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Book Review

Thinking About Bribery


Reviewed by Gary N. Horlick*

Professor Reisman has written a truly enjoyable book, "enjoyable" in the sense of forcing one to think about the basic conflicts underlying a series of recent events, the news reports of which have been marked more often by breadth of coverage than by depth of analysis. Folded Lies has the further, and not unrelated, virtue of not being solely about the Foreign Corrupt Practices Act of 1977 (FCPA or Act) but rather about bribery in general. As such, it provides a framework for continuing examination of the interpretation and application of the Act.

Folded Lies is a useful book, but the reader should be warned that it is not an easy book. The so-called New Haven School has often been accused of writing incomprehensible prose. I believe that charge to be overstated. In the extreme case, one may well have to


The bulk of Folded Lies was apparently written in 1977 (when one portion of it appeared in these pages) and thus deals with the Act (which was passed in late 1977) within the context of the overall phenomenon. See Reisman, Myth System and Operational Code, 3 Yale Stud, World Pub. Ord, 229-249 (1977).
spend five to ten minutes on a paragraph, chewing on it, digesting it, and going back a few pages to relate it to the framework in which it is set. Virtue, however, is rewarded, and the reward for parsing out each paragraph is the high density of conceptual meat. In short then, this is hardly a book which one can skim for the highlights, but the reader in search of an understanding of the phenomenon of bribery, who is willing to invest the time in careful perusal, will find that the effort has been worthwhile.

I. Myth System and Operational Codes.

Professor Reisman suggests that the furor over bribery arises from the almost inevitable discrepancies between a society's "operational code" and its "myth system." The myth system consists, in essence, of the values which the society publicly espouses, while the operational code represents acceptable deviations from the myth system necessary to "get things done."

Thus, for example, in many societies (including, in certain circumstances, our own) bribery is a part of the operational code in that it is an officially prohibited but acceptable and not infrequent technique of accomplishing certain ends. By contrast, for example, murder is certainly prohibited officially and is certainly a means sometimes used to accomplish certain ends, but it is not acceptable and therefore is not part of the overall society's operational code.

As Reisman points out, neither the myth system nor the operational code alone constitutes the legal structure. While the cynic would say that there is no law but rather only the expedience of the operational code, others would perceive operational codes as "illegal" (which they are, strictly speaking) and therefore not part of the overall system. A disinterested anthropologist, however, would want to look at behavior, which includes both myth system and operational code. Indeed, many activities outside of the formal legal system, such as solving crimes by paying money to informers, are practiced by those charged with upholding the law (thus, the common practice of reducing sentences for informers is increasingly being incorporated into the formal legal system, as plea bargaining becomes more openly acknowledged). According to Reisman, what
distinguishes the "operational code" from outright illegality (e.g., murder) is that deviations of the operational code from the myth system are selectively tolerated, depending upon the circumstances, identity of the agents, purpose of the acts, and effects on the larger organizations. At the same time, the "operators" strive, often quite strenuously, to maintain the integrity of the myth system; those who bribe do so in the dark, or at least in the shadows, and thereby implicitly affirm the myth system's strictures against bribery by seeking to hide their activities.

Of course, this difference between formal adherence to a myth system and actual, even if not constant, deviation in favor of an operational code creates in most cases a dissonance in the person seeking to have the best of both systems. While some bribes are clearly acceptable enough to bear the light of subsequent publicity (the example in Folded Lies is of Bertolt Brecht bribing immigration officials to escape from Nazi Germany2) in most cases even "good" bribes will create a certain dissonance in the individual, since bribes are categorized by the myth system as "evil." 3

2. P. 128. A "lawful" illegal bribe, as in the Brecht example, must be justified by a code of behavior clearly transcending the legal code which is transgressed by the bribe. Where the bribery is animated by either a higher natural law or divine command, the search for that transcending code is not problematic. Similarly, a culture where the highest value is given to family (or to class or to a similar group) would permit bribery in the name of that group. Problems are more frequent in "modern" Western societies, where loyalty is formally owed to one's state, so that bribery of the official of another state on behalf of one's state is not only acceptable but frequently rewarded, while bribery on behalf of one's corporation may be accepted as part of an operational code but is subject to sanction as outside of the myth system.

Some philosophers would insist that an act of disobedience to the official myth system (e.g., the Brecht bribe) must be a public act of disobedience. As Reisman points out, such counsels of perfection are unrealistic in the modern totalitarian state, which can usually assure that such a public act is the person's last one.

3. Reisman describes a curious aspect of bribery: its essentially democratic nature. After all, bribery is far more accessible than preference based on family or class ties, yet we frown much more on people getting jobs by buying them than we do on hiring on the basis of word-of-mouth referral, old school ties, or pure nepotism. (Bribery, of course, is not an ideal; it does discriminate against those with no money. Moreover, it too contravenes the principles of meritocracy as does nepotism or other circumventions of the official myth system.)
In the face of this dissonance, some will attempt to justify the action, often a difficult feat (which may explain why, to outsiders, the moralizing appears tortured). Another possible reaction to the dissonance is to commit the act through a middleman, ideally by instructions ambiguous enough to allow participants to deny responsibility not only to others, but, indeed, to themselves.

Dissonance will increase where the myth system includes two value systems which are potentially in conflict. On a day-to-day basis, it would appear that most people's values are dominated by the values of the group most proximate to them in daily life. In this country, we have a myth system of pure republicanism (i.e., one acts for the public good) juxtaposed with one of pure capitalism (i.e., one acts for money). As Reisman points out, the conflict between the two is heightened by the growth of the modern corporation (a bastion of capitalist values), which is for many people now the most proximate group. The two value systems may be reconciled in theory by the "invisible hand" theory in which each person acting in his or her own best interests together leads to the greatest public good. In neither theory nor practice, however, do bribes offered to public officials to enable the briber profitably to evade the rules of the game fit within the myth system, so corporate employees acting in their own (and the corporations') interests are not acting in the public good (at least according to the myth system).

4. This may explain how a "pillar of the community" can undertake or authorize actions which are condemned formally by the myth system but encouraged by the business firm to which he or she has committed his or her life, as long as it is permitted by the operational code. Thus, a pillar of the community convicted of bribery will frequently find considerable support in his or her milieu, while, to take the extreme case, the pillar-of-the-community-turned-ax-murderer will not find such sustenance.

5. This may not be the case in a transnational context. If Corporation A of Country X bribes Official B of Country Y, it may be the greatest "public good" (i.e., increased exports) for Country X (although not necessarily for world order) and perhaps within the myth system of certain Countries Y.
Very little of this is new to civilization in the 20th century. The distinction between the myth system and operational code goes back to at least biblical times and bribery for one's family then was probably at least as widespread as bribery for one's corporation is now. A more recent note is the continuing growth of bribery opportunities. As more and more governmental "checkpoints" are set up along the road to any given goal, there are more opportunities for seeking or offering bribes. For example, connoisseurs of minor corruption, on reading the list of stamped papers required to show compliance with the Arab Boycott Office's regulations, at once recognized the creation, whether inadvertently or not, of multiple opportunities for informal salary increases on the part of those officers at consulates of Arab states charged with supplying the appropriate stamps. This country can claim no immunity from the phenomenon. The media in Washington are currently publicizing the discovery that government hiring here requires not only the necessary qualifications required by Civil Service regulations but also connection with one or another "network" -- a requirement no more envisioned by the ideals of Civil Service hiring than would be a requirement of tendering bribes.

II. The Three Categories of Bribes

The amount of dissonance between myth system and operational code varies, both for the individual and for the society, depending on the context in which the bribe occurs. This can be seen from Reisman's three categories of bribes. First, there is the "transaction bribe" -- the "grease money" which pervades life not only in foreign countries, but also in the routine payments in the United States to housing inspectors, the Christmas gifts to postmen and trash collectors, the free food for policemen in restaurants, and so forth. While technically illegal, it is very rare that this activity is prosecuted or penalized in any way (indeed, one suspects that, even after brief flurries of publicity, the practice obdurately continues), Obviously, with

6. For an economic analysis of the role of corruption in governmental structures, see Rose-Ackerman, Corruption: A Study in Political Economy (1978).
respect to transaction bribes, the size of the bribe is important. In many countries, small bribes given to underpaid officials to perform their required duties are widely perceived as part of the benefits of holding the job, while large bribes may fuel resentment among the general population of those who are enriching themselves from official positions (a situation which some of the charges leveled at the United States by Iran may illustrate). Large bribes, however, are not generally resented when it is understood by everyone that the money really is going not to the bribe recipient, but rather to the political party or other machine that appointed him or her.7

By contrast, the "variance bribe" attempts to seek an evasion of some existing norm (e.g., instead of a transaction bribe to a building inspector for a certificate for a building which is essentially safe, a payoff to certify as safe that which is seriously dangerous). The line between variance bribes and transaction bribes can become fuzzy. Indeed, some governmental systems can be structured so as to require variance bribes.8 Finally, the extreme form of bribery is the "outright purchase," where the loyalty of the public official has been so totally subverted that it is directed exclusively towards the briber rather than towards the State. In virtually all systems with republican governmental structures these bribes are perceived as violating both the myth system and the operational code.

It is not surprising that variance bribes are the ones that create the most difficulty and the most social dissonance. Transaction bribes, unless for excessive sums, will be dismissed by most of the society.

7. The real problem with these large transaction bribes aimed at financing political machines is the opportunity for "skimming" generated by the discreet nature of the payoff.

8. A structure where the need for a variance bribe is built into the system also creates an opportunity for the ruling elite to maintain control over the governmental structure by blackmail; implicitly, everyone in the governmental structure has received bribes, and thus each individual member knows that he or she can be discarded by the elite through selective use of the legal processes.
as inconsequential, while "outright purchases" will be
condemned by most of the society. It is the variance
bribe, especially for the award of large contracts
overseas, where most of the fuss has been generated in
recent years. Such bribes are clearly prohibited by
most countries' myth systems (as are transaction bribes),
and they are seen as perverting the social goals of the
myth system more than would a routine transaction bribe.

III. Antibribery Campaigns

Reisman categorizes antibribery campaigns into two
groups: the true "reform" and the "much-sound-and-fury-
signifying-nothing" crusade. Both types of campaigns
require a certain context. First, a popular campaign
is not relevant except where the government is based to
some extent on popular approval; a governmental system
explicitly based solely on the whim of a dictator need
not be much concerned with popular campaigns. Second,
campaigns tend to occur when things are not going very
well in general, and when an explanation is thus sought
for a perceived societal crisis. The campaign results from
the anxiety of the people over the fidelity to the myth
system of those who dominate them, and the campaign must
result in a catharsis of that anxiety, either through
the real results of a reform, or through the ritual
purge resulting from a crusade. As Reisman points out,
the United States is peculiarly subject to such cam-
paigns, perhaps because of the extreme degree of faith
placed in its formal legal processes and rules (the
"myth system"), and perhaps because of the continuing
search for a separation between the political market-
place and the commercial one.10

9. One aspect in which the FCPA is typical of recent cam-
paigns in the United States is the increased involvement of lawyers.
While one can argue about the impact of the Act on the incidence of
actual bribery, there is no question among practitioners that com-
pliance with the Act has generated a whole additional level of work
with clients required to do business overseas.

10. The tension between the political and the commercial may
be inevitable in a democratic capitalist society. "Money is the
natural form of influence in the marketplace, but it is an illicit
form of influence in the democratic forum." P.102.
What, then, is the difference between a "crusade" and a true "reform"? The mark of the "crusade" for Reisman is its ultimate ineffectiveness in changing the operational code, so one can only distinguish the two with certainty ex post facto. Nevertheless, the book does offer indicia setting apart the two different species of campaign. Since the essence of the crusade is that it upholds the myth system while enabling users of the operational code to continue their practices, certain recurring forms of crusade will be discernible. Thus, many criminal cases involving bribery can be initiated with much publicity but with the majority of them dropped or settled on the basis of guilty pleas to minor offenses. Also, blame can be diverted to one scapegoat group, allowing the rest of the population to continue its activities unhindered. Similarly, publicity and punishments can be focused on subordinate groups (i.e., the middlemen), while the principals escape unharmed. More subtly, within pluralist polities, one elite group can use a crusade as an opportunity to eliminate some of its rivals without impairing its own use of the same operational code. Finally, it may be necessary actually to sacrifice some members of one's own elite group in order to preserve the utility of the operational code for the remainder of the group.

One recurring and popular technique of a crusade is the passage of a law which is not meant to be enforced. This is done either by structuring the new law in such a way as to make enforcement impossible, by carefully entrusting its enforcement to an incompetent, or by failing to provide the resources necessary for its enforcement. Thurman Arnold is quoted in this context:

Most unenforced criminal laws survive in order to satisfy moral objections to established modes of conduct. They are unenforced because we want to continue our conduct, and unrepealed because we want to preserve our morals.11

By contrast, true "reform" is much more difficult to pin down, because it must actually change the operational code to conform to the myth system. Reisman outlines some of the ways in which this can happen:

11. P. 173.
1. An elite group will actually change its ways (the operational code) in order to remain in power.

2. A new elite, seeking to displace the old one, will require a change in the operational code in order to consolidate its power and displace the old elite. As Reisman points out, this is not to say that revolution must change the operational code. The Soviet example is only the best known one of a new elite adopting the norms (or secret police practices) of its predecessors.\(^\text{12}\)

3. Even with the first or second of these phenomena, Reisman believes that a reform campaign must recruit the support of those who are the custodians of the myth system (e.g., clergymen, journalists, or teachers).

One obvious difficulty is assessing whether in any specific case true "reform" has been achieved. In this connection, the FCPA is likely to present a particularly difficult problem of assessing success, because it will never be easy to measure the degree to which bribery is practiced and especially to compare it with past years in a meaningful way.\(^\text{13}\)

Perhaps more important than assessing the success of a "reform" is to bear in mind the importance of even a failed reform, i.e., a "crusade." A successful crusade, it will be recalled, reasserts the values of the myth system, although it generates few changes in the operational code. Similarly, a failed reform will have the same effect. By contrast, a failed crusade which fails at least to reassert the primacy of the society's expressed values could generate demands for restructuring of the myth system, thus opening up far more dangerous ground.

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\(^{12}\) Readers may wish to study the Abbasid Revolution of 747-750 A.D. as an early model of this phenomenon.

\(^{13}\) The General Accounting Office currently is making an attempt to assess the impact of the FCPA and has sent a survey on the subject to 250 of the Fortune 1,000 largest industrial corporations.

The example which Reisman gives is whether the major "reforms" represented by the U.S. antitrust laws have in fact succeeded in reducing the concentration of power in American industry and increasing competition. P.115. That is certainly a difficult question to answer, but measuring the incidence of bribery will be far more difficult.
IV. The International Focus on Bribery

Perhaps the most interesting aspect of the entire furor over bribery in the mid-1970s has been its concentration on payments made outside of the United States. The curious result is that the "solution" (the FCPA) has been one whose most direct benefit is to foreign nations rather than to the United States or to any American citizen or organization.

Lest this analysis appear too startling, it should be borne in mind that, economically, the entity harmed by bribery of the type most commonly alleged to be practiced by major United States multinational corporations overseas\textsuperscript{14} is the foreign country letting the contract which, as a rule, winds up paying an amount equal to the bribe in excess of what it should otherwise have had to pay for the goods or service.\textsuperscript{15} It is unlikely that it is the shareholders of the bribing corporation who are harmed, despite the occasional derivative suit brought by shareholders in connection with payments overseas.\textsuperscript{16} In fact, it is perfectly arguable that the shareholders would have approved the bribes, had they known of them, in order to gain the necessary business.\textsuperscript{17}

\textsuperscript{14} I.e., the payment to foreign government decision-makers of "variance" bribes in order to obtain contracts not otherwise merited.

\textsuperscript{15} Where a U.S. firm offers a bribe in order to take business from another U.S. firm, the second U.S. firm is also injured. But the FCPA is not limited to that situation, as it should be if that were the harm to be prevented.

\textsuperscript{16} The prospect of recovery of attorneys' fees may well be the decisive factor in the decision to bring derivative suits.

\textsuperscript{17} It is of some interest that the initiator of the current United States antibribery campaign was the Securities and Exchange Commission, an agency which was created in order to reinforce investors' belief in a myth system of capital markets in which everyone has equal access to information and in which manipulation is prohibited—even though, arguably, the SEC is not really protecting investors' interests in situations where it inhibits a United States company from paying bribes to obtain a contract which would otherwise be granted to a non-United States corporation.
It would seem that there must be something more that motivated the United States to enact the FCPA than a desire to assist foreign countries in getting full value when they let contracts for bid.\(^{18}\) A more persuasive explanation is the great need of the United States at that time to reaffirm its adherence to its own myth system, even in circumstances as far afield as Japan or the Netherlands. The antibribery campaign was a direct result of the Watergate scandal, in which the country as a whole perceived a need to reaffirm that the myth system, rather than the Nixon White House's view of the operational code, is what should govern our political processes. More directly, one aftermath of Watergate was to discredit the classic operator's excuse that "everyone does it." The use of that claim to justify Watergate made it suspect as a defense for bribery.

If, as *Folded Lies* suggests, bribery is as prevalent in the United States as overseas, perhaps the explanation for the focus of the United States antibribery campaign on questionable payments abroad is to avoid a searching examination of such practices at home. If that is the case, then by diverting attention from the problems at home, the entire campaign—even if a true "reform" with respect to payments overseas—is to be seen merely as a "crusade."\(^{19}\)

\(^{18}\) It is not convincing to argue that reform was necessary in order to maintain the United States' image abroad. The disclosures that were themselves a part of the campaign probably damaged that image more than the resultant legislation could benefit it.

\(^{19}\) Certain practical reasons for concentrating on payments overseas should not be neglected. Overseas payments more frequently involve more traceable transfers among subsidiaries, and more frequently require a middleman, than would be the case in the United States.

An alternative analysis may explain the emphasis on bribes paid by multinational corporations. To date, there has been little question of the "right" (within the myth system) of agents of states to bribe employees of other states, as Senator Moynihan has alleged was occasionally the case with respect to the purchase of U.N. General Assembly votes. See p. 63. With multinationals' bribes of foreign government officials, however, the question became "whether the United States has a foreign policy or Lockheed had a foreign policy." P. 173. Perhaps the FCPA is merely an attempt by states to retain for themselves the sole competence to bribe foreign nationals.

It should be noted that the Act does not focus solely on overseas activities. The accounting requirements of Section 102, which
The extension of this concern overseas, however, makes true "reform" not only more difficult but the desirability of its attainment more questionable. While I believe that it is rare in the United States for bribery to be an integral part of the governmental structure, that is not the case in some foreign countries where receipt of small transaction and variance bribes is a normal part of the salary structure or campaign finance mechanism of the local government. Our relatively free-market economic system also requires less intervention by well-connected middlemen than is the case in many countries. Consequently, the results of a true "reform" could be far more disruptive in those countries than in the United States.

In addition, the type of bribery which has actually occurred so far may create far less dissonance in those societies than it would in ours. It is here that the usefulness of Folded Lies's categories of bribes becomes apparent, because they enable one to carry the analysis beyond the facile statement that virtually all other foreign countries outlaw bribery, and that therefore there is nothing untoward in the United States' pressing its views on the matter. Assuming arguendo that most foreign statutes dealing with bribery are at least as clearly prohibitory as those of the United States, it is perfectly possible that a variance bribe in foreign country X (where such payments in return for discretionary acts are considered normal and are barely concealed) creates no more dissonance in that country between the operational code and the myth system than would a garden-variety transaction bribe/grease money payment in the United States. The FCPA, by exporting a distinction between the two which may loom larger here than there, implicitly seeks to apply our myth system and operational code overseas.

19. (Continued)
requires detailed accounting of domestic as well as international operations, could well prove to be the most significant portion of the Act.

20. See 18 U.S.C. § 201. Unfortunately, Section 201 itself is far from being a model of clarity,
VI. The FCPA as "Reform" or "Crusade"

The question which the book implicitly poses is whether the FCPA is a true "reform" or a mere "crusade." As noted earlier, the final assessment can only be made in retrospect. Nevertheless, one immediate indicator will be the amount of resources devoted to enforcement of the FCPA. The argument has been made that, with full funding, prior law (e.g., the anti-bribery statute and wire fraud statute) would have been sufficient even though conviction under those statutes presented numerous difficulties for prosecutors. Nevertheless, the level of funding is not a totally sufficient indicator. Unless enforcement of the Act is completely and openly cut off, one should not underestimate the degree of self-enforcement which many, and perhaps most, major United States corporations in fact practice because the Act is on the statute books.

One additional indicator, though difficult to investigate, will be the degree to which the legal and accounting professions are consulted on these matters by corporate clients. An absence of consultation would argue for the proposition that the operational code has merely been driven further from view but continues to operate as before. Recent proposals by the Securities and Exchange Commission for informal review of FCPA questions, and by the Justice Department for greater confidentiality for review queries, provide further material for arguing that only minimal disturbance in the operational code is intended.

Perhaps the real test on an international level will be whether meaningful international agreement can be

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21. Interestingly enough, Article 12 of the December 31, 1979 Exposure Draft of a new Proposed Statement on Accounting Standards of the American Institute of Certified Public Accounts would in some respects "pass the buck" from the accountants to the lawyers by stating that, in dealing with FCPA matters "[w]hether a company is in compliance with those provisions of the FCPA is a legal determination."

22. The degree to which requests for informal review are kept confidential, and the degree to which review by one government agency can bind all government agencies, will be further indicators of whether the campaign is a "crusade" or a "reform."
reached. Arguably, truly "bad guys" will seek to circumvent any regulatory procedures. Consequently, enforcement becomes the key to deciding whether the campaign is a "reform" or a "crusade" with respect to the most likely violators. Such an agreement, without significant enforcement provisions including at least mandatory international cooperation on exchange of information and judicial assistance and enforcement, would probably be the best international indicator that the campaign against bribery is more "crusade" than "reform."

23. So far, the United Nations Economic and Social Council has been unable to decide whether to schedule a diplomatic conference to conclude such an international agreement (which would be based on a draft drawn up by ECOSOC's Ad Hoc Intergovernmental Working Group on the Problem of Corrupt Practices).