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ARTICLE

DEVELOPMENT OF CATHOLIC MORAL DOCTRINE: PROBING THE SUBTEXT

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I. INTRODUCTION

Judge Noonan has been speaking and writing explicitly about the general topic of development of doctrine in Catholic moral theology for approximately a decade now. In 1993, he published a now-classic article on the topic in *Theological Studies*, arguably the most prominent journal of Catholic theology in the United States.[1] He gave a plenary address on development of moral doctrine to the annual meeting of the Catholic Theological Society of America in 1999.[2] Judge Noonan developed his arguments and analyses more extensively in the fall of 2003, when he delivered a series of eight Erasmus Lectures at the University of Notre Dame on the development of moral doctrine. Those lectures will appear as a book published by Notre Dame Press in 2005, under the title *A Church that Can and Cannot Change: The Development of Catholic Moral Teaching*.[3]

The fact that a brilliant and judicious scholar has been focusing on a particular topic for a decade is reason enough to ponder his writings on that topic. Yet we have even more reason to pay attention to Judge Noonan's work on development of doctrine in Catholic moral theology: truly, it is the fruit not merely of a decade, but rather of a lifetime, of scholarly work. His reflections on the general question of development of moral doctrine within the Catholic Church is supported by and culled from the massive studies of the history of Catholic moral and canonical teaching on a number of distinct moral issues, including usury,[4] contraception,[5] and mar-

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1. John T. Noonan, Jr., *Development in Moral Doctrine*, 54 Theological Stud. 662 (1993).

2. John T. Noonan, Jr., *Experience and the Development of Moral Doctrine*, 54 Catholic Theological Socy. Am.: Proceedings Fifty-fourth Annual Conv. 43 (1999).

3. John T. Noonan, Jr., *A Church that Can and Cannot Change: The Development of Catholic Moral Teaching* (U. of Notre Dame Press forthcoming 2005).

4. John T. Noonan, Jr., *The Scholastic Analysis of Usury* (Harvard U. Press 1957).

5. John T. Noonan, Jr., *Contraception: A History of Its Treatment by the Catholic Theologians and Canonists* (enlarged ed., Belknap Press of Harvard U. Press 1986).

riage,[6] as well as broader studies of development of moral doctrine in the Western world, on topics such as slavery,[7] religious liberty,[8] and bribery.[9] He offers us not an abstract theory of doctrinal development, but a richly detailed account of how such development has actually taken place.

Summarizing the fruits of his studies of particular cases, Noonan makes the following observation:

> Wide shifts in the teaching of moral duties, once presented as part of Christian doctrine by the magisterium, have occurred. In each case one can see the displacement of a principle or principles that had been taken as dispositive–in the case of usury, that a loan confers no right to profit; in the case of marriage, that all marriages are indissoluble; in the case of slavery, that war gives a right to enslave and that ownership of a slave gives title to the slave's offspring; in the case of religious liberty, that error has no rights and that fidelity to the Christian faith may be physically enforced. These principles were replaced by principles already part of Christian teaching: in the case of usury, that the person of the lender, not the loan, should be the focus of evaluation; in the case of marriage, that preservation of faith is more important than preservation of a human relationship; in the case of slavery, that in Christ there is "neither free nor slave" (Gal 3:28); and in the case of religious liberty, that faith must be free.[10]

Noonan's work has provoked an intense, and sometimes a critical, response from various practitioners of the discipline of moral theology. My focus in this essay is largely on this response. After briefly summarizing the fruits of Noonan's historical research on development of doctrine, I will attempt to make sense of the debate his work has precipitated, and in particular my own assessment that the participants in that debate seem to be talking past one another in a frustrating and unhelpful way.

II. Noonan's Approach to Development of Doctrine

Without exception, Noonan's writings trace the change and continuity in moral thinking about the topics they treat. In so doing, they are con-

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6. John T. Noonan, Jr., *Power to Dissolve: Lawyers and Marriages in the Courts of the Roman Curia* (Belknap Press of Harvard U. Press 1972).

7. John T. Noonan, Jr., *The Antelope: The Ordeal of the Recaptured Africans in the Administrations of James Monroe and John Quincy Adams* (U. of Cal. Press 1977) [hereinafter Noonan, *The Antelope*]; John T. Noonan, Jr., *Persons and Masks of the Law: Cardozo, Holmes, Jefferson, and Wythe as Makers of the Masks* (Farrar, Straus and Giroux 1976) [hereinafter Noonan, *Persons and Masks*].

8. John T. Noonan, Jr., *The Lustre of Our Country: The American Experience of Religious Freedom* (U. of Cal. Press 1998); John T. Noonan, Jr., *The Believer and the Powers that Are: Cases, History, and Other Data Bearing on the Relation of Religion and Government* (MacMillan Publg. Co. 1987).

9. John T. Noonan, Jr., *Bribes* (MacMillan Publg. Co. 1984).

10. Noonan, *supra* n. 1, at 669.

cerned not only with abstract statements about the requirements of the moral life, whether promulgated by popes or princes, but also with the way those requirements shaped the decisions made by those who fell under their sway. Consequently, the raw data pertinent to Noonan's analysis of change in church doctrine encompass not only documents promulgating official church teaching, such as papal bulls or (later) encyclical letters, but also the actual practices engaged in by prominent and ordinary Catholics alike.

In his academic methodology, Noonan is a lawyer, a theologian and a philosopher–but first and foremost, in my view, he is a social historian.[11] At the same time, it is important to note that his commitment to examining moral teaching in the broad social and historical context in which they exert their influence is rooted in his adherence to a thoroughly Catholic view of the nature of a human person. For Noonan, the study of ethics, law, and theology is a historical enterprise because the *persons* who engage in these activities are historical beings, as are the institutions that they shape and that in turn shape them and their children. We, the living, stand in community and in conversation with the dead. The shape of our minds and hearts is informed by their ideas and purposes as much as the shape of our bodies is informed by their genetic material. If we do not try to understand them, we will have no hope of understanding ourselves.

As Noonan sees it, a central tension in both law and Catholic moral theology is the tension between rules and persons. Like Maritain and other Thomists, Noonan believes that the power of law is necessary for social existence (whether that society is secular or ecclesiastical). The purpose of law is not only to guard against wrongdoing, but also to direct human efforts cooperatively toward the common good, and to pass on the basic values of society to the next generation.[12] Yet achieving this purpose requires a delicate balance: "the [legal] process is rightly understood only if rules and persons are seen as equally essential components, every rule depending on persons to frame, apply, and undergo it, every person using rules."[13] If we abandon the impartiality of rules of general applicability, we can find ourselves battling "monsters" that strangle justice with favoritism. On the other hand, unless we are vigilant, rules inexorably applied without considering the impact they have on particular human lives will harden into masks ("personae"), which conceal faces full of pain.[14]

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11. M. Cathleen Kaveny, *Listening for the Future in the Voices of the Past: John T. Noonan, Jr. on Love and Power in Human History*, 11 J.L. and Religion 203 (1994-95).

12. Noonan, *Persons and Masks*, *supra* n. 7, at 12-13.

13. *Id.* at 18.

14. In both *Persons and Masks* and *The Antelope*, Noonan argued that the American legal system has produced "masks" that covered the pained faces of enslaved Africans. *See supra* n. 7. In *A Private Choice: Abortion in America in the Seventies*, he contended that the American legal system's creation and defense of a nearly unlimited right to abortion created "masks" that obscured the humanity of unborn life. John T. Noonan, Jr., *A Private Choice: Abortion in America in the Seventies* 154, 162 (The Free Press 1979).

In my view, this tension Noonan identifies between rules and persons furnishes a helpful way of understanding the moral impetus behind his accounts of specific areas of development of moral doctrine within the Roman Catholic Church. All of Noonan's case studies show that the church's moral teaching develops when it becomes evident that the church's moral rules must be adjusted if they are not going to obscure or diminish the human dignity or impede the human flourishing of those persons to whom they apply. In some cases (e.g., in the case of slavery), that development seems to take place primarily because the Holy Spirit has led the church to penetrate more deeply the constant message of the Gospel. In other cases, (e.g., in the case of usury) that development takes place at least in part because of the changing social and economic circumstances. In yet a third set of cases (e.g., religious liberty), the impetus for development seems to be a combination of deeper insight into the requirements of the Gospel and changing social and political circumstances.

The accounts that John Noonan has given of how the church's moral teaching has evolved have been challenged, either implicitly, or explicitly, with respect to virtually every topic he has treated. No one denies, of course, that the church's response is not in every respect the same on these topics as it was hundreds or even thousands of years ago. Yet it would be fair to say that other thinkers seem to be at greater pains than Judge Noonan to stress continuities in the teaching, as well as to minimize the nature and degree of the change that has occurred.[15] In so doing, some thinkers chal-

15. *See, e.g.*, John Beaumont, *Contraception, Authority, and Catholic Truth*, 98 Homiletic and Pastoral Rev. 25 (Jan. 1998) (available at http://www.catholic.net/RCC/Periodicals/Homiletic/Jan98/contraception.html); E. Christian Brugger, *Capital Punishment and Roman Catholic Moral Tradition* 141-63 (U. of Notre Dame Press 2003); Avery Dulles, *Religious Freedom: Innovation and Development*, First Things 35 (Dec. 2001) (available at http://www.firstthings.com/ftissues/ft0112/articles/dulles.html); Avery Dulles, *Catholicism & Capital Punishment*, First Things 30 (Apr. 2001) (available at http://print.firstthings.com/ftissues/ft0104/articles/dulles.html); John Finnis, *Aquinas* sec. 5.4 (esp. n. c) (disputing Noonan's account of Aquinas on the marital goods), sec. 6.4 (emphasizing the principled and context-dependent nature of Aquinas's theory of usury) (Oxford U. Press 1998); John Finnis, *The Good of Marriage and the Morality of Sexual Relations: Some Philosophical and Historical Observations*, 42 Am. J. of Juris. 97 (1997) (disputing Noonan's account of Aquinas on the marital goods); John Finnis, *"Historical Consciousness" and Theological Foundations, Etienne Gilson Series* no. 14 (Pontifical Inst. of Medieval Studies 1992) (discussing development in connection with examples of marriage and usury); Kevin L. Flannery, SJ, Dignitatis Humanae *and the Development of Doctrine*, 6 Catholic Dossier 31 (Mar.-Apr. 2000) (available at http://www.catholic.net/rcc/Periodicals/Dossier/00MarApr/doctrine.html); John C. Ford, SJ & Germain Grisez, *Contraception and the Infallibility of the Ordinary Magisterium*, 39 Theological Stud. 258 (1978); Germain Grisez, *The Way of the Lord Jesus Volume 1: Christian Moral Principles* 891-94 (Franciscan Press 1997) (on development of doctrine and Noonan's account in *Contraception*); Germain Grisez, *The Way of the Lord Jesus Volume 2: Living a Christian Life* 506-07 (on contraception), 594-95 (on Noonan's account of development of church teaching on marriage) (Franciscan Press 1993); Germain Grisez, *Infallibility and Specific Moral Norms: A Review Discussion*, 49 The Thomist 248 (1985) (available at http://www.thomist.org; select College and University Explore); Brian Harrison, *Vatican II and Religious Liberty: Contradiction or Continuity?* 6 Catholic Dossier 21 (Mar.-Apr. 2000) (available at http://www.catholic.net/rcc/Periodicals/Dossier/00MarApr/continuity.html); Brian Harrison, *Religious*

lenge his reading of key texts (e.g., Finnis on Aquinas), while others take issue with his emphasis on change over continuity in church teaching (e.g., Palam on usury). In some cases (e.g., Brugger on capital punishment), the author takes pains to show that the substantial change that has occurred, and the continuing changes that he advocates, will not require the church to alter teaching that qualifies as irreformable under *Lumen Gentium*, the Second Vatican Council's Dogmatic Constitution on the Church,[16] while in other cases (e.g., Grisez on contraception), the author argues that any change that seems to be warranted by Noonan's work will fly in the face of irreformable teaching.

III. A Frustrating and Uneasy Conversation

In my view, readers trying to come to grips with the work of Noonan and his implicit and explicit critics should not be surprised if they experience a mounting sense of frustration and unease in pondering the issues at stake. First, and most importantly, very few of us have the expertise necessary independently to evaluate Noonan's historical scholarship, much of which involves archival and manuscript work. Confronted with learned challenges to his reading of a particular text, or the broader import of that text in its social context, most readers will find themselves experiencing an uncertainty analogous to that which jurors face when confronted with eyewitnesses giving conflicting accounts of the same event.[17]

Second, when reading the literature around development of moral doctrine, it is difficult to avoid the sense that the relevant issues have not been properly defined or joined. Many of the conversation partners seem to be talking past (or around) one another, rather than mounting direct criticisms of one another. Perhaps the source of this problem is inherent in the notion of "development" itself, which must involve some combination of the notion of change and the notion of continuity. On the one hand, without any change whatsoever, one does not have development, one has mere stasis; on the other, if there is no identifiable continuity, one does not have development, but only raw difference. Consequently, one party in the discussion

Liberty and Contraception: Did Vatican II Open the Way for a New Sexual Ethic? (John XXIII Fellowship Co-op. 1988); Christopher Kaczor, *Moral Theology, Development of Doctrine, and Human Experience*, 10 Josephinum J. of Theology 194 (Summer/Fall 2003) (taking usury as the example); David J. Palm, *The Red Herring of Usury* in *This Rock* 20 (Catholic Answers, Inc. 1997) (available at http://www.catholicculture.org/docs/doc_view.cfm?recnum=646); and Joel S. Panzer, *The Popes and Slavery* (Alba House 1996).

16. Vatican II, *Lumen Gentium (Dogmatic Constitution on the Church)* in *Vatican Council II: The Conciliar and Post Conciliar Documents* 350 (Austin Flannery, OP, ed., new rev. ed., Costello Publg. Co. 1992) (*Lumen Gentium* available at http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_const_19641121_lumen-gentium_en.html).

17. It is of course, only analogous. It is theoretically possible for the reader, unlike for the juror, to do the work necessary to come to his or her own independent judgment. Nonetheless, that would require a prodigious amount of time and effort that not many readers are prepared to dedicate to the question.

can emphasize the change, while the other emphasizes the continuity, without their positions being directly contradictory.

Third, when combined, the first two sources of frustration and unease augment, even if they do not generate anew, a third such source in the mind of the reader. It is impossible to read the relevant literature without a growing sense that some, if not all, the participants, believe that something very important is at stake which goes beyond the correct resolution of the particular cases that Noonan discusses. Why else, for example, would one bright young moral moralist think it important to take a stand emphasizing the continuity in the church's long and complicated history on usury, all the while openly admitting that he has done no research of his own into the primary texts that evidence that history?[18] Why would another impressive young scholar, advocating a rejection of the death penalty in principle, take great pains to demonstrate, by drawing upon the primary sources, that the position he favors is in important respects not discontinuous with the tradition, and in particular does not involve an inconsistency with irreformable teaching?[19] It is hard not to read the growing literature on development of moral doctrine without gaining the impression that the concept of "development" itself is the theological equivalent of nuclear energy; acknowledged by all as a powerful and potentially helpful tool in theory, but intensely feared by some as dangerous and even deadly in practice.

In the remainder of this essay, I would like to do something to alleviate the sense of frustration and unease experienced by observers of the conversation about development of moral doctrine that now swirls around John Noonan's work. I cannot ameliorate the first source of that frustration and unease; I am not currently equipped to wade into the debate about the meaning and appropriate weight to be given to different passages from Aquinas and other historical texts, let alone to do my own archival work. I

18. *See* Christopher Kaczor, *Usury and Interest in the Catholic Tradition: Then and Now* n. 1, http://bellarmine.lmu.edu/faculty/ckaczor/articles/interest.htm (accessed Feb. 3, 2004) (under research). In Kaczor's treatment of capital punishment, he also draws on secondary sources to make the argument for continuity in the tradition. Christopher Kaczor, *Why the Death Penalty? Capital Punishment and the Catholic Tradition*, http://bellarmine.lmu.edu/faculty/ckaczor/articles/penalty.htm (accessed Feb. 3, 2004) (under research). In *Moral Theology, Development of Doctrine, and Human Experience* (which incorporates some of the analysis of his usury article), Kaczor makes it clear that his overriding fear is that the concept of "development" is dangerous because it can be used as a tool by "revisionist" theologians to challenge controverted doctrine he wishes to preserve. Consequently, he advocates a notion of development that minimizes notions of change: "Authentic developments of doctrine, as opposed to corruptions of doctrine, preserve what was taught in the past but in an enlivened, clarified, and new way." Kaczor, *supra* n. 15, at 198. Noonan's own theory of development plays a ghostly role in Kaczor's article; its threatening nature is made all the more conspicuous by its absence from his list of sources. Although Kaczor cites Noonan's work on usury, he does not cite, let alone address or explicitly attempt to refute, either Noonan's *Theological Studies* article (Noonan, *supra* n. 1), or his plenary address at the CTSA, which is entitled "Experience and the Development of Moral Doctrine" (Noonan, *supra* n. 2)—squarely on the point of Kaczor's article.

19. *See* Brugger, *supra* n. 15.

will attempt, however, to provide some slight remedy for the remaining sources of discontent. In the second section of this essay, I will try to develop a framework that will facilitate, not agreement, but at least a real joining of the issue on the part of those who wish to debate the nature and extent of doctrinal development within the realm of the church's teaching on moral issues. In the third section, I will attempt to make explicit some of the reasons why some might approach with such anxiety the discussion of development in the church's moral teaching. By drawing upon analogies with the legal tradition, I hope to indicate some ways in which their anxiety may be assuaged.

IV. Clarifying the Levels on Which Change and Continuity Occur

The sense that the discussants are frequently talking past one another in their conversations about development of doctrine is, in my view, due to two major factors. First, as I noted above, the term "development" incorporates both continuity and change. One party can emphasize change, while the other emphasizes continuity, without there actually being a disagreement between the two parties regarding the set of true claims that can be made about what happened to the church's moral teaching over the course of time. Second, in evaluating continuity and change, we need to pay attention to what we mean by the "church's moral teaching." We need to see that with respect to any moral question, questions of similarity and difference can be asked on three distinct levels: (1) the permitted or prohibited act itself; (2) the pattern of justification for a moral judgment, as seen within the broader normative vision advocated by the church; and (3) its coherence with authoritative magisterial teaching.[20] What looks like a significant change on one level may not appear to be so significant on another. Focusing on one level, one party can argue for dramatic difference in church teaching on a particular question; tacitly changing the focus to a different level, another party can argue that continuity in teaching is more pronounced than different.

Consider the first level, tightly focused on the permitted or prohibited act itself: According to Judge Noonan's analysis,[21] in the case of usury, what was prohibited (lending money at interest) became permitted. In the case of marriage, what was impossible (e.g., certain types of sacramental marriage) became possible. With slavery, what was permitted (owning slaves) became prohibited. In the case of religious toleration, what was required (persecution of heretics) became prohibited. Finally, with capital punishment, what was permitted (and perhaps encouraged) is now discour-

20. M. Cathleen Kaveny, *A Response to John T. Noonan, Jr.*, 54 Catholic Theological Socy. Am.: Proceedings Fifty-fourth Annual Conv. 57 (1999).

21. Noonan, *supra* n. 1; *see* Noonan, *supra* n. 2.

aged, and perhaps on its way to being forbidden.[22] On this level, the biggest change seems to be in the context of religious toleration: acts that were once required are now forbidden. Capital punishment, in contrast, seems not particularly problematic: moving from "permitted" to "discouraged" does not seem to be that great a change.

But things look different on the second level. This level involves the internal logic of principle and justification: how great a change in the internal structure of the tradition's thought is required to accommodate the change in practice? In the case of usury, what was initially treated as a universal exceptionless moral norm became understood as a culture-dependent exceptionless moral norm. That is, the claim that "lending money at interest is always wrong" became modified to read "in precapitalist cultures, lending money is always wrong."

The theoretical development in slavery was a mirror image of usury. The church has long taught that slaves were human beings made in the image and likeness of God.[23] In the first eighteen or nineteen centuries of its existence, it assumed that in a fallen world, participation in the institution of slavery was not inconsistent with this belief. Actual experience of this institution in its worst forms (i.e., in the United States), which was different in degree but not in kind from its other forms, proved this factual assumption to be incorrect. An incorrect factual judgment, rooted in a moral failure to see the harm caused by the institution of slavery, crumbled at the insistence of the tradition's primary commitment to the dignity of all human beings.[24] In essence, what was viewed at most as a culture-dependent exceptionless moral norm against slavery came to be recognized as a universal, exceptionless moral norm.

The death penalty, however, presents a much tougher case of conflicting commitments on the level of theory. The church formerly taught that in and of itself, it was a positive good for the state to take the life of a guilty person, furthering the common good by removing a diseased member from the body of the community, restoring the balance of justice through retribution, and honoring the guilty person's free will by holding him or her accountable for his or her actions. In Pope John Paul II's encyclical

22. *See* Noonan, *supra* n. 1, at 669.

23. I certainly do not mean to claim that the church's record does not include egregious lapses of moral insight on this point. Some American churchmen, for example, denied that African-Americans were human beings. *See, e.g.*, Noonan, *supra* n. 3; John T. McGreevy, *Catholicism and American Freedom: A History* ch. 2 (W.W. Norton & Co. 2003).

24. On the way in which a legal system can create masks that blind us to the humanity of those subjected to its rules, *see* Noonan, *Persons and Masks*, *supra* n. 7 (chapter 2 deals with the legal structures that supported the institution of slavery in Virginia). *See also* Noonan, *The Antelope*, *supra* n. 7.

Evangelium Vitae,[25] it appears that the intentional taking of human life, even that of a guilty person, in and of itself can be detrimental to the common good because it erodes a "culture of life" that values all human persons. Capital punishment can be justified only as a last resort, if the community cannot otherwise provide for its protection. Here, one theoretical understanding of the actions that further the common good (which emphasizes retributive justice) seems now to be replaced by another (which emphasizes the sanctity of life) at the same level of importance.

Religious liberty presents analogous difficulties. Noonan writes, "The vast institutional apparatus of the Church was put at the service of detecting heretics, who, if they persevered in their heresy or relapsed into it, would be executed at the stake. Hand and glove, Church and State collaborated in the terror by which the heretics were purged."[26] The church's approach to this matter changed decisively at the time of the Second Vatican Council: "No distinction was now drawn between the religious freedom of infidels (in theory always respected) and the religious freedom of heretics, once trampled on in theory and practice. Now each human being was seen as the possessor of a precious right to believe and to practice in accordance with belief."[27]

In contrast, the systemic change required to accommodate the case of marriage seems fairly small. Noonan traces the development of the Pauline and Petrine privileges of the pope to dissolve certain classes of marriage in favor of the faith. For example, in the 1920s, Gerard Marsh, unbaptized, had married Frances Groom, an Anglican. After they divorced, Mr. Marsh sought to marry LuLu La Hood, who was Catholic. Pius XII dissolved the marriage of Mr. Marsh and Ms. Groom, in favor of the faith of Ms. La Hood. As Noonan notes, "The Pope authorized Marsh to marry a Catholic under circumstances that but for the papal action would (morally, not civilly) have constituted bigamy for Marsh and adultery for La Hood."[28] Marriage was always both a sacrament and a contract regulated by canon law; in these cases, the lawyers simply did what contract lawyers do: they identified one more class of people for whom a contract is voidable but not void at its inception.[29]

The third and final level on which change can be analyzed is that of official church teaching. Which developments seem to involve the greatest upheaval in the settled and authoritative teaching of the magisterium? On this level, it seems that the most radical development can be found in the

25. Pope John Paul II, *Evangelium Vitae* (Mar. 25, 1995) (available at http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_25031995_evangelium-vitae_en.html).

26. Noonan, *supra* n. 1, at 667.

27. *Id.* at 668.

28. *Id.* at 664.

29. *See generally* Noonan, *supra* n. 6.

case of usury. As Judge Noonan recounts in his *Theological Studies* article on development of doctrine, the categorical prohibition of usury, understood to encompass any profit on a loan, was "enunciated by popes, expressed by three ecumenical councils, proclaimed by bishops, and taught unanimously by theologians."[30] The fact that it was at least arguable that the condemnation of usury was infallibly taught is demonstrated by the argumentative nuance and analytical delicacy marshaled by the esteemed Jesuit moralist Arthur Vermeersch to address this question in the 1913 edition of the *Catholic Encyclopedia.*[31] He maintains, for example, that Pope Benedict XIV's condemnation of usury in his 1745 encyclical *Vix pervenit* was not infallible because it was addressed only to the Italian bishops and not to the universal church, and that the 1836 decree of the Holy Office extending it to the universal church did not make it infallible because "such a declaration could not give to a document an infallible character which it otherwise did not possess."[32]

Why is it important to pay attention to the levels at which change—or the continuity—is found with respect to particular moral questions with regard to which development is said to occur? First, as I noted above, it is important to do so in order to ensure that the participants in the debate about the nature or extent of development are in fact talking about the *same thing*.

Second, paying explicit attention to the level at which change occurs is a necessary prelude to analyzing how the levels interrelate, or more precisely, how locating change at one level affects the degree to which change is said to have occurred at another level. For example, consider the case of usury. If one argues that what to all appearances looks like a universal exceptionless moral norm ("Lending money at interest is always wrong") should in fact be interpreted as a context-dependent exceptionless moral norm ("In precapitalist economies, lending money at interest is always wrong"), then one can interpret the proposition[33] affirmed by magisterial teaching implicitly to include the qualification as to context. More specifically, one could argue that what they (pope, bishops, ecumenical council) *really* intended to say, what they *meant*, was that "lending money at interest is always wrong in a context in which there is no market where money

30. Noonan, *supra* n. 1, at 662.

31. A. Vermeersch, *Usury*, in *The Catholic Encyclopedia: An International Work of Reference on the Constitution, Doctrine, and History of the Catholic Church* 235-38 (The Ency. Press 1913).

32. *Id.* at 236.

33. In assessing change or continuity in magisterial teaching, one has first to identify the *propositions* proposed to be true by the teaching in question. Theologians insist upon the difference between a proposition and a sentence; a proposition is not identical to the words in a sentence, but points to the meaning that the sentence conveys. *See, e.g.*, Francis A. Sullivan, SJ, *Magisterium* 15 (Paulist Press 1983): "A sentence is a particular verbal expression, in a particular language: the proposition is the *meaning* which the sentence intends to express."

could be productive for its owner if it is not lent out" (i.e., in the context of a precapitalist culture). By locating the change at the second level, by showing how the proposition in question, the condemnation of usury, was once understood as a universal exceptionless moral norm and then came in time to be recognized as a context-dependent moral norm, one can maintain that little or no doctrinally significant change occurred on the third level, that of magisterial teaching.

Third and finally, as I will indicate in more detail below, significant changes at one level may raise different questions or problems for members of the church community than significant changes at a different level. We will only make progress in our discussion of the nature and conditions of true development of the church's moral doctrine if we succeed in putting the question in a broader perspective, perhaps shedding light on the dark and diffuse threat that a significant number of people believe to be posed by either the fact that development has occurred or the increased attention given to its occurrence in scholarly and popular discussions.

V. Development of Doctrine: A Broader Perspective

Noonan himself has been quite reticent to explore the implications of his studies of doctrinal development on moral issues for contemporary questions. Many of his scholarly critics, moreover, have shown the same reticence: they take on the particular issues Noonan puts forward as candidates for development, emphasizing continuity rather than change, rather than systematically exploring what is at stake in the discussion.[34] What is obscured by the reticence of academic debate, however, is made patently clear by the market of ideas on the Internet: A "Google" search for the terms "Noonan" and "development of doctrine" revealed, among other things, two interesting articles.

First, an article published in the *Independent Gay Forum* attempted to use Noonan's *Theological Studies* article[35] as a basis for predicting change in the church's teaching on homosexual relationships. Paul Varnell writes:

> As church historian John Noonan points out, the Vatican reversed its view of usury when loans and credit became part of everyday commercial life and it was forced to examine "the experience of otherwise decent Christians who were bankers and who claimed that banking was compatible with Christianity."

In the same way, the Vatican will feel, and is now feeling, the increased pressure to rethink its view of homosexuality for the same reason—

34. Kaczor, *supra* n. 18 (Kaczor's recent article is a partial exception.).

35. Paul Varnell, *Indep. Gay Forum, How the Vatican Can Change*, http://www.indegayforum.org/authors/varnell/ (accessed Oct. 16, 2003).

the growing presence in the Catholic Church of "otherwise decent Christians" who claim that homosexuality "is compatible with Christianity."[36]

The author of the second essay, Patrick O'Neil, would no doubt view the claims made in the first essay as confirmation of his worst fears. In his essay, "A Response to John T. Noonan, Jr. Concerning the Development of Catholic Moral Doctrine," O'Neil is admirably forthright about his concerns regarding the potential impact of Noonan's work in this area:

> On account of the moral assault against the Church which rages today, therefore, Noonan's piece is both timely and potentially dangerous . . . dangerous because anything which opens a potential for doubt about the authority and reliability of the Church's teachings on moral matters will be exploited at once and ruthlessly by those who wish to undermine the Church's opposition to abortion, artificial birth control, divorce, what are euphemistically called "alternative life styles" (including gay marriage), euthanasia, pre-marital sex and "trial marriage," artificial insemination, *in-vitro* fertilization, surrogate motherhood, etc.[37]

The comments of Paul Varnell and Patrick O'Neil are obviously mirror images of each other. Both believe that Noonan's work contributes to a situation in which wholesale reconsideration and revision of the church's moral teaching will immediately take place, particularly on the most controverted issues of our day. Progressives, such as Varnell, believe that such a situation is to be welcomed, while conservatives, such as O'Neil, look upon it with dismay, if not dread.

In my view, however, the hopes of the progressives and the fears of the conservatives are both significantly exaggerated, at least to the degree to which they are based in Noonan's own work. In seeing how this is the case, it is important to keep some sense of historical perspective. Noonan's work in general covers the two-thousand-year history of Christianity, particularly as that history has been instantiated in the Roman Catholic Church. The changes that Noonan described in the teaching on usury and slavery took place over centuries, against the backdrop of changing political and economic contexts far beyond the control of any one individual. They were not brought about by sudden fiat; in fact, I have no doubt that both progressives and conservatives would agree that the change with respect to the latter practice took too long to occur.

The change that Noonan describes with respect to religious liberty seems to me to score the highest on the combined criteria of suddenness, radicalness, and authoritativeness. Less than a century of theological reflection had prepared the way for it to take place; it overturned deeply settled ways about thinking of the ideal relationship between church and state. At

36. *Id.* (citing Noonan, *supra* n. 1, at 675).

37. Patrick M. O'Neil, *A Response to John T. Noonan, Jr. Concerning the Development of Catholic Moral Doctrine*, 22 Faith & Reason 59 (Spring-Summer 1996).

the same time, the change was brought about in the most broadly consultative manner possible: by the pope sitting together with his brother bishops in an ecumenical council.[38]

In contrast, the substantial change that has occurred with respect to the church's teaching on capital punishment in a comparatively short period of time has been spearheaded, it seems, almost entirely by Pope John Paul II's writings in his encyclical *Evangelium Vitae*. Conservatives such as Professor O'Neil typically view the church's centralized teaching authority, concentrated in the pope, as a bulwark against sudden and rapid change in the church's moral teaching. Yet the example of capital punishment demonstrates that a centralized moral teaching authority is no guarantee that such innovation will not occur. I daresay that the forceful example of Pope John Paul II's teaching on capital punishment provides a more powerful model of the possibility of sudden, significant, and nonbroadly based change in church teaching than does Noonan's academic work.

Perhaps Professor O'Neil is not worried about the fact of change, even significant change, *per se*, but about the *wrong* type of change. From his perspective, that category would clearly include change on the church's teaching in the area of sexual ethics and reproductive technology, but perhaps he would not view change in the area of the death penalty in the same way. Is there a foolproof way absolutely to ensure that the church's teaching will not change on any of these "hot button" issues at any point in the future? In my view, probably not.

As we saw in the case of usury, even an apparently absolute claim, e.g., "Lending money at interest is always wrong," can be contextualized by later interpreters. They can do so by attempting to minimize the authority with which the claim was made (as did Vermeersch with respect to usury),[39] or by arguing that despite its seemingly absolute nature, the force of the claim depended upon a number of tacit background assumptions (i.e., the existence of a precapitalist society), which the makers of the claim could not have been expected to acknowledge. Later interpreters can carefully parse the language of the relevant teaching, distinguishing the facts of the current case to the facts assumed to be operative at the time the teaching was issued.

In short, they can behave rather like lawyers do in the common law tradition, highlighting and extending favorable precedent, and distinguishing or downplaying unfavorable precedent, in order to support or advance the interpretation they deem best. But if this is the case, what is to prevent the church's moral teaching from being an entirely arbitrary matter, or from blowing like a reed in the face of strong cultural forces?

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38. Vatican II, *Dignitatis Humanae* (Dec. 7, 1965) (available at http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_19651207_dignitatis-humanae_en.html).

39. *See* Vermeersch, *supra* n. 31.

In my view, a choice between rigid certainty and utter arbitrariness is a false choice with respect to a rich, living tradition such as Catholic teaching on moral issues. Yet I know from experience that it is an attractive false choice. I have encountered the issue many times, not as a theology professor, but as a professor who teaches contracts to first-year law students. Anyone who has offered a big "common-law" class to beginning law students, or who once was a law student him or herself, will no doubt remember the scenario under which they arise. The pull toward certainty, on the one hand, and toward arbitrariness, on the other, are necessary steps in the professionalization of lawyers. They are, however, only preliminary steps. Success as a law student, and ultimately as a lawyer, depends upon recognizing the deep inadequacy of approaching legal reasoning in terms of the dichotomy between utter certainty and utter arbitrariness.

Let me explain. In their first year in law school, students are commonly admonished that they must now learn to "think like a lawyer." In my view, that rather vague phrase refers to two basic components of training in the legal profession. First, students must relinquish a method of learning a subject matter that they followed in high school and college. They enter law school thinking that they will be taught the "answers," i.e., a set of true facts about the applicable law in a particular jurisdiction. And they are, of course, taught some true facts. The point of law school, however, is not the "answers," but rather the "questions." More specifically, the first year law curriculum does not teach students a discreet set of rules and facts to be regurgitated on an exam, but a series of ways of thinking and arguing, a series of ways of identifying and approaching relevant questions within a certain normative context. In other words, law students are not taught to be passive recipients of knowledge, but rather to be active participants in an ongoing practice. To become such participants they must learn to identify which sources of authority have more weight than others with respect to particular questions (e.g., an opinion from the Supreme Court on a federal question) and which rules and principles are fundamental (e.g., the "mailbox rule" is not a fundamental rule, but an auxiliary rule facilitating orderly application of the fundamental principle *pacta sunt servanda*). Part of the socialization process involves learning which scholars and judges have acquired authority about the nature of the practice, because their work has consistently proven to be helpful in preserving and advancing the legal tradition.[40]

Second, fledgling lawyers must acquire an additional set of competencies. They must absorb the appropriate habits of attention and thought, the unstated criteria by which relevant information is sorted from irrelevant in-

40. The process used to interpret ecclesiastical texts described by Francis A. Sullivan, SJ, is not dissimilar to the process learned by law students to interpret legal texts. Francis A. Sullivan, SJ, *Creative Fidelity: Weighing and Interpreting Documents of the Magisterium* (Paulist Press 1996).

formation, and the acceptable patterns of argument and inference. A "good lawyer" is a lawyer who has internalized these habits, criteria, and patterns. More than that, however, he or she has developed the capacity to appreciate what (borrowing from Alasdair MacIntyre) I will call the "goods internal to the practice"[41] of law. External goods, such as money, prestige, and power, are earned by and through the practice of law, but they are not its heart. Rather, the practice of law is a means to those goods; other means work just as well (and sometimes better). In contrast, the goods internal to the practice of law are intrinsic to that practice, achievable only by those who have learned to value the practice for the values which it inherently embodies. They include the facilitation of just relationships among the members of society, including the just resolution of what John Finnis has called society's "co-ordination problems."[42] As MacIntyre points out:

> A practice involves standards of excellence and obedience to rules as well as the achievement of goods. To enter into a practice is to accept the authority of those standards and the inadequacy of my own performance as judged by them. It is to subject my own attitudes, choices, preferences and tastes to the standards which currently and partially define the practice.[43]

It is only the excellent practitioners of the practice, only the *virtuous* practitioners of the practice,[44] who are capable of so judging, who are capable of assessing better or worse instantiations of the goods internal to it, and who are capable of discerning which course of action best promotes those goods in hard cases.

In the first year of law school, therefore, men and women embark upon the path of becoming virtuous in the practice of law. The initial step upon that path plunges them into a massive intellectual and existential uncertainty. They fear that there is no right answer, that everything is up for grabs, that any position can be defended or attacked, that arbitrariness rules the day. They see no rhyme or reason to the decisions that are made, to the way cases are resolved. Their fears, in other words, are extremely similar to the fears expressed by Professor O'Neil and other conservatives with respect to the development of the church's moral doctrine.

Yet most students move beyond that step. The next phase in the development of a budding lawyer generally involves embracing the ambiguity–embracing it a little too enthusiastically, in fact. They reach for the other extreme, maintaining there is no outcome that is better or worse than any other, no argument that is better or worse than any other, no policy that

41. Alasdair MacIntyre, *After Virtue* 176 (U. of Notre Dame Press 1981).

42. John Finnis, *Natural Law and Natural Rights* 232 (Clarendon Press 1980).

43. MacIntyre, *supra* n. 41, at 177.

44. MacIntyre defines "virtue" as "an acquired human quality the possession and exercise of which tends to enable us to achieve those goods which are internal to practices and the lack of which effectively prevents us from achieving any such goods." *Id.* at 178.

the tradition cannot be stretched to accommodate. Their vision, in other words, sound a lot like those of Paul Varnell and other progressives with respect to the potentially unlimited potential for change of the church's doctrine on moral issues.

As some of them painfully learn on their final exams, however, the fact that they *can* make an argument using certain sources, or defending a certain revision in certain positions, does not mean that a person competent to recognize the goods internal to the practice of law (e.g., their professor) will recognize their arguments as sound. The point of the first semester of law school is to teach students that studying law is about learning what it means to make arguments within the context of a living tradition. The point of the remaining two-and-a-half years is to teach them that one argument is not necessarily as good as another, and to teach them how to recognize good arguments. In large part, this is done by exposing them to the best of the common-law tradition, in all its depth and breadth. For example, by reading opinions by Learned Hand and Benjamin Cardozo, law students absorb a vision of the field of torts or contracts through the eyes of its masters. Ideally, by the end of their legal education, law students will have transcended both the fear of radical uncertainty and the embrace of skepticism. They will have taken their place as members of the ancient and venerable guild of lawyers, having internalized its important standards and thereby become competent to argue in good faith for its ongoing extension and revision.

It strikes me that the deep worries about development of doctrine within the realm of Catholic moral theology are in large part attributable to the ways in which education in moral theology is no longer like legal education. Before the Second Vatican Council, there was a clear path of professionalization, of socialization, for those who wished to become Catholic moral theologians. All moral theologians were priests, all studied much the same curriculum, all learned to assign the same degrees of authority to certain texts, and all internalized the criteria by which better or worse arguments were assessed. One could say that their education taught them to "think like a moral theologian" in much the same way that one can still say that legal education teaches students to "think like a lawyer."

But all of that changed after the Second Vatican Council. Lay persons in general, and women in particular, began going into the field. Not only did they no longer receive seminary degrees, it was also the case that many of them no longer studied at Catholic universities. At the same time, Catholic schools began hiring persons trained at Yale, Chicago, and Princeton, in addition to (or sometimes instead of) the Gregorian or Leuven. In many ways this broadening was salutary; it brought different experiences, different backgrounds, and different expertises to bear on the complicated field of human action. I do not mean to disparage it, for I am a product of it, since I myself was trained at Princeton and Yale and now teach at Notre Dame.

Yet an unwelcome byproduct of the salutary expansion of the field of moral theology has been the loss of a common canon that characterizes the field, or a common set of sensibilities that characterize its practitioners. Practically speaking, no one defines a person as a Catholic moral theologian except the person him or herself. There is no required curriculum. Not all contemporary Catholic moral theologians will think the same texts are relevant, not all will give similar weight to a similar set of courses. Not all moral theologians will identify the same set of goods as internal to the practice, and not all will pick out the same qualities as essential to a competent practitioner of the field. Furthermore, if matters were not complicated enough, it seems as if there may in fact be two distinct, if sometimes overlapping, practices within the general discipline. Some Catholics who work on moral matters consider themselves moral theologians, whose task it is to carry on and develop the Catholic tradition of moral reflection within the context of the church. Other Catholics, however, primarily identify themselves as Christian ethicists—they tend to see their audience as primarily the secular academy and their topics of research as the questions considered important by that audience. The goods internal to these two practices are not identical; for example, a personal commitment to the Catholic faith is essential for a Catholic moral theologian, not necessarily for a Christian ethicist.

Ex Corde Ecclesiae,[45] Pope John Paul II's Apostolic Constitution on Catholic Universities, attempted to bring more order to this situation, in part by requiring that all Catholics teaching theology at Catholic colleges and universities request a mandate from the local bishop. The implementation of *Ex Corde* generated a great deal of controversy, in large part because the meaning of the mandate was never sufficiently clarified. What does it mean to teach "in communion" with the bishop? Does it mean simply that one needs to present the teachings of the magisterium in their fullness and integrity, or does it also mean that one needs to defend those positions in the classroom? What are the implications of *Ex Corde Ecclesiae* for a Catholic theologian's scholarly publications? The document and the program of implementation became embroiled in the battles between progressive and conservative Catholics.[46]

In my view, as it affected the realm of moral theology, the politicization of the debate swirling about *Ex Corde Ecclesiae* has meant that the concern about the coherent practice of the discipline of moral theology has

45. Pope John Paul II, *Ex Corde Ecclesiae* (Aug. 15, 1990) (available at http://www.vatican.va/holy_father/john_paul_ii/apost_constitutions/documents/hf_jp-ii_apc_15081990_ex-corde-ecclesiae_en.html).

46. *See, e.g.*, *The Catholic Theological Society of America, Archives*, http://www.jcu.edu/ctsa/ (last updated Jan. 30, 2004) (commonly understood to represent the progressive viewpoint); *Fellowship of Catholic Scholars, Resources*, http://www.catholicscholars.org/resources/statements/v2.htm (last updated Jan. 8, 2004) (commonly understood to represent the conservative viewpoint).

become too narrowly focused on the "bottom-line" positions people hold. Despite Cardinal George's plea in *Commonweal* [47] for American Catholics to move beyond the labels "liberal" and "conservative" with respect to Catholicism, the questions that seem to many people relevant to ask of moral theologians have been focused almost exclusively on outcome: do you or do you not defend magisterial teaching on abortion, contraception, and homosexuality (if the questioner is a conservative Catholic) or capital punishment, immigration law, and economic justice (if the questioner is a liberal Catholic)?

In my view, this outcome-oriented approach may not be the most helpful way to deal with the current situation. It misleadingly suggests that the complexity of the Catholic tradition can be reduced to a multiple-choice test. But it cannot be so reduced, any more than being a good lawyer can be reduced to achieving a passing score on the bar exam. The Catholic moral tradition is multidimensional; it cannot ignore (1) the integral relationship of systematic theology, liturgical theology, and moral theology; (2) the source of all theology in Holy Scripture; (3) the foundation of scripture and tradition in the triune God, as revealed to us most perfectly in the person and work of the Redeemer, Jesus Christ; and (4) the bedrock assumption that the God who creates and the God who redeems are one and the same, which is reflected in the Catholic belief in the capacity of human reason and reflection to discern, however imperfectly, the requirements of the natural law.

What would be a better approach to deal with the current situation? Let me offer a suggestion. Let us focus more on sources, methods, and intellectual and moral habits. Let us pay attention to what texts moralists use, what thinkers they hold up as important, what care, attention, and respect they give to the tradition. Let us try to recreate a common conversation, richer and more diverse than it was before the Second Vatican Council, but still common. How could this be done? In my view, one possibility would be to attempt to recreate the intense intellectual bonding and socialization process characteristic of the first semester of law school, while making modifications appropriate to the fact that moral theologians teaching and writing in colleges and universities are far beyond their first year of graduate school. A suitable model might be the seminars offered each summer by the National Endowment for the Humanities, which are led by senior scholars in the field, but which also respect the professional accomplishments of the seminar participants. Perhaps the institutions representing the major contemporary approaches to moral theology could each sponsor such seminars, which would be led by a senior scholar from the

47. Francis George, *How Liberalism Fails the Church: The Cardinal Explains*, 126 Commonweal 24, 28-29 (Nov. 19, 1999).

institution, but which would welcome seminar participants representing other approaches.

For example, suppose that the Vatican were to sponsor such a seminar, perhaps under the auspices of one of the academic academies constituted by Pope John Paul II. I could imagine moral theologians from a wide variety of perspectives thinking it would be intellectually worthwhile for them to participate, not withstanding the ways in which their own approaches might diverge from official church teaching. Such a seminar would create a context where those with more traditional training in Catholic moral theology could interact for a sustained period of time with those who approach the discipline from a different angle or angles. It would also enable the members of the latter category to appreciate the goods of the practice of moral theology as traditionally construed, and allow the members of the former group to see how the traditional practices might be enriched with different perspectives.

VI. Conclusion

When John Noonan is asked about the implications of his historical studies of doctrinal development for controverted contemporary issues, he typically demurs. He typically responds that he cannot say anything about those issues without conducting a study of the history of the church's teaching on these points. What I hope to have done here is to show how, in the end, that response embodies faithfulness to the tradition itself. In both moral theology and law, questions of development cannot be addressed in the abstract; they must be addressed in the relevant context. What, concretely, does this mean? In my view, it puts us to work. We cannot hope to address the pressing questions of our day in the context of the Catholic moral tradition without knowing that tradition. We may never reach the depths of knowledge of a John Noonan; the magnitude of his talents are not only a gift to him, they are a gift to the entire church. But we can learn more than we know today, and we can recognize that we must learn more as a condition of contributing to the ongoing life of the church with creativity and with fidelity.