. He has not, however, thought it through to a

51. The only authority Noonan cites for his legal conclusion is People v. Montgomery, 61 Cal. App. 3d 718, 132 Cal. Rptr. 558 (1976). He does not mention that the court on appeal never addressed the question of whether the conduct on which the defendant was convicted actually amounted to bribery. See Lowenstein, supra note 8, at 814.

52. See Lowenstein, supra note 8, at 806-16.

53. In addition to the conceptual discussion of campaign contributions, Noonan offers one of his extended narratives, in this case the story of the illegal corporate contributions from the Gulf Oil Corporation to various federal candidates and elected officials during the 1960's and early 1970's (p. 639). His account provides a fascinating glimpse into the corporate-political world, and into the efforts of corporate officials to come to grips with ethical questions, both before and after the illegalities were disclosed.
successful conclusion. His problems arise from a combination of the following:

1. He recognizes that money is required for election campaigns.
2. He is not willing to consider campaign reforms such as public financing of election campaigns.
3. He does not want to characterize mainstream campaign contributions in our existing system as bribes.
4. Although he evades as much as he can, he cannot entirely overlook the nature of our existing system of campaign finance.
5. He is a decent man.

Take any one of these away, and one can develop a coherent normative account of campaign contributions and bribery in contemporary America. Noonan is stuck with all of them, and he cannot reconcile them.

Near the beginning of his discussion of campaign contributions, he sets forth seven hypotheticals that he claims “will illustrate the range” of the problem:54

1. A gives to X, a candidate, out of dislike or distrust of Y, X’s opponent.
2. A gives to X out of admiration for his character and a belief that the country will be better with him in office.
3. A gives to X because of X’s general sympathy to a particular industry, section of the country, or economic class.
4. A gives to X because X has a principled stand on a specific issue.
5. A gives to X because he needs ‘an insurance policy’ guaranteeing he can present his position to X—that is, although A has such status that legislators listen to him, he wants to be sure that he will always have access to X.
6. A gives to X because he has no other way of getting access to him.
7. A gives to X because he expects X to vote for a specific bill (p. 623).

Noonan finds Cases 1 through 4 easily innocent. One is struck by the articulation of subtly different fact situations within this noncontroversial range, in contrast with the high degree of equivocation that we shall see characterizes the last three examples.

Regarding Case 7, Noonan says, “the donation is made with the expectation of X’s response in official conduct. Full reciprocation is anticipated.55 The distinction between bribe and contribution is close to
collapsing” (p. 623). But what does that mean? Does the distinction collapse or not? This is not an exotic case, it is a crucial case. Noonan must sense that if he calls Case 7 a bribe, the dikes will collapse and he will have no way to avoid condemning the routine interest group contribution in American politics. Yet, he is too much of a democrat, or at least too able to recognize corruption when he sees it, to be willing to say Case 7 is not a bribe.

Just as much of a problem as Noonan’s evasiveness about Case 7 is the gap between Cases 7 and 6. Case 6 is an “access” case. Case 7 is one in which there is an intent to influence a specific piece of legislation. Left out—although Noonan will refer to it implicitly in his analysis of Case 6—is the much more typical case, in which the interest-group contributor intends to influence official decisionmaking in general on matters of concern to the group, but without specific reference to a particular bill. Is the “distinction between bribe and contribution . . . close to collapsing” in such cases? If not, why not? How is the public interest protected or the moral status of the official elevated if campaign contributions purchase influence in general rather than being limited to particular bills?

Here is Noonan’s conclusion on Case 6, the “access” case:

In Case 6, A is making a payment of the kind frequently used in the past to win the attention of a judge . . . The evil may be less specific because unlike a judge the legislator is not judging between two parties but looking at a range of alternatives. Nonetheless, the access buyer is paying not only for attention but for favorable attention. The payment is close to what would be called a bribe if made to a judge; but access to, and favorable attention by, a legislator has not generally been regarded in the same way as an approach to a judge (p. 623).

The conclusion, though not stated explicitly, is that Case 6 is not a bribe. But how weak is the foundation for that conclusion! It is certainly true that access to judges and access to legislators are regulated by different conventions—ex parte communications to judges are exceptional, while to legislators they are routine—but this begs the question. Whatever the conventions regulating access to elected officials, why is it not corrupt for “favorable attention” to be purchased with campaign contributions? There may be an answer, but it is surely not sufficient to say in the most general way that legislators are different from judges.

Case 5, Noonan says, is “only a slight step from Case 6 and still more benevolently viewed” (p. 623). In fact, the distinction between the

whatever that means. Noonan must mean in Case 7 that A expects X’s vote on the bill to be affected by the fact that A makes the contribution, and my discussion in the text assumes that is what Noonan intends. But what a fact to leave unstated!

56. Except where they are not. When I was in a legal services program in a rural county many years ago, the major litigation technique among members of the local bar seemed to be figuring out how to get into the judge’s chambers to discuss the case before the opposing attorney did.
two kinds of "access" cases probably would not hold up in practice. A more interesting question is why Noonan tries to draw a distinction. Is he not so confident that Case 6 is benign?

The discussion of the "access" hypotheticals is significant, since the idea that nothing more than access is being purchased is the party line of apologists for interest group contributions. Noonan's acknowledgment is surely correct that in practice "attention" means "favorable attention." But if this is conceded, then campaign contributions intended to purchase access break down the distinction between contributions and bribes just as much as contributions intended to influence substantive official decisions. Indeed, there is no difference between these types of contributions—one is simply described euphemistically.

Noonan continues by observing that under the "non-Burkean" view of legislative representation that prevails as a practical matter, a "certain identity of interest" between legislator and constituent is expected to exist (p. 624). If Noonan had used this as a starting point for an inquiry into what sort of impartiality is expected of legislators—which pressures brought to bear on them are legitimate and which pressures are corrupting—he might have brought us more deeply into the analysis of bribery. But he does not do this. He slides off the point, saying "it is easy for every contributor to see himself in the role of a constituent" (p. 624). Perhaps so, but so what? Does the facility of interest group contributors for self-deception have a bearing on the ethical, legal, and political issues? The intuition that an elected legislator will properly give favored treatment to constituents, and to some constituents over others, does not support the conclusion that it is proper for interest groups to purchase similar or vastly greater favored treatment with large campaign contributions.

Noonan continues:

Given the acceptance of this mutuality of purpose between contributor and legislator, the prevailing assumption in America has been that campaign contributions normally fall in the range of cases where specific votes are not being bought (p. 624).

This is Noonan at his most evasive. Who has made this assumption? If Noonan is talking about public opinion, he is almost surely wrong. Public opinion polls generally indicate the public believes large

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57. See Lowenstein, supra note 8, at 827 & n.161.
58. Contributors are not necessarily or even typically constituents. See Weeks, Bribes, Gratuities and the Congress: The Institutionalized Corruption of the Political Process, The Impotence of Criminal Law to Reach It, and A Proposal for Change, 13 J. LEGIS. 123, 131 (1986).
59. In his discussion of the Gulf case, Noonan criticizes a report of a Gulf review committee for reporting that the company's practice of payments in Italy "was characterized as tipping rather than bribery," thus avoiding the question of who was doing the characterizing (p. 639). Noonan himself frequently uses the passive voice in this manner with the same obfuscating effect. This is
contributors get favored treatment. Is Noonan leaning heavily on the phrase “specific votes”? He offers no evidence that people believe specific votes are not bought, and more importantly, he has not defended the significance of specific votes as against generalized favorable treatment. Furthermore, whether the relevant standard is specific votes or generalized favorable treatment, whether or not either one is bought with campaign contributions is an empirical question. Why should “prevailing assumptions” be relevant? And even if we lived in a society in which votes and favors were not usually bought with contributions and in which most people understood this, that would be no reason to say there is not a bribe in the exceptional instances where the conduct occurs. In short, Noonan’s assertion that campaign contributions are not regarded as buying votes is neither accurate nor to the point.

Yet Noonan moves from his unsupported conclusion about prevailing assumptions to the conclusion that contributions are not bribes. He suggests that the only difficulty in distinguishing a contribution from a bribe is determining when a contribution is actually a disguised personal payment to the candidate (p. 624). He does not say how he would deal with a case in which a payment that was unquestionably a campaign contribution was unquestionably made in order to influence a specific vote.

At the end of his chapter on campaign contributions, Noonan seems to speak with an altogether different voice. After setting forth some defenses of Political Action Committee contributions, Noonan writes:

Reward not bribe, access not vote—the claimed distinctions had circulated since the days of Rome. The PAC representatives did not suppose that they could be confessing to federal crimes. They assumed—no doubt reasonably—that what was otherwise criminal was licensed by the license given by the election law to organize PACs in the first place (p. 649).

especially the case in his discussion of campaign contributions, as in the quotation under discussion in the text.

60. In a recent example, 74% of California voters said state legislators are either very or somewhat obligated to contributors. See Cal. Comm’n. on Campaign Fin., The New Gold Rush: Financing California’s Legislative Campaigns 148 (1985).

61. There is no reason to assume that buying of legislative votes and other governmental favors with campaign contributions is rare. For some anecdotal evidence to the contrary, see Lowenstein, supra note 8, at 826 n.154.

62. American cases without exception have held that a campaign contribution is a “thing of value” within the meaning of bribery statutes. See Lowenstein, supra note 8, at 808-09. Noonan suggests that these cases actually involved disguised personal payments (pp. 624, 797 n.4). The cases he cites are but three of the older cases holding that contributions can be bribes, and the facts as stated in the opinions simply do not indicate that the payments were personal gifts. The only fact Noonan seems to rely on for his characterization of these cases is that the contributions were in cash. But in the days before effective campaign finance disclosure requirements, cash contributions were common.
Although he characterizes the PACs' supposed legal position as reasonable, Noonan is clearly skeptical, for he draws an analogy to old distinctions drawn in the law of usury, concluding, "It was a line too fine to be maintained except in the interior judgment of a soul. A similar mental line seemed to distinguish the lawful gift to a candidate from a bribe" (pp. 649-50). He notes recent cases like People v. Brandstetter, in which campaign contributions have been held to be bribes, and concludes that although the Justice Department has not yet prosecuted PACs for bribery based on contributions complying with the federal campaign laws, the position of Congress with respect to contributions is untenable.

He compares Congress's position to that of the papacy with respect to simony around 1500. The situation of the papacy had been that it needed the money but had no basis for justifying the practice. So with Congress.

However arbitrary, a line had to be drawn. Congressmen whose campaigns had to be funded drew a not dissimilar line [to the untenable line drawn by the papacy around 1500] and used not dissimilar licenses . . . . [I]n fact the distinction was made on no principled basis. Depending on the decision of the prosecutor and the will of the judges, many contributions could be classed as bribes (p. 651).

Noonan thus closes his chapter taking the possibility of campaign contributions being bribes much more seriously than in his earlier discussion. In his concluding chapter he takes yet another approach. Here he attempts to show how contributions can be distinguished from bribes. The most basic distinction, he suggests—although one he had not mentioned in his chapter on campaign contributions—is that a contribution creates no "absolute" obligation.

[There is no absolute obligation on the part of the candidate to do the work the contributor expects. Absence of absolute obligation creates one difference between contributions and bribes. Size is thus a relevant characteristic. A large contribution can create an overriding obligation; its proper name becomes bribe (p. 697).

This distinction is not helpful. What does Noonan mean by an "absolute obligation"? How can any obligation be "absolute"? Whatever meaning is given to "absolute," why should it be an element of bribery? Would not Hodek the baker and Huda the vegetable woman have known better?65

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63. This characterization is offset by his implication that what the PACs do would be bribery in the absence of the campaign finance legislation that "licenses" their activities. Such an argument made as a defense to a bribery prosecution would be very tenuous, since nothing in the federal campaign laws licenses a PAC or anyone else to make a campaign contribution with the corrupt intent to influence official decisions, which is what the bribery laws prohibit.

64. 103 Ill. App. 3d 259, 430 N.E.2d 731 (1982).

65. See supra Part II, Section B.
Noonan probably means that a contribution becomes a bribe if the pressure it puts on the candidate or official is great enough. That is a factual question to which size may be relevant, but only among many other factors. Furthermore, bribery statutes contain phrases like "intent to influence." Surely something more than a trivial or de minimis influence is required, but beyond that, why should the degree of pressure be relevant so long as the intent to influence is present?

Noonan also claims that contributions "normally" are different from bribes because bribes are secret (p. 697). Although secrecy can be a relevant consideration, it will not support the weight Noonan appears to place on it. I have set forth the reasons elsewhere, and shall not repeat them here. It is important to note, however, that Noonan sets up this criterion without discussing the obviously relevant fact that we now live under a regime of required campaign disclosure. By making secrecy a key criterion, Noonan, deliberately or not, exempts virtually all interest-group contributions from the charge of bribery.

Finally, Noonan returns to the question of a contribution made to gain "access" to an official.

Large, secret, variable, it bears the marks of what is given in expectation of official action. The pretense is then made that only attention is purchased. The pretense is transparent. In its ancient form of a price paid to a judge's servants, or in its modern form of a substantial campaign contribution, it is accompanied by the tacit understanding that the attention bought will be favorable. Access payments of this sort are bribes (p. 698).

Under contemporary conditions, access payments are certainly "large" and "variable," but they are not secret. If Noonan is serious about the secrecy requirement, his writing on contributions has no contemporary relevance. But if secrecy is not an absolute requirement, Noonan is condemning the great majority of interest-group campaign contributions.

Noonan has simply failed to come to grips with the question of when the law does or should treat contributions as bribes. At times he stretches and strains to find a way to avoid condemning contemporary interest-group contributions. At other times his recognition of the corruption inherent in our present system appears on the surface. He is at his best on this issue when he compares the current system to the system of simony in the Catholic church during the Renaissance. Then as now, either ethical sensibilities had to change, or the system had to change.

Noonan, who understands deeply the evil in bribery and corruption, cannot and does not argue for a change in our ethical sensibilities.

67. See Lowenstein, supra note 8, at 829-31.
Unfortunately, he brushes off the seemingly more hopeful possibility of reform of the system in a single sentence. If campaigns were financed publicly, he writes, "the danger of manipulation by incumbents would be great" (p. 621). Perhaps, although it is curious that despite the charges by Noonan and other critics that public financing would favor incumbents, the incumbents in Congress and in most state legislatures have been willing to pass numerous campaign finance regulations, but not public financing for their own (and their challengers') campaigns.

In any event, for one who rejects the possibility of reform, there are only two choices: accept deep and far-reaching corruption at the heart of our system, or place a veil over the problem. John Noonan is too decent for the former and too honest to get away with the latter. Hence the incoherence of his position.

V
THE NEED FOR STANDARDS

Bribery is a difficult term to define and apply to our own times. The difficulty of definition is greatly compounded for the author of a topical history such as Bribes. How can the book maintain any continuity unless a more or less constant definition is used throughout? Yet, how can a single definition be applied to such vastly different cultures as are described in Noonan's book without falling into hopeless anachronism? The problem is a complex one. Noonan makes an astute point at the outset when he observes that the core of the concept of bribery is constant if considered at a high enough level of abstractness, but that the meanings of the "concrete constituent elements" are relative to the culture (p. xi). Since the meanings of the elements make all the difference, Noonan essentially lands in the camp of the relativists with respect to the definition of bribery. The recognition of constancy in the core elements—a benefit passing to a public official; the exercise of public authority; some form of reciprocity, whether or not explicit or specific—has relatively little normative significance, because the elements are stated so abstractly. Yet these abstract elements provide an analytic framework that can be used to organize an historical study of the subject.

Although Noonan's position on this question is probably correct, there is no denying that it creates difficulties. One is that it is hard to adhere consistently to the posture of relativism. Noonan does not overtly depart from his posture that judgments must be based on the "standards of the day" (p. 442), but he does not always seem entirely determined to discern what those standards were.

68. It has received considerable attention from social scientists interested in corruption. See, e.g., Moodie, On Political Scandals and Corruption, 15 GOV'T & OPPOSITION 208 (1980).
An example is his treatment of President James Monroe (pp. 442-44). When Monroe was Secretary of State he borrowed $5,000 from John Jacob Astor, and he remained indebted to Astor through his two terms as President. While in office Monroe supported Astor's American Fur Company on various matters. On these facts, by modern standards, Monroe would be guilty of an acute conflict of interest at the least. Noonan presents considerable circumstantial evidence that the loan was intended to influence Monroe's conduct in office and may have had that effect. If so, by modern standards Astor and Monroe would be guilty of bribery.

But was Monroe guilty of bribery by the moral "standards of the day"? Noonan believes he was. As evidence, he cites the fact that two Congressmen in the 1830's were publicly reported to have received large loans from the Bank of the United States, for which they were accused in the press of being bribed (p. 444). These accusations occurred during the heated controversy over renewal of the Bank's charter. "It is fair inference," Noonan concludes, "that if there had been an analogous battle over American Fur's special favors from the government, Monroe would have been regarded as bribed. The public standard, in short, was there" (p. 444). This conclusion is overdrawn. If there had been a similar controversy over American Fur it is reasonable to conclude that Monroe, like the two Congressmen, would have been attacked by partisan opponents, including those in the press, but a politically inspired attack does not by itself prove there was a societal consensus that "regarded" such loans from persons interested in government decisions as corrupt. Other information Noonan provides, including numerous instances of similar loans during the same period and Monroe's apparent lack of shame over the Astor loan in his private correspondence (in which he demonstrated shame over certain unrelated matters), points away from Noonan's conclusion.

Noonan's occasional lapse in adherence to the "standards of the day" is not a serious flaw. Indeed, the problem would hardly arise if he did not find it necessary to issue verdicts on historic figures such as Monroe. However, the problem points to something more serious, namely the difficulty of discerning at any given time what the "standards of the day" were or, most importantly, are. The two most obvious problems are that at any given period people disagree about what the standards are or should be, and that the standards change as some par-

69. In general, Noonan's approach to politically inspired accusations of bribery is sophisticated. He recognizes that charges may be made to further political, religious, or other objectives (pp. xiv, 256). He also recognizes that a "jury of thieves convicting a thief" may be unavoidable if bribery laws are to be enforced at all (p. 296) and that the mere fact that accusations or prosecutions may be politically inspired is not ground for discounting them entirely (p. 359).
tisans prevail and others are defeated. A more subtle problem is that even the standards of a given individual may be unclear. Few if any people work out for themselves, abstractly, a set of standards as to what constitutes improper official conduct. We like to think of ourselves as responding to particular situations by applying general standards to which we adhere, but the psychological reality may be at least as much that our general standards emerge from our reactions to particular situations. In the case of bribery, the particular situations to which we respond will almost always have partisan political and other aspects that will influence our judgments sufficiently to make it difficult to isolate pure beliefs about what constitutes corrupt conduct. Opinions regarding a particular case may not depend entirely on whose ox is being gored, but who among us can be confident that such considerations do not affect our judgments at all?

These problems loom larger as we approach the present, as questions of bribery increasingly emerge within the context of controversies that remain alive. Relativism may be a necessary posture for the empirical study of corruption, but it is no help at all for normative consideration. When we turn to our own society, the question is not how bribery "is regarded." The use of such language is likely to be tendentious. So it is with Noonan, most significantly, as we have seen, in the case of campaign contributions. The issue for our own time and place is not what "is regarded" as counting as a bribe, but what does count as a bribe, or what ought to count as a bribe.

How can we approach such questions? One approach is the legal positivist idea that a bribe is whatever the law says it is. Noonan lapses into that view at least once, when he says "legalized bribery" is a "self-canceling phrase" (p. 582); but it is not, and Noonan does not really believe it is (p. 683).71

For Noonan, bribery is above all a moral concept (p. 683). He has only scorn for social scientists who would ignore the moral dimension of bribery, observing, quite correctly, that they are usually Americans or Europeans who apply their views to underdeveloped countries (p. xvi). Noonan’s book does not preach, but it is an exquisite exploration of the moral dimension of bribery. At the end, Noonan can write, “Human beings do not engage in such acts without affecting their characters, their view of themselves, their integrity” (p. 700). And who can read Noonan’s accounts of the lives of Bacon, or Pepys, or Lockheed chairman A. Carl Kotchian, or dozens of others, and disagree?

Noonan is right that bribery is a moral concept, but it is by no

70. See Lowenstein, supra note 8, at 800-02.
71. Thus, Noonan maintains that "defensible definitions" distinguishing bribes from other reciprocities will not be "dependent on the lines drawn by legal statutes" (p. 695).
means exclusively a moral concept. In particular, its moral dimension provides little or no help in answering the important question, what counts as a bribe? The destructive effects of bribery on the lives and characters of those who are defiled by it occur because they have violated the standards of their society. Bribery is a moral issue, but only after it has been defined politically and socially.

There is no moral dimension of bribery without social and political standards, but in no society are the standards fully defined or constant. We disagree with each other as to what is proper; we are ambivalent within ourselves; we find out what our views are when they crystallize around the latest controversies; we struggle for or against reform. We do not want our views to be utterly ad hoc, and we cannot hope to persuade others if they are. But the problem is sufficiently complex that we cannot reasonably expect to find satisfactory standards that consist of a few easily applied formulas.

What we need, if we are to think coherently about what counts as a bribe, is a conception of what we expect the political system to accomplish and how we would like government officials and others in the political process to behave if that system is to have a chance of success. Such a conception must be as well-informed as possible regarding the realities of our complex society, and the demands it makes must be demands it can reasonably expect participants in the system to meet.

One of the literary works Noonan discusses is Henry Adams's novel, Democracy,72 in which Ratcliffe, the corrupt Senator, courts but ultimately is spurned by the virtuous protagonist, Madeleine Lee. Noonan believes the novel is fair to Ratcliffe, because it presents his arguments in favor of his conduct, arguments that are patriotic, not selfish (p. 511). The book is not fair to the political point of view that Ratcliffe might have but did not represent. It is true, as Noonan says, that Ratcliffe is permitted to articulate the rationale of necessity, but by the end of the book he is unmasked as a monstrous hypocrite. His arguments are lies. Adams was unwilling to take seriously the choices facing the high-level politician. It is not simply, as Noonan says, that the novel sides with Madeleine. The deck is stacked and the novel, although delightful, is naive. “I want to go to Egypt,” says Madeleine at the end, “democracy has shaken my nerves to pieces.”73

Democracy has not shaken John Noonan’s nerves to pieces, but he has been no more willing than Henry Adams to consider seriously how a conscientious person active in the American political system ought to behave. He does not offer a conception of the political process of the sort

73. Id. at 182.
described above. The fact that he does not do so accounts, I believe, for the most important limitations in Bribes.

Having dwelt for so long on what the book does not do, let me conclude by reviewing briefly some of the qualities in which it excels.

CONCLUSION

Bribes’ most dazzling quality is its erudition. The book covers a vast territory, without succumbing to superficiality. Noonan’s research penetrates deeply into scores of diverse subjects. He is truly a man of learning, to a degree that would be impressive for a scholar in any field, and is extraordinary in legal scholarship.

Noonan is also a fine stylist, especially in his narratives. His narrative method is the patient accumulation of facts and details. The salient features of character and causation are not forced, but emerge from the information Noonan provides. This narrative method is in part responsible for another important quality of Noonan’s book, fairness. Where one disagrees with his conclusions, one usually can rely on facts that Noonan himself has provided. This gives the reader unusual confidence that in the great majority of cases in which the arguments supporting Noonan’s conclusions are persuasive, it is unlikely that any material facts that might alter the conclusion have been withheld.

Finally, this is a book of great subtlety, intelligence, and humanity. If, as I have argued, Noonan has a few blind spots, they are in sharp contrast with a vision that is normally keen. It is difficult to demonstrate these qualities of Noonan’s, because they manifest themselves not in abstract theories that can be summarized in a few pages, but in a steady stream of sensitively written, insightful commentaries on concrete situations of the sort with which the author of Persons and Masks of the Law is most at home.

Let me close with a single example of Noonan’s analysis at its best, though by no means an atypical best. Noonan is describing the characteristics of gifts that distinguish them from bribes:

A gift . . . is meant as an expression of personal affection, of some degree of love. It is given in a context created by personal relations to convey a personal feeling. The more it reflects the donee’s interests and the donor’s tastes the better. . . . In modesty or shyness gifts may sometimes be made in secret; but secrecy is not their necessary concomitant. The donee is glad to acknowledge the donor. The size of what is given is irrelevant. What counts is how much the donor expresses identification with the recipient. The gift once given is wholly the donee’s and no one else’s—it is with this donee and not someone else that the donor identifies . . . .

It would be idle to pretend that donors are usually not responding to
favors given or hoping for favors to come. The donor, however, does not give by way of compensation or by way of purchase. No equivalence exists between what the donee has done and what is given. No obligation is imposed which the donee must fulfill. The donee's thanks are but the ghost of a reciprocal bond. That the gift should operate coercively is indeed repugnant and painful to the donor, destructive of the liberality that is intended. Freely given, the gift leaves the donee free . . . . Every gift tries to approximate this ideal case. A present of any amount is a gift when it conveys love (p. 695).

John Noonan has been appointed and confirmed recently to the United States Court of Appeals for the Ninth Circuit. *Bribes*, then, is perhaps his parting gift, a gift that most certainly "conveys love" to the world of scholarship. It is a gift that will be valued highly by those who care about the history of our civilization and the content of its moral and political tradition.